Environmental Review Tribunal

Case Nos.: 11-058/11-059/11-060/11-061/11-062/
11-063/11-064/11-065/11-066/11-074

Dea v. Director, Ministry of the Environment

In the matter of an appeal by AbiBow Canada Inc., Abitibibowater Inc., Abitibi-Consolidated Company of Canada, Pierre Rougeau, David J. Paterson, Allen Dea, Jacques P. Vachon, William G. Harvey and Alain Grandmont filed May 27, 2011 and OfficeMax Incorporated filed May 30, 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 Order No. 6248-8GRHU2 issued by the Director, Ministry of the Environment, on May 13, 2011 under sections 18, 44, 132 and 196 of the *Environmental Protection Act* regarding the property known as the Mud Lake Waste Disposal Site located in the City of Kenora, Ontario; and

Case Nos.: 11-144/11-146/11-147/11-148/11-149/
11-150/11-151/11-152/11-153/11-154

Office Max Incorporated v. Director, Ministry of the Environment

In the matter of appeals by Office Max Incorporated filed August 30, 2011 and by AbiBow Canada Inc., Abitibibowater Inc., Abitibi-Consolidated Company of Canada, Pierre Rougeau, David J. Paterson, Allen Dea, Jacques P. Vachon, William G. Harvey and Alain Grandmont filed August 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 an Order issued by the Director, Ministry of the Environment, on August 16, 2011 under section 18, 44, 132, 196 and 197 of the *Environmental Protection Act*, regarding the property known as Margach Waste Disposal Site located in the City of Kenora, Ontario; and

Case Nos.: 11-155/11-156/11-157/11-158/11-159/
11-160/11-161/11-162/11-163/11-175

Grandmont v. Director, Ministry of the Environment

In the matter of appeals by AbiBow Canada Inc., Abitibibowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Forest Productions Inc., Pierre Rougeau, David J. Paterson, Jacques P. Vachon, William G. Harvey and Alain Grandmont filed September 9, 2011 and by Weyerhaeuser Company Limited filed September 16, 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 an Order issued by the Director, Ministry of the Environment, on August 25, 2011 under section 18, 44, 132, 196 and 197 of the *Environmental Protection Act*, regarding the property known as Bowater Mercury Waste Disposal Site located in the Town of Dryden, Ontario; and

In the matter of teleconferences held on July 15, August 17, September 26 and September 28, 2011.

Before: Alan D. Levy, Member

Appearances:

Dennis Mahony and Tyson Dyck	-	Counsel for the Appellants, Abitibibowater Inc., AbiBow Canada Inc., Abitibi-Consolidated Company of Canada, Abitibi-Consolidated Inc., Bowater Canadian Forest Productions Inc., Pierre Rougeau, David J. Paterson, Allen Dea, Jacques P. Vachon, William G. Harvey and Alain Grandmont
Elizabeth Putnam	-	Counsel for the Appellant, OfficeMax Incorporated
Gabrielle Kramer	-	Counsel for the Appellant, Weyerhaeuser Company Limited
Brian Blumenthal and Justin Jacob	-	Counsel for the Director, Ministry of Environment

Dated this **18th** day of **November, 2011**.

Reasons for Decision

Background:

Three separate Director's Orders have been issued by Trina Rawn, a Director in the Ministry of Environment ("MOE"). Most of the orderees named in these Orders have appealed to the Tribunal pursuant to section 140(1) of the *Environmental Protection Act* ("*EPA*") and progress with these appeals is addressed in this Order of the Environmental Review Tribunal (the "Tribunal"). Many, but not all, of the Appellants are the subject of all three Director's Orders, and are represented by the same Counsel. They have requested that the early stages of the appeals be dealt with in a series of joint teleconferences prior to the Tribunal convening one or more Preliminary Hearings.

