



Environmental Review Tribunal

Case No.: 11-001

2241960 Ontario Inc. v. Director, Ministry of the Environment

In the matter of an appeal by 2241960 Ontario Inc. filed March 31, 2011 for a Hearing before the Environmental Review Tribunal pursuant to section 140 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended with respect to Director's Order No. 7671-8AGPMT-1 issued by the Director, Ministry of the Environment, on March 18, 2011 under section 157.3(5) of the *Environmental Protection Act*, requiring that all soils be deposited in an area to which no previous soil deposit has been made, that audit soil samples be provided, and that groundwater be monitored quarterly at a site located at 13471 Lakeridge Road, in the Township of Scugog, in the Regional Municipality of Durham, Ontario; and

In the matter of a Settlement Agreement and withdrawal of the appeal.

Before: Alan D. Levy, Member

Appearances:

John Tidball	-	Counsel for the Appellant, 2241960 Ontario Inc.
Brian Blumenthal	-	Counsel for the Director, Ministry of the Environment
Ian MacIntosh	-	Participant, on behalf of the Lakeridge Citizens for Clean Water
Bev Hendry	-	Representative for the Presenter, Township of Scugog

Dated this 3rd day of October, 2011.

Reasons for Decision

Background:

This case involves the threat of contamination of local soil and ground water which arose after the Appellant commenced work in 2010 to convert a large old gravel pit into a private aerodrome (airfield) by importing and depositing hundreds of thousands of tonnes of fill from elsewhere in the Province.

2241960 Ontario Inc., the Appellant, operates under the business name of Earthworx Industries. The property is located on the Oak Ridges Moraine ("Moraine"), and known municipally as 13471 Lakeridge Road in the Township of Scugog, Regional Municipality of Durham (the "Site"). Among other things, four elevated helicopter pads have now been created with inbound fill deposited in the area which was previously excavated. The pads consist of imported fill ranging in depth estimated at from 1 to 8.5 metres.

Located nearby are many homes supplied with potable drinking water from separate private wells and a communal spring. It appears that the aerodrome project has been very controversial within the local community, especially since the discovery of contaminants in some of the imported fill.

The Township has been involved in oversight of the project since it approved an application for a Site Alteration Permit in 2010. The Ministry of Environment ("MOE") became directly involved shortly thereafter, and a Provincial Officer's Order (the "PO Order") was first issued in October 2010. It was amended on three occasions since then, and ultimately a Director's Order was issued on March 18, 2011, by Dave Fumerton of MOE's York Durham District Office (the "Order"). On March 31, 2011, the Appellant appealed this Order to the Tribunal pursuant to section 140(1) of the *Environmental Protection Act* ("EPA").

After conducting a review of the PO Order at the Appellant's request, the Director upheld the following requirements:

- all inbound fill to be deposited in an area in which no previous fill has been deposited;
- audit samples of inbound fill arriving at the Site to be taken and tested weekly instead of monthly;
- sampling of soil at the Site to be taken at intervals of no more than 25 metres, and tested;

- additional soil sampling to be completed by March 31, 2011;
- ground water monitoring to be conducted on a quarterly basis; and
- submission of a report by March 31, 2011 addressing environmental site assessment and soil removal work undertaken, along with recommendations for further soil sampling and ground water monitoring.

I conducted a Preliminary Hearing on June 1, 2011, in the Town of Port Perry where Scugog's municipal offices are located. At that time, Ian MacIntosh requested Participant status in the appeal proceeding on behalf of an unincorporated residents' group, Lakeridge Citizens for Clean Water ("LCCW"). A written submission filed on behalf of LCCW, dated May 24, 2011, maintains that it has more than 143 members from households surrounding the site. No objection was raised by the Parties to this request and I granted Participant status to Mr. MacIntosh.

Beverly Hendry, Chief Administrative Officer for the Township, appeared for the Township and requested Presenter status on its behalf. She filed a copy of a Resolution passed by Scugog Council in May 2011 which expressed support for the requirements imposed by MOE "in the interest of best practice regarding groundwater protection against possible fill contamination, and the precautionary principle." No objection was raised by the parties to this request, and I granted Presenter status to the Township.

On the same occasion, Appellant's Counsel, John Tidball, indicated that his client was withdrawing its appeal with respect to Items 10 (increase of frequency of audit sampling to weekly) and 13 (new fill to be deposited in areas with no previous fill) in the Order, leaving only Item 15 still to be resolved. The Parties agreed to an adjournment of the Preliminary Hearing to June 21, 2011 via teleconference in order to provide more opportunity for discussion and negotiation between the Parties.

Prior to that teleconference Mr. Tidball circulated for comment and approval the following documents:

- (1) draft Settlement Agreement between the Appellant and Director;
- (2) proposed amendment of the Director's Order, reproduced at Appendix B hereto ("Amended Order");
- (3) a letter report from D.L. Services Inc. (on letterhead of DLS Group) dated June 14, 2011, outlining an "Amended Work Plan, Supplementary Subsurface Investigation"; and
- (4) written submission from Mr. Tidball dated June 20, 2011, to support the proposed settlement.

These documents were discussed during the June 21, 2011 teleconference, and both Parties proposed that the settlement be accepted by the Tribunal and the appeal proceeding be dismissed accordingly.

The settlement confirms the withdrawal of the appeal of Items 10 and 13, proposes a revision of Item 15, which adopts the Amended Work Plan, and adds a new provision, Item 16, which provides a process going forward for making further amendments to the Order. These changes are discussed in greater detail below. Brian Blumenthal, Counsel for the Director, confirmed the Director's support for the settlement and concurred with the written submissions filed by Mr. Tidball. Ms. Hendry indicated that the Township supported the settlement and the MOE's position.

Ian McLaurin, a member of LCCW, participated in the teleconference and spoke on behalf of Mr. MacIntosh who was traveling and unavailable. Mr. McLaurin indicated that LCCW had two concerns about the settlement, namely that a more rigorous level of testing should be a requirement of the Amended Work Plan, and that the proposed characterization of ground water was not satisfactory.

After receiving submissions from the Parties, I directed Mr. McLaurin, on behalf of Mr. MacIntosh and LCCW, to circulate and file a written statement providing more detail with respect to the two areas of concern, and any recommendations and changes to the Order and/or Amended Work Plan required to address them. The timing for circulating the written statement and a response from the Parties was discussed, resulting in agreed-upon deadlines for circulation and filing with the Tribunal.

