



**BY MAIL AND EMAIL**

February 26, 2010

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CC: Gord Miller, Environmental Commissioner of Ontario

Dear Ms Mulcahy:

**Re: Toronto Waterfront Revitalization Corporation  
Application for a Waste Disposal Site - EPA s.27  
EBR #: 010-9018**

Please find enclosed Lake Ontario Waterkeeper's comments on Waterfront Toronto's proposal to establish and operate a waste disposal site at 294, 320, 348, & 348R Unwin Avenue. If you have any questions or comments, please do not hesitate to contact our counsel, Joanna Bull, at 416-861-1237.

Yours truly,

Mark Mattson  
Waterkeeper & President

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## EXECUTIVE SUMMARY

Waterfront Toronto has proposed the construction and operation of a waste disposal facility on the shore of Lake Ontario in Toronto's port lands. While remediating the soil along Toronto's waterfront is an essential activity that will lead to a healthier and more accessible lake, Lake Ontario Waterkeeper has serious concerns about the impacts of this proposal on the health of Lake Ontario and recreational users in the community.

The proposed site for this waste disposal facility is in the heart of Toronto's port lands, which are increasingly being used by residents and visitors for a variety of recreational purposes. The proposed waste site sits between Lake Ontario to the north and Lake Ontario Park to the south. Toronto's Waterfront Trail, used for walking, jogging, biking, and roller blading, runs along the south and west sides of the proposed site. Cherry Beach and two active sailing clubs are located just south of the site.

The soil processed at the proposed site would be heavily contaminated with a variety of pollutants, including polycyclic aromatic hydrocarbons (PAHs), heavy metals, petroleum hydrocarbons (PHCs), volatile organic compounds (VOCs), and pesticides. When compared to the relevant standards for soil quality, the levels of contaminants estimated for the site are alarming and warrant a high level of concern.

It would not be reasonable for the Ministry to approve a waste site with these levels of contaminants on the shore of Lake Ontario and in close proximity to recreational areas. For a site located on a spit in Lake Ontario, surrounded by parkland frequented by recreational users, the mitigation measures proposed by Waterfront Toronto are not sufficient to protect human and environmental health.

No reasonable person, having regard to the relevant law and to government policies developed to guide such decisions, could decide to issue a Certificate of Approval for this site. A decision to issue a Certificate of Approval for this site would not be consistent with the Ministry's Statement of Environmental Values as it would be inconsistent with the precautionary principle, a science-based approach, a consideration of cumulative impacts, and the ecosystem approach. A hearing under Part V of the *Environmental Protection Act* and an environmental assessment under Ontario's *Environmental Assessment Act* are required in order to be consistent with provincial law.

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## BACKGROUND

Waterfront Toronto (formerly the Toronto Waterfront Revitalization Corporation) is a public body funded by the municipal, provincial, and federal governments with a mandate to create and develop waterfront parks. To facilitate that work, Waterfront Toronto has proposed the construction and operation of a waste disposal facility on the shore of Lake Ontario in Toronto's port lands. While remediating the soil along Toronto's waterfront is an essential activity that will lead to a healthier and more accessible lake, it is not acceptable to contaminate the lake and recreational areas in order to do so. Lake Ontario Waterkeeper fully supports soil remediation, but strongly asserts that this location is not appropriate and a waste site at the proposed location would threaten human and environmental health.

The proposed site for this waste disposal facility is in the heart of Toronto's port lands, which are increasingly being used by residents and visitors for a variety of recreational purposes. The proposed waste site sits between Lake Ontario to the north and Lake Ontario Park to the south. Toronto's Waterfront Trail, used for walking, jogging, biking, and roller blading, runs along the south and west sides of the proposed site. Cherry Beach and two active sailing clubs are located just south of the site.

The proposed facility would be used to receive, sort, store, and process heavily contaminated soil from various sites in the Toronto, including waterfront lands controlled by Waterfront Toronto. The site would operate for an estimated twenty years, Monday to Saturday. It would receive up to 2500 tonnes of contaminated waste per day and store up to 600,000 tonnes on site. The contaminated soil would be brought to the site by trucks and ships, and would be stored in open piles on the site during the day and covered when the facility is closed or the piles are "full". Efforts to contain the pollution on the site would include a truck wash, a water collection system, and spraying the piles with water or chemicals to control dust.

The list of contaminants that Waterfront Toronto would be storing, sorting, and processing at the site is extensive and includes more than 30 at concentrations far exceeding provincial and federal limits. The nature of the contamination and the location at the heart of one of Toronto's burgeoning recreational destinations make this proposal untenable.