The first Director's Order ("DO-1"), No. 6248-8GRHU2, is dated May 13, 2011, and has been referred to by Counsel as the Mud Lake Order. It was the subject of a Tribunal Order issued by me on June 13, 2011. The Mud Lake Waste Disposal Site ("WDS") is located in the City of Kenora and constitutes a waste pile consisting primarily of wood bark from a now-closed pulp and paper production facility. This WDS was created in 1973 and continued in use until the mid-1980s.

The second Director's Order ("DO-2"), No. 8301-8HFPUQ, is dated August 16, 2011, and has been referred to by Counsel as the Margach Order. The Margach WDS, also located in the City of Kenora, is an 11-acre landfill which received non-hazardous waste material from the same facility as the Mud Lake WDS. This waste included wood room bark, primary clarifier sludge, biosolids from a secondary treatment facility, sludge from a recycle facility, general wood waste, ground scrapings, boiler ash and clinkers. This WDS was in use from 1986 until 2009, and contains a reported volume of 1,204,700 cubic metres of waste.

The third Director's Order ("DO-3"), No. 4345-8HFPHW, dated August 25, 2011, deals with the Bowater Mercury WDS and has been referred to by Counsel as the Dryden Order. This WDS is located in the Town of Dryden and was created in 1971 for the disposal of mercury contaminated waste from the demolition of a local mercury chloroalkali plant. The plant's owner, Reed Ltd., had produced chemicals (sodium hydroxide and chlorine) used for bleaching paper. The production process caused the plant's building and associated equipment to become contaminated with trace amounts of mercury. During the period from 1971 until 1981, eight concrete cells containing mercury-contaminated rubble, stabilized sludge and equipment, were buried at this WDS.

The Appellants are variously alleged by the Director's Orders to have some degree of current or historical responsibility, in one capacity or another (as former owners or operators, corporate

officers or directors, etc.) to address environmental issues which are considered by the MOE to be outstanding with respect to one or more of the three sites. For a variety of similar and different reasons the Appellants deny that they are responsible for dealing with current environmental issues at these sites, and seek to have the Tribunal revoke the Orders.

The Parties involved with DO-1 reached an agreement with respect to a stay of some provisions of that Order and amendments to others, as well as an adjournment to permit ongoing settlement discussions. These matters were discussed at an initial teleconference on June 3, 2011, with Counsel for those Parties, and later confirmed in my June 13, 2011 Order, along with an extension of time for providing information required by the Tribunal to convene a Preliminary Hearing.

In the teleconference of July 15, 2011, Justin Jacob, Counsel for the Director, discussed the request he made in correspondence dated June 28, 2011, to have the Tribunal's Order amended in some respects. The purpose of his request, which was supported by other Counsel, was to:

- clarify that factual information cited in the Order and drawn from DO-1 and the Appellants' notices of appeal, may be contested by any of the Parties in future as the appeal proceeding progresses;
- avoid the appearance that the information and position of each Party was necessarily adopted by other Parties; and
- confirm that Counsel had not agreed that the statutory bars to a stay, found in *EPA* section 143(3), apply to parts of DO-1 other than those dealing with financial assurance requirements.

I accepted the purpose of the request and the above points, but advised Counsel that for practical reasons I did not wish to amend and re-issue the Tribunal Order. Instead, I indicated that I would confirm these points in another order to be issued in due course. I trust that the above recitation accomplishes this objective.

During this teleconference Dennis Mahony, Counsel for a number of Appellants, requested an extension until July 29, 2011, of the deadline in Item 14 of DO-1 as amended by the June 13, 2011 Tribunal Order. Item 14, as amended, states:

> The Parties shall provide written confirmation to the District Manager by July 15, 2011 that the arrangements described in Item No.13 have been memorialized in a written agreement with the City of Kenora.

Item 13 deals with arranging to have the City continue to accept, treat, and dispose of leachate from the Mud Lake WDS. I granted this extension and advised Counsel that it would also be confirmed by order in due course.