No one requested a further opportunity to discuss these issues by teleconference or otherwise, on the basis that the documentation would be sufficient for the Tribunal to make a decision. Accordingly, another appearance before the Tribunal was not scheduled.

The Settlement Agreement was subsequently signed on behalf of the Appellant and the Director, and filed with the Tribunal. The executed Settlement Agreement (the "Agreement") is reproduced at Appendix A. The written statement of LCCW's concerns and the separate responses of the Appellant and Director have now been circulated and filed.

Relevant Legislation:

Rule 201 of the Tribunal's Rules of Practice states as follows:

Where there has been a proposed withdrawal of an appeal as part of a settlement agreement not objected to by any Party that alters the decision under appeal, the Tribunal shall review the settlement agreement and consider whether the agreement is consistent with the purpose and

provisions of the relevant legislation and whether the agreement is in the public interest. The Tribunal shall also consider the interests of Participants and Presenters. After consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.

The purpose of the *EPA*, according to section 3(1), is “to provide for the protection and conservation of the natural environment.”

The PO Order, which was varied by the Director, was issued pursuant to section 157.1 of the *EPA* which states as follows:

- (1) A provincial officer may issue an order to any person who owns or who has management or control of an undertaking or property if the provincial officer reasonably believes that the requirements specified in the order are necessary or advisable so as,
 - (a) to prevent or reduce the risk of a discharge of a contaminant into the natural environment from the undertaking or property; or
 - (b) to prevent, decrease or eliminate an adverse effect that may result from,
 - (i) the discharge of a contaminant from the undertaking, or
 - (ii) the presence or discharge of a contaminant in, on or under the property.

Section 1(1) of the *EPA* defines a contaminant as including, among other things, any solid or liquid resulting from human activities that may cause an adverse effect. The definition of adverse effect in this section includes such things as the impairment of the quality of the natural environment, damage to property, impact on human health or safety, and loss of enjoyment of normal use of a property.

Issue:

The issue for determination is whether the Settlement Agreement should be accepted by the Tribunal, on the basis that its terms are consistent with the purpose and provisions of the *EPA* and are in the public interest.

Discussion and Analysis:

According to the material which has been filed, the history of this matter has included the following events, among others:

- the Township ordered the Appellant to stop bringing fill to the Site;
- injunction proceedings were commenced by the Township in the Superior Court of Justice to enforce this prohibition;

- an interlocutory injunction was issued by Justice Whitaker on March 11, 2011, and no fill has been received at the Site since March 14, 2011;
- concern about dumping fill at the Site has been raised in the Ontario Legislature during question period;
- judicial review proceedings were unsuccessfully brought by the Appellant to challenge on constitutional grounds the Township's attempt to regulate the Appellant's fill operations;
- two orders issued by the Township pursuant to the Ontario Building Code with respect to the construction of a hangar building, have been appealed by Earthworx to the Superior Court of Justice; and
- D.L. Services Inc. was retained by the Appellant to assess the quality of fill which has been deposited at the Site, and characterize subsurface soil and ground water conditions.

During the Preliminary Hearing, Mr. Tidball advised that the injunction matter is proceeding, and the judicial review decision of the Divisional Court is under appeal.

The initial submission filed with the Tribunal on behalf of LCCW, dated May 24, 2011, by their lawyer, Ian A. Blue, included the following statements with respect to the residents' concerns about the Applicant's project:

2. Most members of LCCW live in close proximity to the contaminated soil dumping grounds located at the Applicant's site. Following the September 29, 2010 testing of soil samples taken by Golder and Associates [on behalf of the Township], a real and substantial concern arose among residents, now members of LCCW, that the soil was being dumped in non-compliance with the [MOE's] 2004, *Soil, Groundwater, and Sediment Standards for use Under Part XV.1 of the [EPA] Table 2 Full Depth Generic Site Condition Standards in a potable Ground Water Condition for Residential/Parkland/Institutional Property Use with Medium/Fine textured soils* (2004) Standard. The October 1st and October 22nd, 2010 Golder Associates' reports showed the soil was, in fact, contaminated with, *inter alia*, heavy metals and hydrocarbons.
3. The LCCW and its members are deeply concerned that chemicals and byproducts contained with the soil dumped at the Applicant's site at 13471 Lakeridge Road will leach into their wells and/or the communal spring located at the intersection of Lakeridge Road and Chalk Lake Road, and negatively affect the quality of residents' drinking water.
4. Additionally, the daily influx of over 150 "semi-trailer" dump-trucks while the site was in operation raised additional safety concerns for the members of the LCCW. As the fill operation was expected to take several

years, the presence of these large trucks would be of continuing concern to the LCCW and its members. ...

15. In January, 2011, LCCW received a letter from the solicitor for Earthworx requesting that the LCCW, the Township of Scugog and Eathworx participate in a Public Liaison Committee. ...
18. The LCCW has played a substantial role in bringing this issue to the forefront, and in representing the voices of those citizens most affected by the fill operation. As shown by the activities [listed] above, and in particular the request of Earthworx to participate in a Liaison Committee, the LCCW is a legitimate and important stakeholder very much involved and respected with regards to this issue.

The third amendment to the PO Order was issued by David Fisher, Senior Environmental Officer in MOE's York Durham District Office, on March 7, 2011. It recites his reasons for making the amendment, which include the following:

- The Appellant has been cooperative with MOE and in compliance with the PO Order.
- There is no information so far to indicate that ground water has been impacted.
- One of the four sources of incoming fill is Block 6N at Fort York in Toronto. Analysis of a sample of soil deposited in January 2011 at the site from this source indicated that some parameters (polyaromatic hydrocarbons and electrical conductivity) exceeded MOE Table 2 standards.
- Since then, soil has been removed from the area where the Applicant believed that contaminated fill had been deposited.
- In January and February 2011, 4 test pits were excavated and 23 boreholes were drilled and sampled. Ground water monitoring did not reveal exceedances but soil samples from three of the boreholes contravened Table 2 standards for certain polyaromatic hydrocarbons.
- Borehole 14 was drilled on Pad 2 in February by the Applicant and a consulting firm was retained to sample the side walls.