Lake Ontario Waterkeeper recognized these factors in the proposal and requested an extension of the time to comment from the Ministry on February 12, 2010. We asked the Ministry to extend the time for commenting pursuant to section 23 of the *Environmental Bill of Rights (EBR)* to reflect the complex issues inherent in Waterfront Toronto's proposal. In addition to the complexity and magnitude of the issues associated with the proposal, both environmentally and procedurally, the Ministry requested additional information from the proponent part way through

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the comment period. The answers to those requests will not be received by the Ministry until March 22 and were therefore not provided to the public or available for consideration in this comment period. That information has never been available for comment as required by the *EBR*. The Ministry should have exercised its power to extend the comment period when it requested that information. As the Ministry's own, "Guide for Applying for Approval of a Waste Management System" says at page 6:

For proposals prescribed under the *EBR*, if the additional information is such that it changes the information that is on the Notice to the ER, it may be necessary for the approving office to resubmit the Notice and restart the comment period.

As LOW did not receive the requested extension, we did not have time to commission a hydrogeologist or waste disposal site expert to review the proposal. We believe this level of review is required, because of the importance of this issue to the public and by law under the Ontario *Environmental Assessment Act* and *Environmental Protection Act*. As explained below, both an environmental assessment and a hearing under Part V of the *EPA* are required with respect to this proposal.

## COMMENT

### 1. The Ministry cannot issue a Certificate of Approval for this site because such a decision could result in significant harm to the environment.

**The proposal poses a significant threat to the environment because of the hazardous contaminants that would be received, stored, sorted, and potentially processed at the site.**

According to the Design and Operations Report ("the Report") prepared for Waterfront Toronto, the soil processed at the proposed site would be heavily contaminated with a variety of pollutants, including polycyclic aromatic hydrocarbons (PAHs), heavy metals, petroleum hydrocarbons (PHCs), volatile organic compounds (VOCs), and pesticides. Many of these contaminants should be considered hazardous waste pursuant to O.Reg. 347. Table 2 of the Report lists the estimated maximum concentrations of contaminants in the soil that the site would be accepting. When compared to the relevant standards for soil quality, the levels of contaminants estimated for the site are alarming and warrant a high level of concern.

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A comparison of the contaminant levels in the Report to the Canadian Council of Ministers of the Environment (CCME)'s "Canadian Soil Quality Guidelines for the Protection of Environmental and Human Health" reveals that the site exceeds the standards set for Industrial sites for at least 33 contaminants:

**Benzene**  
**Dichlorobenzene 1,2-**  
**Dichlorobenzene 1,3-**  
**Dichlorobenzene 1,4-**  
**Dichloromethane**  
**Ethylbenzene**  
**Toluene**  
**Total Xylenes**  
**Benzo(a)anthracene**  
**Benzo(a)pyrene**  
**Benzo(b)fluoranthene**  
**Benzo(k)fluoranthene**  
**Dibenzo(a,h)anthracene**  
**Indeno(1,2,3-cd)pyrene**  
**Naphthalene**  
**Phenanthrene**  
**Pyrene**  
**Antimony**  
**Arsenic**  
**Barium**  
**Beryllium**  
**Cadmium**  
**Chromium (total)**  
**Chromium (VI)**  
**Copper**  
**Lead**  
**Mercury**  
**Molybdenum**  
**Nickel**  
**Selenium**  
**Vanadium**  
**Zinc**  
**Thallium**

While the proposed site is zoned for industrial use, the adjacent land is a heavily used park. It is therefore also important to compare the contaminant levels to the CCME Soil Quality Guidelines for parkland. That comparison reveals that at least 39 contaminants significantly exceed the standards for parkland:

**Benzene**  
**Chlorobenzene**

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Dichlorobenzene 1,2-  
Dichlorobenzene 1,3-  
Dichlorobenzene 1,4-  
Dichloroethane 1,1-  
Dichloromethane  
Ethylbenzene  
Styrene  
Toluene  
Total Xylenes  
Trichloroethane 1,1,1  
Benzo(a)anthracene  
Benzo(a)pyrene  
Benzo(b)fluoranthene  
Benzo(k)fluoranthene  
Dibenzo(a,h)anthracene  
Indeno(1,2,3-cd)pyrene  
Naphthalene  
Phenanthrene  
Pyrene  
Antimony  
Arsenic  
Barium  
Beryllium  
Cadmium  
Chromium (total)  
Chromium (VI)  
Cobalt  
Copper  
Lead  
Mercury  
Molybdenum  
Nickel  
Selenium  
Silver  
Vanadium  
Zinc  
Thallium

All of these contaminants exceed the standards by at least 100%. Some stand out as particularly egregious:

**Aromatic Hydrocarbons:** The estimated level of benzene is **779.4 times higher** than the standards for both industrial and parkland sites. Ethylbenzene is estimated at **3536.5 times higher**, and toluene, which can enter the human body through contact with contaminated soil

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and can severely damage cells, is estimated at **117 times higher** than both the industrial and parkland limits. Total xylenes are **27.6 times higher** than both CCME standards.

