**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *3076525 Nova Scotia Ltd. v. Nova Scotia (Environment)*, 2015 NSSC 137

**Date:** 20150506
**Docket:** Halifax No. 340840
**Registry:** Halifax

**Between:**

3076525 Nova Scotia Limited

Appellant

- and -

Minister of the Environment Representing Her Majesty The Queen in Right of the Province of Nova Scotia

Respondent

- and -

Melissa King, Jonathan Andrews, and Marlene Brown

Intervenors

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|---|---|
| **Judge:** | The Honourable Justice Joshua M. Arnold |
| **Heard:** | October 6, 2014, in Halifax, Nova Scotia |
| **Final Written Submissions:** | November 21, 2014 |
| **Counsel:** | Robert G. Grant, Q.C. and Nathan Sutherland, for the appellant<br>Sheldon A. Choo, for the respondent<br>Kaitlyn Mitchell and Donna Franey, for the intervenors |

**By the Court:**

## Introduction

[1] The appellant, 3076525 Nova Scotia Limited, has appealed an Order issued by the Minister of the Environment (the "Minister"). The Ministerial Order requires the appellant to undertake a number of remedial activities in relation to pollution created by recycling operations at a property located in Harrietsfield, Nova Scotia.

[2] Part of the remediation includes preparing and implementing a plan to clean up a containment cell filled with 120,000 tons of unrecyclable material located on the property. The evidence on appeal estimates a cost in excess of $10 million to deal with the containment cell cleanup. The creation and use of the containment cell predates the appellant's involvement at the property.

[3] For reasons set out below, the standard of review in this application is a deferential standard of reasonableness. Nevertheless, I conclude that the Minister acted unreasonably in issuing one clause within the Ministerial Order. The Minister failed to consider certain facts, thereby reaching a result outside of the range of possible and acceptable outcomes, in relation to that single aspect of the Order. Therefore, I would grant the appeal in part, quash one clause within the Minister's Order, and remit the matter back to the Minister for reconsideration on that clause.

## Background

[4] This appeal relates to a Ministerial Order issued in relation to an environmental problem emanating from 1275 Old Sambro Road ("the Property"). Prior to 1997 the Property had been used as an automotive salvage yard. From 1997 to November 2005, RDM Recycling Limited ("RDM"), owned and operated a construction and demolition ("C&D") recycling facility on the Property.

[5] In November 2005, the appellant purchased the assets of RDM, with the exception of the Property, which the appellant leased from RDM. At the closing of the asset purchase, RDM changed its name to 3012334 Nova Scotia Limited (appellant), and the appellant assumed the business name "RDM Recycling".

[6] Beginning in the spring of 2000, RDM sought the necessary approvals to operate a C&D disposal facility on the Property; it first applied to the Nova Scotia Department of Environment and Labour. The Nova Scotia Department of Environment and Labour eventually became the Nova Scotia Department of the Environment ("NSDE"), sometimes also called "Nova Scotia Environment". RDM later applied to Halifax Regional Municipality ("HRM"), in November 2002, for a license to dispose of C&D waste on the Property. In order to operate a disposal facility on the Property, RDM required both an HRM C&D license and approval from NSDE.

[7] At the time of the application there were no licensed C&D disposal facilities within HRM, and as a result non-recycling C&D material was being stockpiled on the Property. RDM had stockpiles of C&D waste that, by mid-2003, had been sitting on the site uncovered and exposed to the elements for several years.

[8] The RDM stockpiles included gyproc, textile carpeting and non-C&D waste, such as old tires and household appliances. RDM had also placed C&D material in a settling pond on the Property without the required approval for disposal from NSDE, but in anticipation of obtaining same.

[9] HRM issued a C&D disposal license to RDM in March 2003. However, RDM continued to be unable to dispose of C&D material without the necessary approval from NSDE.

[10] In the course of pursuing its application to NSDE for approval to dispose of C&D waste, RDM undertook surface water and groundwater monitoring both on and near the Property, beginning in or about October 2001. The first off-site domestic water quality samples and surface water samples were collected and tested in June 2001.

[11] NSDE hydrogeologist John Drage noted in his July 25, 2002 review of the groundwater monitoring results submitted by RDM that various on-site monitoring wells exceeded drinking water guidelines for turbidity, colour, pH, iron, manganese and uranium. Mr. Drage noted that these exceedances were likely associated with natural conditions.

[12] The water monitoring disclosed off-site impacts to both Shea Lake (adjacent to the Property), and residential wells adjacent to the Property. NSDE was of the opinion in July 2003 that leachate emanating from stockpiled material on the

Property was moving off-site and that monitoring results from Shea Lake "might well be the result of influences from stockpile leachate".