Mr. Fisher stated in his PO Order that the amendment is necessary or advisable to prevent or reduce the risk of a contaminant discharge, or to decrease or eliminate an adverse effect resulting from the contaminant. It contains the following directives in relation to Item 15 on page 4 thereof:

By March 31, 2011, submit to the undersigned Provincial Officer one or more reports on the environmental site assessment and soil removal work done at the Site to date, and a plan for additional environmental site assessment. The plan will include the recommendations and opinion of the Qualified Persons involved regarding the extent of further soil sampling and ongoing groundwater monitoring

required to ensure that there will be no impact to any groundwater aquifers or adjacent property from the activities at the Site. The plan must require at a minimum that soil sampling be undertaken at a minimum of 25 metre intervals.

Furthermore, it is required that the additional soil sampling shall be completed by March 31, 2011 or such other date as indicated in writing by the undersigned Provincial Officer and the groundwater monitoring shall be carried out on a quarterly basis (four times a year) commencing in May, 2011.

The term “qualified person” is defined in section 168.1 of the *EPA* as a person (typically an environmental consultant) who meets the qualifications which are prescribed in Regulations.

The Order of the Director, dated March 18, 2011, confirmed the amended PO Order and provided reasons which include the following:

- A Phase II Environmental Site Assessment Report prepared by D.L. Services Inc. on behalf of the Appellant, was submitted to MOE on March 15th.
- It was not accompanied by a separate plan for additional environmental site assessment (ESA), as required by Item 15.
- It did include recommendations for further testing and development of a contingency plan. He agreed with these recommendations.

The following comments were included at the conclusion of the Order (at page 4):

The plan for additional environmental site assessment required under Item No.15 of the Order was intended to be a document which would detail a specific scope of work including scheduling. This was not provided but I am willing to meet with Earthworx and its Qualified Person to have this plan submitted and finalized. Once this plan is submitted, or in any event by April 15, 2011, I will issue an amendment to this Director’s Order regarding implementation of additional environmental site assessment work and timelines. ...

I understand the concern about a desire to vary the groundwater monitoring frequency upon receipt of sufficient results that demonstrate that less frequent monitoring is justified. In my amendment to this Director’s Order, I plan to provide that Earthworx may at any time request a further review of the groundwater sampling and monitoring requirements and the soil audit sampling, and that if I do not make a decision that is agreed to by Earthworx and amend my Director’s Order, Earthworx would have a right of appeal as provided by the EPA.

The revised version of Item 15 which arises out of the settlement and is found in the proposed Amended Order (at Appendix B hereto), directs the Appellant to undertake the supplementary subsurface investigation work detailed in the Amended Work Plan and submit a final report by October 1, 2011. The proposed addition of a new provision, Item 16, is intended to establish

the review and appeal opportunity which the Director described in the above excerpt from his Order.

The Amended Work Plan from D.L. Services Inc. included as Figure 1 a diagram entitled "Proposed Borehole Locations – Supplementary Phase II Assessment" dated April 14, 2011. It illustrates existing and proposed borehole locations, and is reproduced at Appendix C hereto. The Amended Work Plan identified the following details of on-site contamination:

The Phase II ESA investigations that were carried out in the fill material identified one location (borehole BH 14 in Pad 2) where benzo(a)pyrene concentrations exceeded the Table 3 Standard. This material was subsequently removed during a remedial excavation directed by Canadian Engineering Services Inc. (CESI) of Toronto, Ontario. Analytical results for verification soil samples collected by DLS from the walls and floor of the excavation showed that the fill material within the footprint of the excavation complied with the Table 3 Standards. At this and two other locations (boreholes BH7 and BH8 in Pad 3) exceedances of the Table 2 Standards for naphthalene and/or 2- and 1-methylnaphthalene were identified. Due to the heterogeneity of the fill material, additional borehole drilling and soil sampling was recommended in the vicinity of boreholes BH7, BH8 and BH14. These investigations were recommended to further delineate the extent of the soil contamination identified at BH7 and BH8, and to determine if further remediation work is required beyond the remedial excavation at BH14.

The Phase II ESA was conducted while fill material was being actively deposited at the Site at the east sides of Pads 1 and 2. Due to the high density of vehicular and heavy equipment traffic flow safe access for drilling and test-pitting activities in this area was not practical at that time. Consequently DLS recommended additional borehole drilling to complete the characterization of the fill material at the Site.

Analytical data for the groundwater samples obtained during the Phase II ESA showed that the shallow groundwater at the locations tested meets the Table 2 Standards for all parameters analyzed. Low levels of toluene were detected in the shallow groundwater at all of the newly installed monitoring wells, including MW1 which is situated hydraulically up-gradient of the imported fill. The occurrence of toluene at MW1 suggests that the concentrations may be the result of an up-gradient source of contamination. Low level concentrations of naphthalene and acetone were also detected in the shallow groundwater at MW3, situated near Lake Ridge Road at the southwest corner of the Site. It was recommended that the monitoring wells and on-Site supply well be re-sampled to verify these low level detections.

The investigation proposed by the Amended Work Plan includes drilling up to 14 more boreholes within the fill to take soil samples. These boreholes, which are also illustrated in Appendix C, will extend down to the base of the fill and continue for approximately one more metre into the native soil below. Parameters for testing will include a suite of metals, inorganics,

petroleum hydrocarbons, volatile organic compounds and poly-aromatic hydrocarbons. Test results will be compared to the MOE standards in Tables 2 and 3.

The three existing ground water monitoring wells and one ground water supply well will be sampled again to determine if there have been any changes in ground water quality. The report on this work will also include a map which illustrates ground water flow patterns across the Site.

The Amended Work Plan has included at page 13 thereof a list of all parameters for testing of soil and ground water samples. This list, entitled "Extended List of Parameters," is reproduced at Appendix D.

The reasons provided for the changes set out in the proposed Amended Order describe the process through which the Amended Work Plan, dated June 14, 2011, was developed. Among other things, the Director's reasons refer to the statement in the Plan that:

- the Amended Work Plan incorporates MOE's comments on a previous draft;
- the work will provide further characterization of the quality of the fill that has been deposited at the Site, and evaluate native soil and ground water conditions; and
- it will not delineate all surface or subsurface contamination as this is an "iterative process" which might require more investigation and monitoring.

However, in the proposed Amended Order (Appendix B, page 2) the Director asserts that the Amended Work Plan will:

- provide "a high degree of coverage across the filled area";
- "augment the understanding of environmental conditions at the Site";
- provide enough additional soil sampling to adequately address current concerns about the previous deposit of fill; and
- allow for review and modification of location and frequency of ground water monitoring.