In the teleconference of August 17, 2011, Counsel informed me about ongoing developments regarding DO-2 and DO-3. The next step would be for DO-2 to be served, and DO-3 to be issued and served. Appeals would then be filed with respect to these Orders, followed by a joint teleconference involving representatives of all Parties. Efforts would be made by Counsel before then to negotiate the terms of interim arrangements, as was done with DO-1.

Counsel also advised about the need for a significant delay in these proceedings due to an appeal pending in the Supreme Court of Canada ("SCC") from a decision of the Quebec Court of Appeal dated May 18, 2010. Among the respondents in that appeal are AbitibiBowater Inc., Abitibi-Consolidated Inc. and Bowater Canadian Holdings Inc.

A significant issue in the appeals of the Director's Orders is the effect of the insolvency of some of the corporate Appellants on the MOE's authority to include them as orderees. Although the SCC appeal involves unrelated sites and some other parties, Counsel expect that the outcome may well be determinative of the insolvency issue in these appeals before the Tribunal. Oral argument of the SCC appeal took place on November 16, 2011, but a decision might not be forthcoming for several months. Nevertheless, Counsel agreed that it would be prudent and practical to await the SCC's decision before proceeding much further with these appeals.

During this teleconference I also granted another extension of time for providing information required by the Tribunal to convene a Preliminary Hearing. This extension was until October 3, 2011.

The joint teleconference of September 26, 2011, involved the representatives of all Parties involved in the appeals from the three Director's Orders. It was Gabrielle Kramer's first appearance as Counsel for Weyerhaeuser Company Limited ("Weyerhaeuser"), one of the orderees in DO-3. At that time negotiations were ongoing with respect to interim arrangements involving DO-2 and DO-3. As an agreement of the Parties was likely imminent with respect to DO-3, another teleconference was scheduled for September 28, 2011, in order to allow time to finalize some remaining details. The next 'regular' joint teleconference was scheduled for October 31, 2011.

During the September 26, 2011 teleconference I extended until November 7, 2011, the deadline for providing information required by the Tribunal to convene a Preliminary Hearing for the appeals from the three Director's Orders.

In the teleconference of September 28, 2011, the last of the series of meetings addressed by this Tribunal Order, Counsel discussed the terms of an interim agreement involving DO-3, the

Dryden Order, and I approved same. The text of this agreement was finalized by the Parties, and a revised Draft Interim Order was filed with the Tribunal later that day. It is reproduced at Appendix A.

Relevant Legislation:

Environmental Protection Act

132(1) The Director may include in an approval or order in respect of a works a requirement that the person to whom the approval issued or the order is directed provide financial assurance to the Crown in right of Ontario for any one or more of,

(a) the performance of any action specified in the approval or order; …

(c) measures appropriate to prevent adverse effects upon and following the cessation or closing of the works.

143(1) The commencement of a proceeding before the Tribunal under this Part does not stay the operation of a decision or order made under this Act…

(2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a decision or order, other than,

(a) an order to monitor, record and report; or

(b) an order issued under section 168.8, 168.14 or 168.20.

(3) The Tribunal shall not stay the operation of a decision or order if doing so would result in,

(a) danger to the health or safety of any person;

(b) impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it; or

(c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Issue:

The issue for determination is whether the Tribunal should approve the terms of the Draft Interim Order at Appendix A, prepared by the Parties with respect to the Bowater Mercury WDS and the Dryden Order (DO-3). It includes a stay of some of the provisions of this Director's Order.

Discussion and Analysis:

The Dryden site (the "Site") has been owned by many companies over the years. The current owner is 4513541 Canada Inc. ("451 Inc.") which acquired the property in 2010. 451 Inc. was at that time and remains insolvent. It is in receivership and has no directors or officers.