Benzo(a)pyrene, a mutagenic and highly carcinogenic PAH, is estimated at **281 times higher** than the CCME standards. Naphthalene exceeds the industrial standard by 40 times and the parkland standard by **1463 times**. Pyrene is 5.9 times the industrial standard and **58.6 times** the parkland standard.

**Metals:** The estimated levels of metals in the ENVIRON Report consistently exceed the CCME standards for both industrial and parkland sites. Antimony is estimated at 10 times the industrial standard and 20 times the parkland standard. Arsenic exceeds both standards by 26.5 times. Chromium (VI) is 17 times higher than the industrial limit and 60 times the parkland limit. Copper and lead are respectively 81 and 26 times the industrial limit, and 117.5 and 112 times the limit for parks. Mercury on the site will exceed the industrial limit by 1.3 times, and the park limit by 9.7 times. Nickel will be 200 times higher than both standards, and selenium will exceed the industrial limit by 586 times. Selenium will be 1700 times the limit for parklands. Vanadium will exceed both limits by 70 times. Zinc will be 56 times higher than the industrial standard and 101 times the park standard.

A comparison of the estimated contaminant levels to the Ministry's "Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act" shows that 29 of the contaminants exceed the limits in Table 1 (Full Depth Generic Site Condition Standards in a Non-Potable Ground Water Condition), which are the most conservative standards applicable to this site:

**MEK (Methyl Ethyl Ketone)**  
**Total Xylenes**  
**Benzo(a)anthracene**  
**Benzo(a)pyrene**  
**Benzo(b)fluoranthene**  
**Benzo(ghi)perylene**  
**Chrysene**  
**Dibenzo(a,h)anthracene**  
**Fluoranthene**  
**Indeno(1,2,3-cd)pyrene**  
**Naphthalene**  
**Phenanthrene**  
**Pyrene**  
**Arsenic**  
**Barium**  
**Beryllium**  
**Boron**  
**Cadmium**  
**Chromium (total)**

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**Chromium (VI)**  
**Cobalt**  
**Copper**  
**Lead**  
**Mercury**  
**Molybdenum**  
**Nickel**  
**Selenium**  
**Vanadium**  
**Zinc**

The levels of metals are especially high compared to the Ministry's standards, as arsenic is **6.4 times higher**, cadmium is **8.3 times the limit**, copper is **24.7 times higher**, lead is **15.7 times higher**, nickel is **50 times higher** than the standard, selenium is **170 times the standard**, vanadium is **36.8 times higher** and zinc is **25 times the limit**. Aromatic hydrocarbons are also a problem from this perspective, with dibenzo(a,h)anthracene at **79.4 times** the standard, naphthalene at **22 times higher**, phenanthrene at **23.6 times higher**, and benzo(a)pyrene at **103.7 times higher** than the Ministry's standard.

Regardless of which soil standard is applied to the proposal, it is apparent that the waste soil Waterfront Toronto wants to bring to this site will be heavily contaminated and potentially hazardous to human and environmental health.

**It would not be reasonable for the Ministry to approve a hazardous waste site on the shore of Lake Ontario and in close proximity to recreational areas.**

It is not appropriate to locate a hazardous waste site like Waterfront Toronto's proposed Soil Management Facility on the water's edge on a lake that provides drinking water for millions of people, as well as important aquatic habitat and recreational value. Lake Ontario is an essential source of drinking water for Toronto and surrounding areas. Two of the city's four water treatment plants are in close proximity to the proposed waste site: the R.C. Harris Treatment Plant in The Beach, and the Toronto Island Treatment Plant on Centre Island. Environment Canada has formally identified Toronto as an "Area of Concern" on the Great Lakes due in part to the loss of fish and wildlife habitat, consumption restrictions on fish, and beach closings.<sup>1</sup> Further degradation cannot be allowed to take place in an "Area of Concern", especially one that Canada's largest city relies upon.

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<sup>1</sup> Environment Canada, "Canadian Remedial Action Plans: Areas of Concern". Accessed February 2010 at <<http://www.ec.gc.ca/raps-pas/default.asp?lang=En&n=5098A4FF-1>>.