The written submission by Mr. Tidball, dated June 20, 2011, on behalf of the Appellant, and supported by the Director, maintains that:

- the requirement to characterize the deposited fill was intended to provide confidence that it would not likely cause contamination of ground water;
- the Phase II Report confirmed that the fill met MOE soil standards "for the most part";
- the proposed level of additional investigation is appropriate, along with ongoing ground water monitoring;

- it will “assist in ensuring that there will be no contamination of the aquifer beneath the Site”;
- by providing more information on existing conditions and confidence that the aquifer will not become contaminated, the proposed Amended Order is in the public interest; and
- it is also consistent with the purpose of the *EPA* and Item 15 (testing at 25m intervals, etc.) of the Order under appeal.

The concerns of LCCW about the terms of the settlement, and Items 10 and 15 in particular, were elaborated in written comments received from Mr. McLaurin and dated June 26, 2011. In response, Mr. Tidball filed a written response on behalf of the Appellant, dated July 4, 2011, and Mr. Blumenthal submitted correspondence dated July 8, 2011, on behalf of the Director. The Director concurs with the Appellant’s position. The content of these submissions is summarized below.

By way of introduction, LCCW commented as follows on the sensitive nature of the Site:

However, the location [referred to elsewhere as “a former aggregate extraction pit”] had been rehabilitated into a grassland ranch with three wetlands or ponds frequented by local wildlife. The Oak Ridges Moraine Conservation Plan places the site within an Area of High Aquifer Vulnerability. Regulation 153/04 [“Records of Site Condition,” Part XV.1 of *EPA*] classifies the site as an environmentally sensitive area because the property immediately to the south is Oak Ridges Moraine natural core area. Along the roads to the south and east of the site are a dozen or more homes that rely on wells.

As such, the [LCCW] contend that waste soil should not be dumped at the site, and if it is, it must be closely monitored.

The Appellant has withdrawn its appeal with respect to Item 10, which requires audit sampling of fill on in-bound trucks on a weekly basis, instead of monthly. In addition, no fill has been arriving at the Site as a result of the injunction granted by the Superior Court in March 2011. Nevertheless, LCCW maintains that a larger number of samples should be required. On this point its submission states as follows:

If dumping were to resume, it would be reasonable to assume an average of 250 trucks a day could be dumping soil on the site 6 days a week. A weekly sample, if all trucks were from the same site, would represent a sampling rate of 0.07%. The sampling and analysis cost for a weekly sample would be two thousand dollars at most, representing only 1.6% of the site’s weekly revenue. MOE’s fact sheet on bringing soil to a RSC [Record of Site Condition] property says there must be one sample analyzed per 160 cubic meters. As this site was a clean site, surely it deserves at least the same level of protection and requires one sample per 160 cubic meters, dropping to one per 300 cubic meters after 5000 cubic meters.

In response to the above the Appellant takes the following position:

- The primary quality control mechanism for in-bound fill is the requirement that the source must analyze and provide a report on soil quality.
- In addition, this report must be reviewed and accepted by the Appellant's engineer.
- Audit sampling at the Site on a weekly basis is intended to complement the testing at source.
- New audit sampling requirements in amendments to O.Reg.153/04, related to *EPA* Part XV.1 ("Records of Site Condition"), for in-bound soil to a Phase II property are not applicable in the circumstances of this case.

In general the Director's position is set out in the following paragraph from Mr. Blumenthal's letter:

The Director wishes to emphasize that the settlement proposal is preventative in nature, and incorporates the LCCW concerns about security of ground water and impacts of site soils. The MOE will continue to work with, and received input from, [LCCW] as more information becomes available for this site. The MOE will also continue to work with the municipality. Should the municipality become the regulatory agency as a result of the issuance of a new site alteration permit, and if any such permit includes requirements that, in the opinion of the Director, meet the objectives of the Order, the Director may take steps to amend the Order.

With respect to the proposal to amend Item 15, LCCW's concerns relate to adequacy of on-site soil sampling and locations (extent of coverage and quality standards) as well as ground water monitoring.

Regarding the investigation of fill that has already been deposited at the Site, LCCW maintains that more stringent MOE quality standards should be applied to testing of samples. LCCW's submissions in support of this concern included the following:

- The backfilling of the Site was commenced with imported soil that was required to meet only the MOE Table 3 Standards ("Full Depth Generic Site Condition Standards in a Non-Potable Ground Water Condition").
- By comparison, Table 2 has higher standards as it deals with areas involving potable ground water ("Full Depth Generic Site Condition Standards in a Potable Ground Water Condition"), and Table 1 ("Full Depth Background Site Conditions Standards") contains the most stringent standards.
- At the end of October 2010 Earthworx committed to import fill that complies with Table 1 or Table 2 standards.

- “[A]pproximately 25,000 truckloads of soils up to and possibly exceeding Table 3 were dumped before the site was under the orders of MOE” in October 2010.
- The application of Table 3 Standards would be appropriate only if the Site and neighbouring properties were supplied by a municipal drinking water system, which is not the case here.
- Accordingly, all “Table 3 soils must be located and removed”.
- Higher standards should be applied to “clean” sites, as compared with the remediation of contaminated sites which fall under *EPA Part XV.1* (“Records of Site Condition”).
- The MOE Certificate of Approval governing the source of inbound fill did not authorize it to be deposited in a sensitive area. The Site is in an “Area of High Aquifer Vulnerability” under the Oak Ridges Moraine Conservation Plan, and located adjacent to the “natural core area” of the Oak Ridges Moraine. As such it qualifies as a sensitive area. This point was not disputed by the Parties.

LCCW maintains that the type of sampling plan which has been employed in the Amended Work Plan is useful, according to MOE guidelines, only when there is excellent knowledge of a property, which is not the case here. Its submission states as follows:

The new proposed work plan places 14 borehole sampling locations at approximately 25 meter spacing over the previously un-sampled surface of the pads and analyzes only 1 soil sample from each. The site is non-homogeneous as evidenced by the lack of similarity between the stratigraphy of neighbouring boreholes as shown in the Phase II report. The sampling plan does not include the unconsolidated slopes, which especially in the case of pad 3, represents a significant area. Because a dumped load is only a few meters wide LCCW requests a denser sampling pattern that is scientifically defensible.

LCCW has also advised that a topographic survey of the terrain prior to landfilling be used to ensure that boreholes extend down far enough to reach native soil.

In response, the Appellant maintains that the purpose of Item 15 is to determine the quality of the fill which has been deposited to date at the Site, and its potential to cause adverse effects on ground water. The issue of different standards in the Tables is not relevant in achieving that purpose, as “[t]he choice of Table will not affect or determine the sampling program as set out in the proposed settlement.”