Several companies have held (i.e., been named in) the Provisional Certificate of Approval ("CofA"), No. A7145502, issued by the MOE for the WDS. Since July 2002, the CofA has been held by Bowater Canadian Forest Products Inc. ("Bowater"), one of the Appellants. According to DO-3, AbitibiBowater Inc. ("ABI"), another Appellant, has exercised management and/or control over the Site.

DO-3 describes the Site as an open, grassy field on a small hill, surrounded by a fence. Although surface water drainage has been managed with the installation of rock (rip-rap), new erosion gullies along the eastern edge of the property were discovered last year, and the security fencing was sagging in one area. In addition, mercury concentrations have been detected in shallow ground water (less than 4 m in depth) by two of the monitoring wells (MW3 and MW4). Mercury and chloride concentrations recorded by on-site monitoring wells exceed the MOE's Reasonable Use Guideline.

A ground water assessment report prepared on behalf of ABI in September 2010 concluded that there is a risk of chloride impacts from the WDS to ground water off-site. Monitoring wells have recorded increasing chloride concentrations, indicating that a contaminant plume is advancing. It is currently located to the east/southeast of the Site in or near a marshy area, in the vicinity of the "Domtar industrial sewage treatment lagoon."

A report prepared by True Grit Consulting Ltd. in January 2011 for 451 Inc. estimated the contaminating life span of the WDS to be 64 years, with 35 years still remaining. The MOE does not currently hold any monetary security or Financial Assurance ("FA") to cover the cost of ongoing work specified in the CofA, including monitoring and maintenance of the Site. The report estimated the present value of the cost of such work to be $273,063.

The Director cited an excerpt from material filed by ABI in July 2010 with respect to proceedings pursuant to the federal *Companies' Creditors Arrangement Act ("CCAA")* in the Quebec Superior Court. This material stated as follows (from section 1.38 of DO-3):

> With respect to the Dryden Mercury Property, the Environmental Exposure that could be incurred is estimated to be $250,000 per year for ongoing monitoring and maintenance. The site includes a former mercury landfill in which the mercury has been stabilized in a concrete mixture. The landfill is encapsulated and closed. There is a risk of impact to groundwater if the encapsulation was to somehow fail. The Dryden Mercury Property is assessed at $31,000.

On the other hand, the Director referred to very different information provided to the MOE on behalf of ABI in August 2010 (at section 1.39 of DO-3):

> The encapsulation and closure of Dryden landfill undertaken in 1980 … has been effective in containing substances including mercury and chloride, as demonstrated by ongoing monitoring activities. The Ministry has conducted inspections of the landfill, received monitoring results and provided comments regarding such monitoring (which have been addressed by Bowater). Costs for monitoring and maintenance has been estimated by Bowater at $250,000 for a period of 20 years which includes annual monitoring costs of approx. $10,000 as well as $50,000 with respect to activities such as ditch cleaning, vegetative cover repair and monitoring well replacement as needed. Bowater is of the view that this is a reasonable estimate of time and costs related to future management of the Dryden landfill.
>
> There is currently no anticipated risk of failure of the encapsulation and such potential risk is viewed as highly unlikely. In the unlikely event that mercury or chloride be released from the landfill at levels that would require further action, it is anticipated that mitigation measures could be implemented (such as increasing vegetation to the site) without having to repair the encapsulation. Such mitigation measures are expected to be achieved at reasonable costs (e.g. within the estimated maintenance costs or <$100,000 additional funds).

The Receiver for the insolvent owner of the Site, 451 Inc., was granted permission by an order of the Quebec Superior Court to abandon the landfill, effective on April 30, 2011. DO-3 states that this Site "is now an abandoned property that is owned by a company that is insolvent and that has no directors, officers, or employees" (section 1.44, page 11). In the Director's opinion, her Order is needed in order to prevent or reduce the risk that mercury and other contaminants will be discharged from the WDS and cause adverse effects.