Section 3.3 of Waterfront Toronto's Application for a Waste Disposal Site indicates that the land adjacent to the proposed site is "industrial". This fails to reflect the reality of the surrounding area, which is a popular and active recreational area. Directly across Unwin Avenue from the proposed site is Lake Ontario Park. Part of Waterfront Toronto's plans for waterfront redevelopment, the former Chair of Waterfront Toronto described the organization's vision of the Park akin to Vancouver's Stanley Park. In 2005, when funding was announced for the Park, Robert Fung said, "Lake Ontario Park is our biggest move in creating the clean, green publicly accessible waterfront that we all want."<sup>2</sup>

While Waterfront Toronto's plans for Lake Ontario Park are in the works, the area is already accessed on a regular basis by a growing community of recreational users. The Toronto Waterfront Trail is, "a 900 km celebration of nature and culture".<sup>3</sup> Used by walkers, joggers, bikers, and rollerbladers, the Waterfront Trail passes along Unwin Avenue and through Lake Ontario Park before turning up Cherry Street, where it runs directly along the western border of the proposed site. The Westwood and St. James Town sailing clubs, used throughout the summer, are located approximately 250 metres from the site, on the south side of the spit. Cherry Beach, a popular site for swimmers, dog walkers, and other recreational users, is situated just west of the sailing clubs.

Despite the heavy use of this area for a wide variety of recreational activities, Waterfront Toronto's proposal would place a hazardous waste site in close proximity to the park, beach, trail, and sailing clubs. The proposal would see the site operating during evenings and on Saturdays, when recreational use will be heavy. Recreational users would be forced to pass the waste site both on the way in and out of the area, whether they enter from Cherry Street or Leslie Street. They will also compete with truck traffic from the waste site operation on local roads.

**The proposal poses a significant threat to the environment because the Design and Operations Report will not adequately protect the environment or the members of the public that frequent the areas directly adjacent to the site.**

The environmental mitigation measures proposed in the Design and Operations Report may help to protect the environment and human health in another location. However, for a site located on a spit in Lake Ontario, surrounded by parkland frequented by recreational users, the mitigation measures are not sufficient to protect human and environmental health.

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<sup>2</sup> City of Toronto, News Releases (28 April 2005), "\$10 M Investment will Kick-Start Construction of Lake Ontario Park", accessed online February 2010 at: <<http://206.130.170.35/waterfront/newsrel042805.htm>>.

<sup>3</sup> Waterfront Trail, Accessed February 2010 at <[www.waterfronttrail.org](http://www.waterfronttrail.org)>.

Waterfront Toronto has proposed receiving heavily contaminated soil at the site from both trucks and ships. Both will be screened and unloaded on the site, creating piles of waste on the asphalt or concrete surface. The piles will only be covered once they are “full”, in the event of rain or snow, or when the site is closed. A series of measures are described in the Report to control dust and prevent wind from blowing contaminated soil from the piles offsite. However, despite the best efforts of staff at the site, uncovered piles of soil located between the Lake and a park will inevitably result in material leaving the site, whether as blowing dust, leachate, or otherwise. Soil could also be blown off site during transport and unloading. While these emissions might be controllable through mitigation in another location, any emissions from the proposed site would have significant environmental consequences.

## **2. No reasonable person, having regard to the relevant law and to government policies developed to guide decisions of that kind, could decide to issue a Certificate of Approval for this site.**

### **A. A decision to issue a Certificate of Approval for this site would not be consistent with the Ministry’s Statement of Environmental Values.**

The Minister of the Environment is required to take every reasonable step to ensure that the Ministry’s Statement of Environmental Values (SEV) is considered whenever decisions that might significantly affect the environment are made in the Ministry (EBR, s.11). Among the principles in the Ministry’s SEV, five are particularly relevant to the decision put before the MOE by Waterfront Toronto:

**Ecosystem Approach:** 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.

**Cumulative Effects:** 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.

**Precautionary Principle & Science-based Approach:** The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment.

**Pollution Prevention:** The Ministry’s environmental protection strategy will place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment.

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

In *Lafarge Canada v. Ontario (Environmental Review Tribunal)*, the Ontario Superior Court of Justice found that a failure to explicitly consider and apply an SEV when a prescribed Ministry makes a decision on approvals and permits is grounds for review by the Environmental Review Tribunal.<sup>4</sup> At paragraph 60, the court explained that, “the Directors' decision was unreasonable because of the failure to take into account SEV principles”.<sup>5</sup>

The Lafarge decision still applies to the Ministry's SEV despite the fact that a new version was implemented by the MOE in 2008. As the Environmental Review Tribunal found in *Protect Our Water and Environmental Resources v. Ontario (Ministry of the Environment)*:

[C]hanges to the MOE's SEV do not alter or change the findings in the Lafarge decision with respect to the obligations to consider the SEV for proposals for Class I and Class II instruments. In addition, it would be reasonable to consider well-recognized principles of environmental decision-making, such as precaution, the ecosystem approach and conservation, in making environmentally significant decisions even if they were not specifically mentioned in the SEV. These principles are simply reflective of current best practices in environmental decision-making.<sup>6</sup>