With respect to the adequacy or density of coverage proposed by the Amended Work Plan, the Appellant asserts that it is “scientifically defensible,” was prepared by an experienced consultant and approved by MOE technical staff, and will provide information which is equivalent to or better than that which was originally required by Item 15.

LCCW proposes that the Amended Work Plan include a requirement that ground water elevations be recorded monthly, and ground water be sampled and tested with the same frequency. Submissions by LCCW in support of this recommendation include the following:

- In an amending Order issued on December 8, 2010, the MOE had requested the Appellant to implement a ground water characterization program.
- The aquifer at the Site is at the top of the Moraine and provides drinking water to many people.
- The hydraulic conductivity of gravel found in this aquifer “can be in hundreds of meters per year” (page 3). This point and the two above were not disputed by the Parties.
- It is expected that the Amended Work Plan will also prove to be inadequate.
- The requirement of only one round of ground water sampling by October 1st is inadequate.
- The attempt to characterize ground water at the Site in the Phase II report was inadequate.
- The type of information that should be required includes details of off-site ground water characteristics and uses, comparing fill and water table elevations, identifying all aquifers and aquitards, determining hydraulic conductivity of the fill and aquifer(s), and relating the water table to the pond at the foot of Pad 3.

In its response the Appellant noted that information concerning off-site ground water uses is provided in Appendix E of the Phase II report, and that the upper aquifer is known to be located at a depth of between 12m and 20m below ground surface. The LCCW proposal for augmenting ground water investigation at this stage is opposed on the following basis:

The site assessment work is being undertaken in an iterative manner. Given existing knowledge about the site setting, no impact on the underlying aquifer is anticipated. The groundwater investigation undertaken to date has not revealed any impacts from filling activities on the upper aquifer beneath the Site. The next step in the iterative process is to confirm that absence of impact through further groundwater monitoring. The Amended Work Plan proposes one sampling round in the third quarter of this year, which is consistent with the quarterly sampling contemplated by the original Item No.15. It will be appropriate to revisit issues such as groundwater monitoring frequency and the need for any additional characterization of the local groundwater regime after the results of the supplementary work are available. There is no reasonable basis to undertake the additional groundwater characterization work suggested by LCCW, or to implement monthly groundwater sampling, at this time.

On behalf of the Director, Mr. Blumenthal's response noted that additional ground water sampling "is unlikely to indicate impacts from the fill operation." The information forthcoming from the Amended Work Plan will be sufficient to locate "representative down gradient ground water monitoring wells where required."

Findings:

As a result of the agreement reached by the Parties and the proposed withdrawal of the appeal, I am required under Rule 201 to determine whether or not it is appropriate at this stage for the appeal to be withdrawn and the proceeding dismissed.

In view of the very large scale of transformation and development which has been commenced at the Site and the high level of environmental significance and sensitivity of this area, the concerns of the local residents appear to be both understandable and appropriate. I commend LCCW for the active and vigilant role it has taken on a voluntary basis to protect the environmental integrity of this part of the Moraine.

The Moraine is considered to be a very important and sensitive ground water recharge area for southern Ontario, and the *Oak Ridges Moraine Conservation Act, 2001* ("ORMCA") and Oak Ridges Moraine Conservation Plan were created for this reason. Protection of the ecological and hydrological integrity of the Moraine Area is identified in section 4(a) of the *ORMCA* as an important objective of the Plan. This legislation and Plan are also noted in the current Provincial Policy Statement of Ontario (2005) established pursuant to the *Planning Act*.

It is undisputed that quantities of fill contravening MOE Tables 2 and 3 quality standards were received and deposited despite screening efforts which included testing of fill at source and the audit sampling of in-bound truck loads upon arrival at the Site. The screening did not succeed in its purpose, namely to safeguard the Site from contamination. The significance of the problem is demonstrated by the repeated action taken by the MOE and the Township.

However, no more fill has been brought to the Site since March of this year, and efforts have been made to locate and remove the contaminated fill. Since protection of the ground water aquifer depends on ensuring that remaining contaminated fill/soil is located and dealt with properly, the immediate challenge is to learn how much of it continues to remain on-site. Secondly, there must be a determination as to whether it has, or will, adversely affect ground water quality.

The material I have received has referred to some documents which were not filed with the Tribunal, such as reports by Golder and Associates prepared for the Township, comments by MOE staff in their memorandum dated May 26, 2011, and the Phase II ESA report dated March 15, 2011, and prepared for the Appellant by D.L. Services Inc. However, I have proceeded to make a determination in this matter on the understanding that these materials would not have added appreciably to the information available to me from the documents which were filed with the Tribunal.

The argument in favour of approving the Settlement Agreement is supported by several factors, including the following:

- The terms of the Settlement Agreement do not diminish the requirements contained in the Order which is under appeal.
- The Amended Work Plan is not considered by the MOE or the Appellant as the last stage in defining and fixing the problem, but rather as another step in an iterative process of investigating and remediating the contamination of this Site, and preventing any further occurrence.
- No exceedances in ground water quality have been detected thus far, and the upper aquifer is located below ground surface at considerable depth.
- The only authoritative technical/scientific advice and/or opinions before me derive from MOE staff and the Appellant's consultant, D.L. Services Inc. They indicate that the proposed coverage of boreholes for fill/soil testing is adequate.
- These sources also maintain that monitoring well coverage for ground water testing is adequate, and that ground water at the Site is not only currently safe but that it is also expected to remain that way.
- The Township, which has been assisted by an experienced environmental consulting firm, Golder and Associates, supports the approach taken in the Settlement Agreement.
- According to the Appellant's submissions, all soil and ground water test results will be reported, not just those which exceed MOE Table 1, 2 or 3 standards. However, I note the following statement from the Amended Work Plan at pages 7-8:

Analytical results for the soil samples obtained will be compared to the Standards provided in Tables 2 and 3 of the MOE [Standards document]. Groundwater samples obtained from the supply well and observation wells will be compared to the Table 2 Standards only.

- Although LCCW has been actively involved with environmental issues related to this Site since the organization was formed in October 2010, it has not provided any technical/scientific reports to support its concerns about the settlement.
- During the process of deciding on the best course of action, the MOE maintains that it considered the input received from LCCW. It has also undertaken to continue to work with the residents' organization on an ongoing basis as more information becomes available.
- The MOE indicates that the Appellant has been co-operative and compliant with its oversight.