The Notice of Appeal filed by Mr. Mahony claims that, for a variety of reasons, none of his clients should be included as orderees to the Director's Order. It maintains that there is no material threat to the environment as surface drainage at the Site is being controlled effectively, and that ground water contamination is being attenuated in the contamination attenuation zone. Further, the MOE's Reasonable Use Criteria are not being exceeded at the agreed-upon 'trigger' monitoring wells. Accordingly, the appeal asserts that it is premature for the Director to require that FA be provided.

As a result of insolvency and restructuring, the appeal claims that some of the corporate Appellants Mr. Mahony represents have been released of any legal obligation they might otherwise have had to maintain the Site and respond to DO-3. ABI should not be held liable for any of Bowater's environmental obligations. The individual orderees have also been released

as part of the *CCAA* proceedings. The appeal asserts that, in addition, they should not be held liable merely because they were corporate directors during the relevant period of time. The appeal claims that Mr. Mahony's clients were not in "management and control" of the landfill, as defined in the *EPA*. Overall, they claim that the Director's attempt to impose liability on them "is unfair, oppressive and unlawful, and an abuse of power."

The Notice of Appeal by Weyerhaeuser claims that it should not have been named in DO-3. It has never had management or control of the Site, or a legal or beneficial interest in it. Although it acquired some assets from Bowater Pulp and Paper Canada Inc. ("BPPCI") in 1998, the WDS was not included. BPPCI was named in the CofA commencing in 2000. A severance was required for the Site, and during the 20-month period while consent was pending from the Minister of Municipal Affairs, title to the property was taken by Weyerhaeuser. However, the Site was leased to BPPCI and it retained all ownership obligations, such as carrying insurance. BPPCI agreed to fully indemnify Weyerhaeuser for any claims relating to environmental contamination.

Weyerhaeuser also relies on an indemnity agreement dated December 16, 1985, between the Province of Ontario and prior owners of properties including the WDS. Weyerhaeuser claims that this indemnity protects it from any claims and costs resulting from the presence, discharge or escape of any pollutant, including mercury, from the Site.

For the most part, the interim changes to DO-3 proposed by the Parties fall into two categories:

- the requirement to provide FA of $273,063 in item 12 of the Order to be stayed pending the outcome or final resolution of the appeals; and
- the deadlines for implementing the requirements in items 3 through 11 to be delayed somewhat.

Sections 3 and 4 of the Draft Interim Order are intended to provide the Parties with additional time in order to focus on settlement negotiations without the distraction of scheduling and preparing for a Preliminary Hearing. Section 5 provides a mechanism for any Party to apply to the Tribunal on 15 days' notice in order to revoke or amend the terms of the Draft Interim Order. Section 6 provides that the Parties' agreement to comply with the terms of the Draft Interim Order is without prejudice to any position they might take in future in the appeal.

If approved by the Tribunal, the Parties agreed that the terms of the Draft Interim Order will become effective immediately.

Findings:

The above summary of factual details and issues is based on information contained in DO-3 and the Parties' Notices of Appeal. It is the basis for, among other things, my determination of

the request for a stay. However, this summary does not constitute findings of fact or a determination of the Parties' positions, and does not bind any of them as the appeal process progresses further.

It is understandable that the Parties and Counsel need additional time to fully canvass matters, await the outcome of the SCC appeal, and attempt to negotiate a final settlement addressing all concerns. I am satisfied that the Draft Interim Order at Appendix A represents an appropriate step forward in this process.

During the teleconference, which was convened pursuant to Rule 108 of the Tribunal's Rules of Practice, the Director and all Counsel agreed that none of the statutory bars to a stay, identified in *EPA* section 143(3), apply in the circumstances of this case. In any event, I am satisfied that the Director's concerns about the continuation of proper management of the WDS are addressed by the commitments made by the Appellants in the Draft Interim Order.

On this basis, and mindful of the requirements of Rule 110, I informed the Parties during the teleconference that I approve the terms of the Draft Interim Order, and I hereby confirm that determination.