### **Ecosystem Approach & Cumulative Effects:**

The Environmental Review Tribunal has explained the meaning of ecosystem approach in the Ministry's SEV:

Under an ecosystem approach, decisions are made by measuring effects on the system rather than on their constituent parts in isolation from each other. An ecosystem approach is inherently effects-based: what matters under an ecosystem approach is the overall consequence of human activity, rather than an assessment of particular human actions isolated from the effects of other actions affecting the same ecosystem. As the MOE SEV stipulates, one of the key features of an ecosystem approach is measurement of cumulative effects.<sup>7</sup>

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<sup>4</sup> *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* [2008] O.J. No. 2460 [QL] [Lafarge].

<sup>5</sup> *Ibid.* at 60.

<sup>6</sup> *Protect Our Water and Environmental Resources Inc. v. Ontario (Ministry of the Environment)* [2009] O.E.R.T.D. No. 23 at para. 59 (QL) [P.O.W.E.R.].

<sup>7</sup> *Dawber v. Ontario (Ministry of the Environment)* [2007] O.E.R.T.D. No. 25 (QL) at para. 33.

As the Tribunal found, the Ministry is required to consider the effects of the whole project on the environment, and how those effects add to the consequences of other human activity in the ecosystem, before making a decision.

**There are two significant implications of this ruling for the Ministry as it considers Waterfront Toronto's application:**

1. The Ministry must consider the impacts of the project, along with the impacts of all other human activities in the area, on the environment. The Ministry must consider other sources of pollution in Toronto's harbour, both historical and ongoing. As noted above, Toronto's harbour has been identified as an Area of Concern by Environment Canada. While the goal of remediating contaminated soil is important and must occur, it cannot be allowed to proceed in a way that could add further contamination to the harbour.
2. The Ministry must consider the impacts of the whole project, and cannot make a decision on the constituent parts of the project in isolation from each other. Currently, Waterfront Toronto's application for approval from the Ministry has been split into at least three separate parts.

In addition to the Certificate of Approval for a Waste Disposal Site that is the subject of this comment, Waterfront Toronto has applied to the Ministry for a Certificate of Approval for discharge into the natural environment (air), pursuant to s.9 of the *EPA*. Depending on the technical design of the processing facility, the site might require approval for sewage discharge under the *Ontario Water Resources Act (OWRA)*. Additionally, Waterfront Toronto plans to apply for a C of A for the actual soil processing at the site sometime in the future. At this time, no details about the nature of the processing equipment or techniques are available.

In order to be consistent with the SEV, all requisite approvals for this project must be considered concurrently. Without information about the air emissions, water emissions, and impacts from the processing facility, it is impossible to know whether a series of further approvals will be required. For example, it is possible that the processing equipment itself will require approvals for air, noise, and sewage emissions.

By separating these multiple approvals into discrete pieces and consulting the public on each independently of the others, the Ministry will not be able to make a decision on the basis of cumulative impacts and an ecosystem approach, as required by the SEV. It is an artificial division that does not reflect the impacts of the project on the environment. The Supreme Court of Canada considered this issue in relation to environmental assessments in *MiningWatch Canada v. Canada (Fisheries and Oceans)*.<sup>8</sup> In that case, the Department of Fisheries and

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<sup>8</sup> 2010 SCC 2.

Oceans scoped the description of a proposed mine into pieces to avoid the requirement for a Comprehensive Study Report under the *Canadian Environmental Assessment Act (CEAA)*. The Court found that a project as proposed cannot be scoped by the Responsible Authority to result in “project-splitting” in order to circumvent additional assessment obligations. At paragraph 40, the Court found that the *CEAA* assumes that the proponent will represent the entirety of the proposed project in relation to a physical work. While Waterfront Toronto’s proposal falls under the *EPA* and *OWRA* instead of the *CEAA*, the Court’s rationale against project-splitting applies.

A second danger of splitting approvals lies in the potential for stockpiling to occur before processing is guaranteed. The Ministry has been asked to approve the waste site for compiling, sorting, and storing the contaminated soil before Waterfront Toronto has identified a company to conduct the actual processing. This approach is extremely risky, as it is possible that Waterfront Toronto will not be able to find a contractor to carry out the operation, either within the budget or the terms required by the company. It is also possible that the Ministry will not be able to approve the C of A for processing based on environmental concerns. If this inability to proceed with processing is only discovered after contaminated soil has been piled and stored on the proposed Unwin Avenue site, the processing facility could easily become a *de facto* final disposal site. This would be completed without the appropriate C of A from the Ministry, public consultation, or the requisite hearing before the ERT. The Ministry must have the full complement of applications associated with the project for concurrent consideration before it grants any approvals, from acceptance and sorting of the waste through to processing and decommissioning.