[13] In addition to performing groundwater monitoring, RDM engaged environmental consultants EarthTech Engineering Limited to perform a hydrogeological assessment of the property and the immediate area. NSDE hydrogeologists noted in their assessments of the Property and the monitoring results that:

1. The bedrock in the area is fractured;
2. The nature of the bedrock indicates a groundwater flow in a northwest-southeast direction (towards residential properties located to the southeast of the Property), as well as a southerly direction (towards Shea Lake);
3. The closest residential property on Old Sambro Road is within 60 metres of the proposed disposal area, and, along with other residences, is downgradient of the proposed disposal area;
4. If leachate from the disposal area were to break through the overburden it could reach residential wells in as little as one year;
5. The disposal facility proposed by RDM in its application to NSDE may pose a risk to some private wells on Old Sambro Road.

[14] In July 2003, RDM, through its consultant MGI Limited, performed further groundwater monitoring at the request of NSDE, which included on-site monitoring wells and sampling of off-site residential wells. The results of this monitoring indicated elevated levels of boron, sulphate, conductance and hardness.

[15] NSDE refused RDM's application for an approval to dispose of C&D waste on the Property due to concerns related to groundwater and surface water impacts. An undated NSDE "overview report", states:

> …the site and the surrounding community have groundwater and surface water impacts caused by the RDM site. NSDEL staff view these impacts, and RDM's current plan to operate the site [which plan included a disposal operation], as creating unacceptable site specific risks that are currently too high to the environment potentially creating irreversible damage to the environment.

[16] RDM's environmental consultants concluded that the on-site and off-site impacts were directly related to RDM's practice of stockpiling unrecyclable C&D

material on the Property. A Remedial Action Plan dated October 29, 2003, submitted by Terrain Group Inc., RDM's environmental consultants, states as follows:

> Recent surface water testing done by MGI at the RDM site indicates that gyproc, roofing and carpet are the main sources of boron on the site. …
>
> . . .
>
> Results of that testing [water quality sampling of residential wells] suggested that groundwater and surface water was being impacted by run-off through the site stockpiles of C&D debris. Chemical levels down gradient of the C&D material exhibited higher concentrations of indicator chemical parameters; more specifically these indicators included boron, sulphate, conductance and hardness.

[17] As of 2003, RDM had stockpiles of C&D debris on the Property for a number of years. Monitoring results indicated that stockpiles of gyproc and textile carpeting in particular were located "immediately upgradient from the nested monitoring wells, MW-2, and from the domestic wells exhibiting elevated concentrations of sulphate and boron".

[18] By 2003, RDM had already disposed of some C&D waste in anticipation of receiving an approval from NSDE (which was never granted) and had been investigated by NSDE for these unauthorized disposal practices. One undated NSDE internal memorandum notes that:

> RDM has placed grounded [sic] up C&D material in a settling pond on site in anticipation receiving [sic] an approval to dispose of C&D material on their site. This material has caused and is currently causing impacts.

[19] In 2003, NSDE requested that RDM submit a Remedial Action Plan. RDM submitted a Remedial Action Plan in November 2003 that proposed, among other things, the onetime disposal of stockpiled material on the Property in an engineered containment cell.

[20] NSDE approved the Remedial Action Plan by letter dated November 27, 2003, and agreed to permit the onetime disposal of accumulated materials on the Property in a containment cell, in spite of earlier stated concerns regarding same.

[21] The containment cell was constructed between October 2003 and September 2004. Stockpiled material was moved into the cell in late September and early

October 2004. The cell was capped in October 2004. It is estimated that 120,000 tonnes of material were disposed of in the containment cell.

[22] NSDE's November 27, 2003, letter approving the RDM Remedial Action Plan required the cell liner, cell wall and cap to be tested and approved by a geotechnical engineer.

> The department has reviewed your November 19 and November 26, 2003 submissions regarding the initial remedial work at the RDM site in Harrietsfield. The department recognizes the benefits for containment of the existing C&D material to minimize exposure to surface and groundwater. This letter will serve as authorization to proceed with the initial remedial work involving surface water diversion, leachate collection system, liner construction, and containment cell wall construction. It is understood that the leachate collection outlet would be plugged until the treatment strategy is finalized.
>
> A suitable treatment strategy for the collected leachate and the capping design must be submitted to the department by December 19, 2003 for review and approval.
>
> The initial remedial work must be conducted in compliance with the requirements specified in the NSDEL letter dated November 13, 2003 regarding liner requirements. As stated, the liner and capping work must be certified by a geotechnical engineer. This certification shall be submitted within three weeks of the initial remedial project completion.

[23] The early stages of the containment cell construction were inspected by a professional engineer (though, according to the appeal record, not a geotechnical engineer) with Maritime Testing (1985) Limited. The containment cell was also inspected by NSDE on October 14, 2004 and December 15, 2004, again not by a geotechnical engineer. According to the Field Inspection Reports:

> Date: Oct 14/2004 Time: 10 a.m. 12 p.m. File Number:Name: RDM
>
> Recycling Ltd. Location: HarrietsfieldAddress: 1275
>
> Old Sambro Rd Activity: Recycling Facility
>
> Reason for inspection/observations/directions
>
> Inspected the site with Frank MacNeil, Matthew Brufatto, and Roy Brown of RDM. The reason for the inspection was to inspect the capping of the Cell and inspect the location of the new monitoring wells. Roy Brown indicated that the

capping operation would be completed in approximately 4-5 days under good dry weather conditions. No odor was noted coming from the site.