Order

1. The Tribunal hereby approves the terms set out in the Draft Interim Order submitted by the Parties and attached as Appendix A.
2. In accordance with section 2 of the Draft Interim Order, work items 1 through 11, 13 and 14 in Director's Order No.4345-8HFPHW, issued on August 8, 2011, are hereby amended on an interim basis pending the outcome or final resolution of these Appeals, or until such other time as determined pursuant to section 5 of the Draft Interim Order.
3. In accordance with section 1 of the Draft Interim Order, work item 12 of the Director's Order regarding financial assurance is hereby stayed, subject to section 5 of the Draft Interim Order, pending the outcome or final resolution of these Appeals.
4. The deadline for all Appellants involved in appeals from the three Director's Orders to provide information requested by the Tribunal in relation to the convening of Preliminary Hearings is hereby extended until November 7, 2011, or thereafter as might be ordered from time to time.

5. In accordance with section 3 of the Draft Interim Order, these proceedings are adjourned to a teleconference with the Parties on Monday, October 31, 2011, commencing at 2:00 p.m., and thereafter as might be ordered from time to time.

Stay Granted on Consent
Interim Agreement Approved
Teleconference Scheduled

Alan D. Levy, Member

Appendix A - Draft Interim Order

Appendix A

Draft Interim Order

Draft: September 28, 2011

[Dryden Order – Draft Interim Arrangements Order]

ERT File Nos. 11-155 to 11-163 and 11-175

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF an Appeal by AbiBow Canada Inc., AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Forest Products Inc., Pierre Rougeau, David J. Paterson, Jacques P. Vachon, William G. Harvey, and Alain Grandmont filed September 9, 2011 with the Environmental Review Tribunal pursuant to Section 140 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended (the "*EPA*") with respect to Order No. 4345-8HFPHW issued by the Director, Ministry of the Environment, under sections 18, 44, 132, and 196 of the EPA (the "Director's Order") concerning the property known as the Dryden Waste Disposal Site located in Dryden, Ontario (the "WDS");

and

IN THE MATTER OF an Appeal by Weyerhaeuser Company Limited filed September 16, 2011 with the Environmental Review Tribunal pursuant to Section 140 of the *EPA* with respect to Director's Order No. 4345-8HFPHW issued by the Director, Ministry of the Environment, under sections 18, 44, 132, and 196 of the EPA concerning the property known as the Dryden Waste Disposal Site located in Dryden, Ontario

INTERIM ORDER

1. On consent of the parties to this Appeal, work item 12 identified in the Director's Order is stayed pending the outcome or final resolution of this Appeal;

2. On consent of the parties to this Appeal, work items 1 through 11 and items 13 to 14 in the Director's Order are, as set out below, amended on an interim basis pending the outcome or the final resolution of this Appeal;

Draft: September 28, 2011

[Dryden Order – Draft Interim Arrangements Order]

Item No. 1 Access

451 shall ensure that the Parties, including their employees, contractors, and representatives, are permitted access to the WDS for the purposes of complying with this Order until otherwise notified by the undersigned Director.

Item No. 2 Disclosure

Before dealing in any way with the WDS, 451 shall give a copy of this order to every person who will acquire an interest in the WDS as a result of the dealing.

Item No. 3 Qualified Consultant

By no later than September 29, 2011, the Parties shall submit to the undersigned Director, written confirmation of having retained a Qualified Consultant to prepare and complete all work specified in items 4, 5, 6, 7, 8, 9, 10 and 11 of this Order. The written confirmation shall include the name and professional contact information for the retained Qualified Consultant.

Item No. 4 Erosion and Fence Monitoring

By no later than October 16, 2011 the Parties shall assess whether the southeast slope of the WDS is eroding and whether the fence surrounding the WDS is sagging or otherwise compromised.