### **Precautionary Principle & Science-based Approach:**

The Environmental Review Tribunal has set out what the precautionary approach mandated by the SEV means with respect to decisions made by the Ministry of the Environment:

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.<sup>9</sup>

Therefore, in the absence of scientific evidence that the proposal will not cause harm, the Ministry is required to consider it to be as hazardous as it could possibly be. Waterfront Toronto’s application for a Certificate of Approval does not include enough information to allow the Ministry to make a decision based on science, as required by the SEV. Besides dividing the

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<sup>9</sup> Davidson v. Ontario (Ministry of the Environment) [2006] O.E.R.T.D. No. 33 (QL) at para.44.

application into constituent parts that prevent the requisite application of an ecosystem approach, the application lacks basic scientific and technical details.

This is evidenced by the extensive list of questions provided to Waterfront Toronto in writing by Ministry staff (attached). This list contains 23 questions identifying missing information required before the Ministry can make a decision, including: how and when the waste will be sampled and tested for radioactivity; a consideration of future adjacent uses; whether closing procedures will include groundwater sampling; how material will move through and around the site; a plan for soil erosion from the piles; details of water re-use plan on-site; the height of planned piles; and whether the planned start date for the operation leaves time for Waterfront Toronto to obtain all the required approvals.

The application does not include any scientific review of the site or the proposed activities. No drainage study or hydrogeological assessment report was provided. No consideration of the particular contaminants that the site will handle and their impacts on the environment or human health in the event of emissions was included in the application.

Further, the application notes that Waterfront Toronto expects to receive heavy metals and PAHs at the site. These contaminants are often found with PCBs and radioactive material like uranium in contaminated soil. Despite the well-known relationship between these contaminants, the application does not address screening for PCBs. The information about screening for radioactivity is sparse, as noted in the MOE's list of questions. The application does not explain how the screening will be conducted, how workers and the environment will be protected from radioactive materials, or how detected radioactivity will be addressed.

Waterfront Toronto's application also provides no information about the effects of potential aquatic pollution, asserting instead that no contaminants will leave the site. Aquatic pollution is difficult to account for because of the long-term effects on aquatic organisms from continual life cycle, multigenerational exposure. The possibility for continuous, but undetectable or unnoticed effects on aquatic organisms is particularly troubling because they can accumulate slowly, obscuring major changes until fish and aquatic organisms are unable to sustain healthy populations. Therefore, the precautionary principle is particularly important with respect to decisions about potential sources of pollution on the Lake. The Ministry is required to apply the precautionary principle to this decision in accordance with the Statement of Environmental Values. It is not sufficient to assert that no contaminants will enter the lake, when there is a possibility of leachate, fugitive emissions, windblown emissions, and spills. A failure to consider impacts of emissions on Lake Ontario would be a contravention of the SEVs.

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Without further information about the proposal and evidence supporting that information, the Ministry cannot make a science-based decision that accounts for human health, worker safety and environmental protection, as required by the SEV.

**Sustainable Development:**

Waterfront Toronto has applied to operate this waste site for twenty years, based on an estimated time needed to process the volume of contaminated soils in waterfront areas. This is an exceptionally long period for a Certificate of Approval to be issued. The land use in the area around the site will continue to change significantly over that period of time. As recreational use of the Leslie Spit increases, so does recreation around the Waterfront Trail, the sailing clubs, and Cherry Beach. Waterfront Toronto itself plans to redevelop the parkland across Unwin Avenue from the site, presumably to increase its use for recreation. Plans to redevelop and clean up the Don River and the lake generally will increase recreational uses and fish habitat in the area. The Ministry cannot allow a twenty-year waste disposal site that will handle acutely contaminated and potentially hazardous material to be built in the centre of a thriving and growing recreational area without violating the SEV with respect to sustainable development.

**B. A hearing under Part V of the *Environmental Protection Act* and an environmental assessment under Ontario's *Environmental Assessment Act* are required in order to be consistent with provincial law.**

**B.1: An environmental assessment of this proposal is required by the Ontario *Environmental Assessment Act*.**

The proposal for a waste disposal site on Unwin Avenue must be reviewed as part of a provincial environmental assessment (EA) because Waterfront Toronto is a public body, as defined in the *Ontario Environmental Assessment Act*. Section 3 of that *Act*, which sets out when a provincial EA must be completed, says:

- 3. This Act applies to,
  - (a) enterprises or activities or proposals, plans or programs in respect of enterprises or activities by or on behalf of Her Majesty in right of Ontario or by a public body or public bodies or by a municipality or municipalities;...