- Additional reporting is due relatively soon (beginning of October) and the Parties appear confident that the information it provides will help MOE determine whether or not the ongoing scrutiny of soil deposits and ground water should be augmented or otherwise changed.

I acknowledge the serious warning from LCCW that thousands of truck loads of fill, possibly exceeding Table 3 standards, have been deposited at the Site in an environmentally sensitive area on the Moraine. On the other hand, the Appellant submits that the Phase II Report confirms the fill meets MOE standards “for the most part” (Appellant’s submissions dated June 20, 2011).

In my view there is some basis for the residents’ concern about the limited knowledge and understanding which exists at this point with respect to soil and ground water characteristics across the Site, and the high degree of caution that is therefore required. Indeed, the Resolution passed by Scugog Council called for “best practice regarding groundwater protection against possible fill contamination, and the precautionary principle.” In essence, LCCW has questioned why in such circumstances more thorough and frequent testing is not required at this time.

This is an important and appropriate question. However, an examination of the record does not disclose any technical/scientific opinion or recommendation from an authoritative source to support an augmented plan. The view of MOE staff is that the program proposed by the Amended Work Plan is, indeed, appropriate. For example, in the draft Order, the Director states that the proposed soil sampling “will adequately address the current concerns with filling activities.” Moreover, the Director maintains that more ground water sampling is unlikely to detect impacts related to the deposit of fill at the Site.

I have also considered the fact that there has been considerable public and political attention paid to the environmental problems which have been uncovered at the Site since landfill operations began last year. As a result of this scrutiny, government agencies are undoubtedly aware of the level of public concern regarding the potential risk and consequences of ground water contamination at the Site, and downstream from it. Accordingly, it is reasonable to assume that great care has been taken to assess the adequacy of the Amended Work Plan, and the consequences which might ensue from inadequate testing.

With respect to the issue concerning which MOE standards ought to apply, I accept the assurance provided in Mr. Tidball’s submissions that *all* test results will be reported to the MOE, whether or not they contravene Tables 1, 2 or 3. Indeed, my decision is reliant on that expectation. Although contravention of any standard is certainly very important, so too is any trend revealed by test data which might demonstrate the presence of, or influence from, contamination in soil or ground water.

In making a decision in this matter, it was helpful to know that in addition to the MOE's undertaking to continue to consult and work with LCCW, the Appellant has invited the residents to participate in a Public Liaison Committee for the Site along with the Township. In my view it is important that LCCW will continue to have a significant role with respect to this Site, and that the Appellant, MOE and the Township will support its involvement by providing documentation and input on an ongoing basis.

After considering the Settlement Agreement and Proposed Amendment of the Director's Order, as well as the information, comments and submissions which have been provided on behalf of the Parties, LCCW and the Township, I have decided that the requirements of Rule 201 have been satisfied. In reaching this conclusion it was of critical importance to me that the Settlement Agreement has been acknowledged by the Parties as a step in an ongoing and iterative process of investigating, remediating and preventing contamination at this Site.

In the result I find that the terms of the Settlement Agreement are consistent with the purpose and provisions of the *EPA*, and are in the public interest. Accordingly, the withdrawal of the appeal is accepted and this proceeding is dismissed.

Decision

Pursuant to Rule 201 of the Tribunal's Rules of Practice, this appeal is dismissed.

*Settlement Agreement Accepted
Appeal Withdrawn
Appeal Dismissed*

Alan D. Levy, Member

- Appendix A - Settlement Agreement
- Appendix B - Proposed Amendment of Director's Order (June 20, 2011)
- Appendix C - Proposed Borehole Locations – Figure 1, Page 14 of Supplementary Phase II Assessment (April 14, 2011)
- Appendix D - Extended List of Parameters - Page 13 of Amended Work Plan (June 14, 2011)

Settlement Agreement

Case No: 11-001

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER of an appeal by 2241960 Ontario Inc. filed
March 31, 2011, for a Hearing before the Environmental Review
Tribunal with respect to Director's Order No. 7671-8A6PMT-1

SETTLEMENT AGREEMENT

The Appellant 2241960 Ontario Inc. and the Director agree to settle all matters under appeal on the following basis:

1. The Appellant withdraws its request for a hearing with respect to the requirement in Item No. 10 of the Director's Order to take audit samples weekly rather than monthly.
2. The Appellant withdraws its request for a hearing with respect to the requirement in Item No. 13 to deposit all soils in an area to which no previous soil deposit has been made.
3. The Director proposes to amend Item No. 15 and add new Item No. 16 in a proposed amendment to Director's Order No. 7671-8A6PMT-1, appended hereto.

June 24 / 11
Date

June 24 / 11
Date

[Signature]
MILLER THOMSON LLP
Solicitors for 2241960 Ontario Inc.

[Signature]
Counsel For the Director

Proposed Amendment of Director's Order (June 20, 2011)

Ministry of the Environment
Central Region
York Durham District Office
5th Floor
230 Westney Rd S
Ajax ON L1S 7J5
Fax: (905)427-5602
Tel: (905) 427-5608

Ministère de l'Environnement
Direction régionale du Centre
Bureau du district de York Durham
5e étage
230 Westney Rd S
Ajax ON L1S 7J5
Télécopieur: (905)427-5602
Tél: (905) 427-5608



June 20, 2011

2241960 Ontario Inc.
carrying on business as Earthworx Industries
13471 Lakeridge Rd.,
Scugog, Ontario, L9L 1W3
Canada

Attention: Mr. Gordon Churchill & Mr. Claudio Villa

Re: Director's Order No. 7671-8AGPMT - 1 – Amendment No. 1

I have reviewed the Environmental Review Tribunal (ERT) proceedings material and consulted with legal counsel for the Ministry of the Environment (Ministry) and for 2241960 Ontario Inc. cob Earthworx Industries (Earthworx) and propose, pursuant to sections 49 and 54 of the Legislation Act, 2006, S. O. 2006 c. 21, Sched F, to amend my Director's Order 7671-8AGPMT-1 which was issued on March 18, 2011 (Order).