Item No. 5 Report

The Parties shall report, in writing, the results of the inspection required by Item No. 4 of this Order, including the particulars of any malfunctions, deficiencies or corrective action to be taken, to the Director by no later than October 23, 2011.

Item No. 6 Groundwater Monitoring — All Wells

The Parties shall initiate by October 16, 2011 and continue for the duration of this Order the following groundwater monitoring program:

1) Monitoring wells one to ten shall be sampled once during the spring freshet (May or June) and once in the autumn (September or October).
2) Sampling shall include measurement of field parameters: pH, temperature, conductivity and water level.
3) Samples shall be analyzed for pH, conductivity, mercury and chloride.

Draft: September 28, 2011

[Dryden Order – Draft Interim Arrangements Order]

Item No. 7 Report

The Parties shall report, in writing, the results of the sampling required by Item No. 6 to the Director no later than thirty (30) days from the date of sampling.

Item No. 8 Surface Water Monitoring

The Parties shall initiate by October 16, 2011, and continue for the duration of this Order, the following surface water monitoring program:

1) Surface water sample sites SW1 and SW2 shall be sampled during the spring freshet (May or June) and in the autumn (September or October).
2) Sampling shall include measurement of field parameters: pH, temperature, conductivity and water level.
3) Samples shall be analyzed for pH, conductivity, mercury and chloride.

Item No. 9 Report

The Parties shall report, in writing, the results of the sampling required by Item No. 8 to the Director no later than thirty (30) days from the date of sampling.

Item No. 10 Site Condition and Water Quality Assessment Report

By December 31, 2011, and every two years thereafter, the Parties shall submit to the Director a site condition and water quality assessment report which shall, at a minimum, include the following information:

1) An assessment of trigger values and any off-site contaminant migration from the WDS;
2) A site plan illustrating any WDS features significant to the assessment of the WDS impact;
3) A location map illustrating the WDS relative to nearby sensitive receivers;
4) A map illustrating water table contours and surface water flow paths, stratigraphic cross-sections;
5) Tables containing all historical water chemistry and water level data;
6) Graphs illustrating historical water quality trends for chloride, conductivity and mercury;
7) An assessment to evaluate compliance with the applicable Reasonable Use Guideline;
8) Recommendations for future monitoring;
9) Field sampling protocols and the QA/QC measures used; and

Draft: September 28, 2011

[Dryden Order – Draft Interim Arrangements Order]

10) A statement regarding the condition of the WDS and a summary of required repairs.

Item No. 11 Repairs

The Parties shall correct any malfunctions or deficiencies described in Item No. 4 within thirty (30) days of the identification of the malfunction or deficiency, as the case may be. In the event any malfunction or deficiency cannot reasonably be corrected within thirty (30) days, the Director will, in cooperation with the Parties, devise an alternative timeline and or measures that will continue to protect the environment.

Item No. 12 Financial Assurance

[Intentionally omitted]

Item No. 13 Reasonable Care

The Parties shall take all reasonable measures to ensure that their employees, contractors, agents and representatives comply with all applicable law in carrying out the measures required by this Interim Order.

Item No. 14 Other

All times described in this Order are Central Standard Time. Failure to comply with a term of this Order by the date or time specified does not absolve the Parties from compliance with that requirement.

3. On consent of the parties, this Appeal is adjourned to October 31, 2011 so that the undersigned may focus on settlement discussions;

4. Without consent of the parties to this Appeal, unless the circumstances described in section 143(3)(a)(b) & (c) of the *Environmental Protection Act* exist, no motion or other proceeding in respect of this matter shall be brought before the ERT during the period of adjournment as prescribed in paragraph 3;

5. Any party to this Appeal may apply for leave of the ERT to revoke or amend this Interim Order on fifteen (15) days' notice to the other parties.

6. The parties consent to the terms of this Interim Order and compliance with the terms of this Interim Order shall be without prejudice to any position the parties may take with respect to all or any part of the Director's Order.