Waterfront Toronto is a corporation established by the Toronto Waterfront Revitalization Corporation Act, 2002, S.O. 2002, c. 28. It cannot raise funds and is supported solely by the governments of Canada, Ontario, and Toronto. Each level of government appoints a portion of Waterfront Toronto's Board of Directors, and the Board is required to give annual reports, including financial audit reports, to all three levels of government. Waterfront Toronto exists to

serve a public purpose, funded and overseen by government. It is a public body and should be subject to an environmental assessment under the Ontario *EAA*.

**B.2: A hearing before the Environmental Review Tribunal is mandatory under s.30 of the *EPA*.**

Waterfront Toronto has applied for a Certificate of Approval for a waste disposal site pursuant to section 27 of the *Environmental Protection Act*. Section 27 is in Part V of the *EPA*, which specifically addresses waste management. Part V provides for a hearing on proposed waste sites before the Environmental Review Tribunal (ERT). That hearing is either mandatory or required at the discretion of the Minister, depending on whether it meets the criteria in section 30 or section 32 of the *Act*.

A hearing before the ERT is **mandatory** where a proposal meets the criteria in s.30:

30. (1) Where the Director receives an application for a certificate of approval for the use, operation, establishment, alteration, enlargement or extension of a waste disposal site for the disposal of hauled liquid industrial waste or hazardous waste as designated in the regulations or any other waste that the Director ascertains, having regard to the nature and quantity of the waste, is the equivalent of the domestic waste of not less than 1,500 persons, the Director shall, before issuing or refusing to issue the certificate of approval, require the Tribunal, by a notice in writing, to hold a hearing.

In this case, Waterfront Toronto's proposal states that it excludes hauled liquid industrial waste and hazardous waste. However, a comparison of the contaminants listed in Table 2 of the ENVIRON Report indicates that the soil received at the site may contain hazardous waste, as defined in O.Reg. 347 under the *EPA*. The proposal does not indicate why Waterfront Toronto concluded that the waste does not constitute hazardous waste. If no evidence is available to show that the contaminated soil will not contain or constitute hazardous waste under the regulations, a hearing before the ERT is mandatory.

If Waterfront Toronto can show that the contaminants proposed for processing at the site will not constitute hazardous waste, a hearing would still be required. The site must be referred to the ERT for a hearing if:

- The Director received an application from Waterfront Toronto for a certificate of approval for the use, operation, establishment, alteration, enlargement, or extension of a waste disposal site; and

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- The Director ascertains, having regard to the nature and quantity of the waste, that it is the equivalent of the domestic waste of not less than 1,500 persons.

For the following reasons, Lake Ontario Waterkeeper submits that the proposal is for the establishment, use, and operation of a waste disposal site that will accept more than the equivalent of the domestic waste of 1500 persons. A hearing before the ERT is mandatory.

**If the contaminated soil is not considered “hazardous waste”, then it is “municipal waste”.**

A mandatory hearing under s.30 of the *EPA* is required because Waterfront Toronto’s proposal is for disposal of waste at a waste disposal site.

If the contaminated soil does not constitute hazardous waste under the regulations, it is legally classified as “municipal waste” under the *EPA*. “Waste” is defined under the *Act* as including ashes, garbage, refuse, domestic waste, industrial waste, or municipal refuse and such other materials as are designated in the regulations. “Municipal waste” is defined as any waste, whether or not it is owned, controlled or managed by a municipality, except:

- (i) hazardous waste,
- (ii) liquid industrial waste, or
- (iii) gaseous waste.

The contaminated soil is not liquid industrial waste or gaseous waste. It may be hazardous waste. If not, it is municipal waste.

**The proposal is for disposal at a waste disposal site.**

Waterfront Toronto has proposed using the Unwin Avenue site for depositing, handling, storing, transferring, treating, and processing waste. The terms “disposal” and “waste disposal site” in s. 30 of the *Act* include the deposition, transferring, treatment, and processing of waste. Guidance documents used by Ministry staff in evaluating this proposal may have erroneously led staff to believe that a mandatory hearing under s.30 is only required in the case of “final disposal”.<sup>10</sup> In contrast to the Ministry’s guidance documents, section 30 is not limited in application to sites that will be used for land filling or final disposal.

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<sup>10</sup> See Ministry of the Environment (2005), “Green Facts: Certificates of Approval - Waste Disposal and Management” (PIBS 4978e) at p.2. See also Ministry of the Environment (1999), “Guide to Applying for Approval of a Waste Management System: Sections 27, 30, 31 and 32 of the Environmental Protection Act” at p.ii.