Reasons for this Amendment

Since the issuance of the Order, the following key events have taken place:

- a) Since March 14, 2011 Earthworx has not been accepting soil at the Site in compliance with the decision of the Superior Court of Justice - Ontario made on March 11, 2011 granting the Township of Scugog's motion for an interlocutory injunction.
- b) The Ministry reviewed the Phase II Environmental Site Assessment Report prepared by the Earthworx Qualified Person, D.L. Services Inc. (DLS), as required by Item No. 15 of the Order.
- c) On March 31, 2011 Earthworx submitted a Notice of Appeal to the ERT requesting a hearing regarding the requirements of Order Items No. 10 (weekly audit sampling), No. 13 (segregating new soil deposits) and No. 15 (additional soil sampling requirements).
- d) On March 31, 2011, Earthworx submitted a report prepared by Canadian Engineering Services Inc. titled "Soil Remediation for the Area of Concern Where Soils from the Fort York Site Located at Bathurst Street and Lakeshore Road were Found to be High in PAHs were Imported to 13471 Lakeridge Road, Scugog, Ontario" dated March 4, 2011.

This report describes excavation activities completed at the Site as a result of issues identified during routine audit sampling of incoming fill materials.

e) On April 14, 2011, Earthworx legal counsel submitted to the Director the "Work Plan, Supplementary Subsurface Investigation at 13471 Lakeridge Road, Scugog, Ontario" prepared by DLS and also required by Order Item No. 15. The supplementary report was reviewed by the Ministry and written comments were provided by the Ministry to Earthworx on May 26, 2011.

f) On May 24, 2011, Earthworx and their legal counsel agreed not to appeal the Order requirements for weekly audit sampling and to develop a segregation plan at the Site to ensure compliance with Work Item No. 10 and No. 13 and advised the BRT that the issue under appeal has been narrowed to Order Item No. 15.

g) On June 1, 2011 the Preliminary Hearing took place and was adjourned until June 21, 2011 to allow time for the Ministry and Earthworx to attempt to settle the outstanding issue.

h) On June 14, 2011, Earthworx' counsel submitted to the Ministry an Amended Work Plan, dated June 14, 2011, prepared by DLS (Amended Work Plan), as required by Item No. 15 of the Order and incorporating the Ministry comments provided on May 26, 2011. The Amended Work Plan at pages 3 and 4 states the following:

"The scope of work ("SOW") presented herein is intended to further characterize the quality of the fill that that has been received by the facility, and to evaluate the native soil and groundwater conditions on-Site.

The SOW presented herein is not intended to delineate all areas of surface or subsurface contamination at the Site. The delineation of surface or subsurface contamination areas is an iterative process which may require the completion of additional boreholes and/or test-pits, the installation of additional groundwater monitoring wells, and/or the collection of additional soil and groundwater samples in subsequent iterative phase(s) of investigation."

I have reviewed the Amended Work Plan. The proposed soil borehole locations provide a high degree of coverage across the filled area and are generally 25m from other sample points. DLS has also proposed more closely spaced sample points in areas identified during the previous work (i.e. BH14) and believe that the proposed work plan will augment the understanding of environmental conditions at the Site.

I believe that the additional soil sampling will adequately address the current concerns with filling activities that have occurred at the Site, and that the groundwater monitoring to be carried out under the Amended Work Plan will be reviewed to determine whether any modifications to the location(s) of groundwater sampling is warranted in the future and also the frequency of the future monitoring.

I therefore wish to revoke and replace the requirements of Order Item No. 15 as set out below. In addition, I wish to amend the Order to provide a new Item No. 16 which sets

out an on-going procedure that I believe is appropriate given the iterative site investigation process and to provide more flexibility and certainty for the future.

Work Ordered

- (1) I hereby revoke the requirements of Item No. 15 and replace them with the following:

Item No. 15

“By October 1, 2011, carry out or cause to be carried out the supplementary subsurface investigation work set out in the Amended Work Plan and submit to the undersigned Director a final report thereon for the Ministry to review and share with all interested stakeholders.”

- (2) I hereby also order Earthworx to do or cause to be done the following:

Item No. 16

“Effective immediately, if you have any concerns about the requirements of the Order, particularly those which have no expiration time periods indicated and therefore continue in full force and effect until such time as the Director revokes or alters the requirements, you may submit to the Director, at any time, an application, based on recommendations from a Qualified Person, for a revocation or alteration of the Order requirements. The Director shall alter the Order following receipt of any such application, even where the Director may not approve or accept the submission made, in order to provide for a right of appeal of such a decision.”

Issued at Ajax this day of June, 2011.

Dave Fumerton
District Manager
York Durham District Office
Tel: (905) 427 5626

REQUEST FOR A HEARING

You may require a hearing before the Environmental Review Tribunal if, within 15 days of service of this order, you serve written notice of your appeal on the Environmental Review Tribunal and the Director. Your notice must state the portions of the order for which a hearing is required and the grounds on which you intend to rely at the hearing. Except by leave of the Environmental Review Tribunal, you are not entitled to appeal a portion of the order or to rely on grounds of appeal that are not stated in the notice requiring the hearing. Unless stayed by the Environmental Review Tribunal, the order is effective from the date of service.

Written notice requiring a hearing must be served personally or by mail upon:

The Secretary	and	Director (Provincial Officer Orders)
Environmental Review Tribunal		Ministry of the Environment
655 Bay Street, 15th Floor		York-Durham District Office
Toronto ON		5 th Floor
M5G 1E5		230 Westney Rd S
		Ajax ON, L1S 7J5
		Fax: (905) 427-5602
		Tel: (905) 427-5600

Where service is made by mail, it is deemed to be made on the fifth day after the date of mailing and the time for requiring a hearing is not extended by choosing service by mail.

Further information on the Environmental Review Tribunal's requirements for an appeal can be obtained directly from the Tribunal by:

Tel: (416) 314-4600

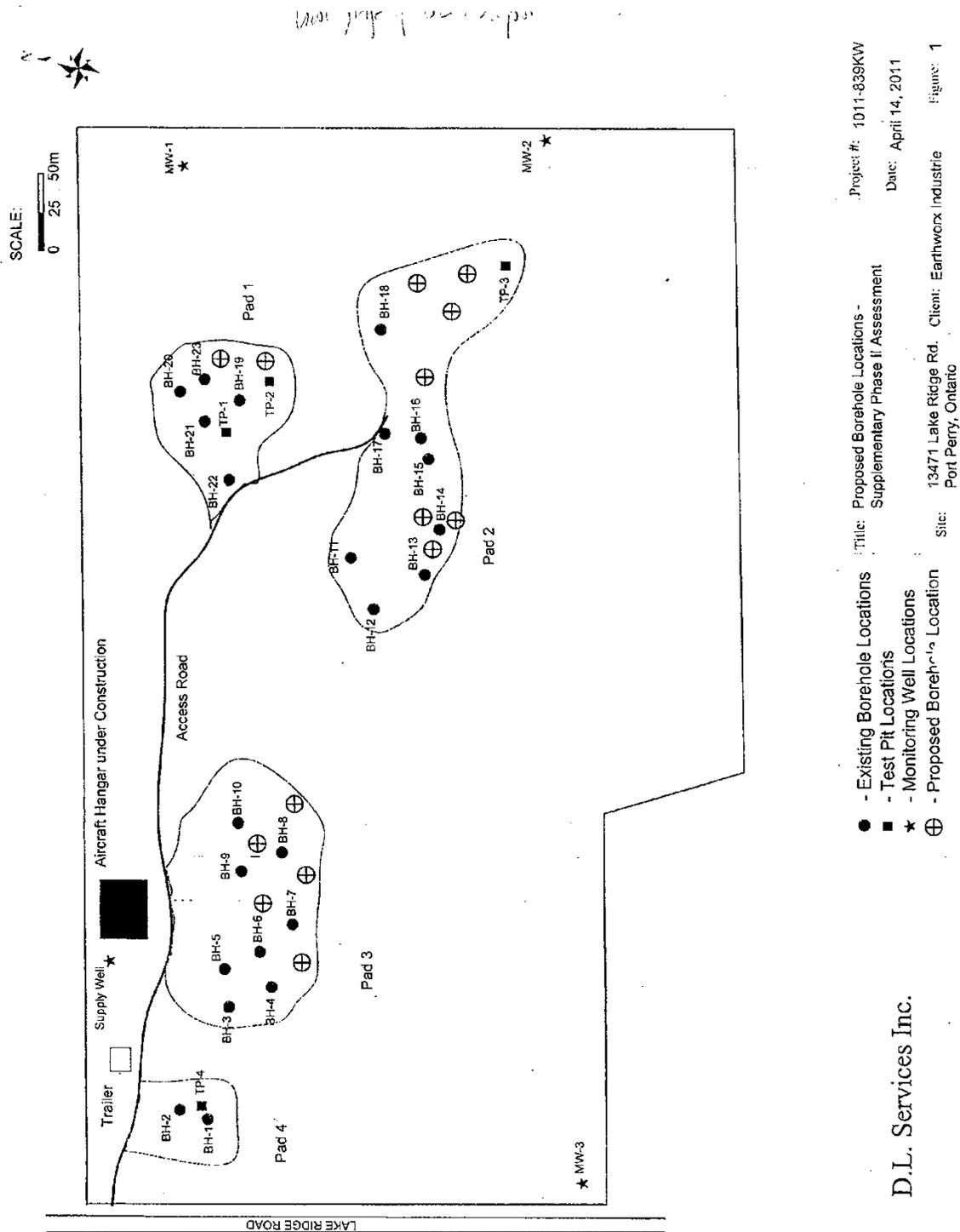
Fax: (416) 314-4506

www.ert.gov.on.ca

The procedures to request a hearing and other information provided above are intended as a guide. The legislation should be consulted for additional details and accurate reference.

Appendix C

Proposed Borehole Locations – Figure 1,
 Page 14 of Supplementary Phase II Assessment (April 14, 2011)



D.L. Services Inc.

**Extended List of Parameters
Page 13 of Amended Work Plan (June 14, 2011)**

Amended Work Plan – Supplementary Subsurface Investigation
13471 Lakeridge Road, Scugog, ON

June 14, 2011
Page 13

Extended List of Parameters

Metals and Inorganics (soil)

Antimony, Arsenic, Barium, Beryllium, Boron, Cadmium, Chromium (total), Chromium VI, Cobalt, Copper, Free Cyanide, Lead, Molybdenum, Nickel, Selenium, Silver, Thallium, Vanadium, Zinc, Mercury, Nitrate, Nitrite, pH, Electrical Conductivity, Sodium Adsorption Ratio (soil)

Petroleum Hydrocarbons

Fractions F1 through F4

Volatile Organic Compounds

Chloromethane, Vinyl Chloride, Bromomethane, Chloroethane, Trichlorofluoromethane, Acetone, 1,1-Dichloroethylene, Methylene Chloride, Trans-1,2-Dichloroethylene, Methyl tert-butyl Ether, 1,1-Dichloroethane, Methyl Ethyl Ketone, Cis-1,2-Dichloroethylene, Chloroform, 1,2-Dichloroethane, 1,1,1-Trichloroethane, Carbon Tetrachloride, Benzene, 1,2-Dichloropropane, Trichloroethylene, Bromodichloromethane, Cis-1,3-Dichloropropene, Methyl Isobutyl Ketone, 1,3-Dichloropropene, 1,1,2-Trichloroethane, Toluene, 2-Hexanone, Dibromochloromethane, Ethylene Dibromide, Tetrachloroethylene, 1,1,1,2-Tetrachloroethane, Chlorobenzene, Ethylbenzene, m & p-Xylene, Bromoform, Styrene, 1,1,2,2-Tetrachloroethane, o-Xylene, 1,3-Dichlorobenzene, 1,4-Dichlorobenzene, 1,2-Dichlorobenzene, 1,2,4-Trichlorobenzene, 1,3-Dichloropropene (Cis + Trans), Xylenes (Total)

Polycyclic Aromatic Hydrocarbons

Acenaphthene, Acenaphthylene, Anthracene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, Chrysene, Benzo(g,h,i)perylene, Benzo(k)fluoranthene, Indeno(1,2,3-cd)pyrene, Dibenzo(a,h)anthracene, Pyrene, Fluoranthene, Fluorene, Naphthalene, Phenanthrene

Metals & General Chemistry (Groundwater)

Conductivity, Saturation pH, pH, Alkalinity, Bicarbonate, Carbonate, Colour, Turbidity, Total Organic Carbon, Hydroxide, Hardness, Ammonia as Nitrogen, Bromide, Nitrate, Nitrite, Fluoride, Chloride, Sulphate, Orthophosphate, Calculated Total Dissolved Solids, Cation/Anion Ratio, Total Phosphorous, Langelier Index, Calcium, Magnesium, Sodium, Potassium, Aluminum, Antimony, Arsenic, Barium, Boron, Cadmium, Copper, Iron, Lead, Manganese, Molybdenum, Nickel, Selenium, Silver, Strontium, Thallium, Tin, Titanium, Uranium, Vanadium, Zinc, Reactive Silica, Mercury