Under the *EPA*, “waste disposal site” means,

- (a) any land upon, into, in or through which, or building or structure in which, waste is deposited, disposed of, handled, stored, transferred, treated or processed, and
- (b) any operation carried out or machinery or equipment used in connection with the depositing, disposal, handling, storage, transfer, treatment or processing referred to in clause (a).

According to O.Reg. 347 under the *EPA*, “disposal facility” has the same meaning as in Ontario Regulation 105/09 (Disposal of Deadstock) made under the Food Safety and Quality Act, 2001. That regulation defines “disposal facility” as:

a transfer station, salvaging facility, rendering facility or composting facility, the operator of which is a licensee.

Based on these definitions, in the context of the *EPA*, the word “disposal” includes transferring and processing. There is nothing in the *Act* or regulations that indicates “disposal” is in any way limited to “final disposal”. In contrast, Regulation 101/94 under the *EPA*, which deals with the recycling and composting of municipal waste, specifically defines and refers to “final disposal”, as the disposal by land filling, incineration, gasification, pyrolysis, plasma arc treatment or another method of thermal treatment, or by deposit at a dump that does not include the handling, storing, transferring, treating or processing of waste at the dump.

If the Legislature had intended s.30 of the *EPA* to mean only “final disposal”, they would have specified that fact as they did when enacting Regulation 101/94. Instead, disposal in s.30 of the *EPA* has a distinct meaning that includes the proposed activities at Waterfront Toronto’s Unwin Avenue site.

**The waste that the proposed Waterfront Toronto site would accept is more than equivalent to the domestic waste of not less than 1,500 persons.**

To trigger a mandatory hearing under s.30, the volume of waste accepted, stored, treated, processed, or transferred must be the equivalent of the domestic waste of not less than 1,500 persons.

Waterfront Toronto proposes to handle up to 2500 tonnes per day (with an average of 1500 tonnes per day) at the Unwin Avenue site. The Conservation Council of Ontario, a province-wide association of organizations and individuals dedicated to conservation and a healthy environment, estimate that each person in the province produces 0.8 tonnes of waste each

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year.<sup>11</sup> That means that 1,500 persons produce 1200 tonnes per year, and 3.3 tonnes per day. Even if the Conservation Council's estimate is conservative, the waste that would be accepted at Waterfront Toronto's proposed site is between 454 and 757 times higher than the threshold in the *EPA*, which means a mandatory hearing is required under s.30 of that *Act*.

**Even if an ERT hearing was not mandatory, the Director has the discretion to require the Tribunal to hold a hearing.**

Based on the analysis above, a mandatory hearing is required under s.30. However, even if a hearing were not mandated by the *EPA*, the Director retains the discretion to require a hearing before the ERT under s.32. The high levels of contamination in the proposed waste matter, combined with the location of the site amongst heavy recreational use and on the shore of Lake Ontario, should prompt the Director to order a hearing on this proposal even if the hearing was not mandatory.

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<sup>11</sup> Conservation Council of Ontario, "Green Ontario", Accessed February 2010 at <[www.greenontario.org/strategy/solid\\_waste.html#Quick%20Facts](http://www.greenontario.org/strategy/solid_waste.html#Quick%20Facts)>.

## SUMMARY AND RECOMMENDATIONS

Waterfront Toronto's proposal poses a significant threat to the environment because of the hazardous contaminants that would be received, stored, sorted, and processed at the site. It would not be reasonable for the Ministry to approve a hazardous waste site on the shore of Lake Ontario and in close proximity to recreational areas. The proposal poses a significant threat to the environment because the plan in the Design and Operations Report will not adequately protect the environment or the members of the public that frequent the areas directly adjacent to the site. A decision to issue a Certificate of Approval for this site would not be consistent with the Ministry's Statement of Environmental Values.

Lake Ontario Waterkeeper recommendations can be summarized as follows:

- 1. The Ministry must ensure that the full complement of applications associated with the project are presented and considered concurrently.**
- 2. In the absence of scientific evidence that the proposal will not cause harm, the Ministry is required to consider it to be as hazardous as it could possibly be.**
- 3. Further information about the proposal and evidence supporting that information is required before the Ministry can make a science-based decision that accounts for human health, worker safety and environmental protection, as required by the Ministry's Statement of Environmental Values.**
- 4. All information about the proposal must be made available for public comment to fulfill the requirements of the *Environmental Bill of Rights*.**
- 5. The Ministry cannot allow a twenty-year waste disposal site that will handle acutely contaminated and potentially hazardous material to be built in the centre of a thriving and growing recreational area without violating the SEV with respect to sustainable development.**
- 6. A provincial environmental assessment must be conducted to review the proposal for a waste disposal site on Unwin Avenue.**
- 7. A hearing before the Environmental Review Tribunal is required to review the proposal for a waste disposal site on Unwin Avenue.**

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