Inspector: Stuart Dockerty Date: Oct 17/04

. . .

Date: Dec 15/04 Time: 1 p.m. File Number:

Name: Roy Brown RDM Location: Harrietsfield

Address: 1275 Old Sambro Rd Activity: Recycling

Reason for inspection/observations/directions

Myself & Frank MacNeil met on site with Roy Brown for a site inspection. Mr. Brown indicated that they are currently hauling some C & D material to a C & D Disposal site in Colchester County near Stewiacke. Roy indicated that he inspects the leachate holding tank daily and to date there is insufficient amounts to pump. The sediment ponds appear to contain clear water. Asphalt shingles were being dumped at the rear of the site. The Cap on the Cell appear to be in good condition.

Inspector: Stuart Dockerty Date: Dec 15/04

[24] Quarterly monitoring activities, consistent with the requirements of the Remedial Action Plan, continued throughout the remainder of 2004 and 2005. Monitoring results up to and including September 2005 indicated there had been no appreciable decline in contaminants detected in Shea Lake and off-site monitoring.

[25] As noted, in November 2005, the appellant purchased the assets of RDM, with the exception of the Property, which the appellant leased from RDM. At the closing of the asset purchase, RDM changed its name to 3012334 Nova Scotia Limited (appellant), and the appellant assumed the business name "RDM Recycling".

[26] Prior to purchasing the assets of RDM and entering into a lease of the Property, representatives of the appellant met with representatives of NSDE, who advised the appellant of concerns regarding certain off-site impacts related to the operations of RDM, in particular elevated levels of boron in groundwater. NSDE

did not advise the appellant of concerns related to elevated levels of uranium in groundwater.

[27] Upon commencing its C&D operation, the appellant removed approximately 6,000 tonnes of material that RDM had permitted to accumulate on-site following the disposal of previously stockpiled material in the containment cell.

[28] The appellant did not dispose of C&D material on the Property and conducted its sorting and processing operations on an asphalt pad that it installed prior to commencing its operations. The appellant stored waste on-site for approximately thirty days at a time as opposed to years at a time. The appellant continued to monitor the domestic and local wells on a quarterly basis.

[29] In late 2008, the appellant contacted NSDE requesting a reduction in frequency of water sampling done at the site located at 1275 Old Sambro Road. NSDE assigned a hydrogeologist to review the available data from 2001 onward. In addition, local residents who had sampling of their wells done by RDM over several years requested a meeting with NSDE. An investigation was undertaken to respond to the appellant's request as well as the concerns of the local residents. Some of the local residents who participated in those meetings are intervenors in this action.

[30] Preliminary reports arranged by NSDE indicated that a reduction in groundwater monitoring was not recommended until the site impacts were adequately addressed. Testing was conducted in the winter and spring of 2010 and the results of that investigation were sent to the appellant on June 24, 2010. The primary conclusions of NSDE were:

> 1) All seven domestic wells located downgradient of the site are considered "very likely" or "likely" influenced by a groundwater plume sourced from the site. This means that the water in the wells has probably been influenced by water which has passed through the materials and soils on the site, and has changed in chemistry in the wells as a result.
>
> 2) Three of these domestic wells will require some form of mitigation or management action to be taken, as well as continued monitoring, because there are upward trends present in certain parameters of the water which may pose a health risk. It appears that the trends in these three wells have arisen due to impacts from a groundwater plume sourced from the site.
>
> 3) Four of the domestic wells will require continued monitoring, but not immediate management action. While there are trends present in the

> groundwater chemistry that show an impact from the groundwater plume source from the site, there are not health concerns arising from these trends at this time.
>
> 4) There are upward trends in various parameters in monitoring wells located on the site. The site owner and operator will also need to take steps to understand better the extent of the impacts from the groundwater plume on the site.

[31] As a result, NSDE did not approve the reduction in monitoring by the appellant. NSDE also indicated that a Directive would follow shortly. In February 2010, NSDE conducted a further analysis of water monitoring results provided by the appellant from 2003-2009. The analysis indicated impacts to groundwater quality in both on-site and off-site monitoring wells. A memorandum by Melanie Haggart, Regional Hydrogeologist with NSDE, concluded:

> It appears there is growing plume of impacted groundwater both on site and leaving the site towards the south. The plume is carrying boron at concentrations which in some wells exceed drinking water health guidelines…
>
> Most significantly, it appears that through complex chemical and possibly microbial changes caused by the plume, uranium is being mobilized into groundwater. The uranium is mostly likely naturally present in sold form in bedrock, but is being dissolved due to the changes in groundwater chemistry (eg. increased alkalinity) caused by the leachate plume from the C and D disposal and handling site…

[32] On June 24, 2010, NSDE issued a letter to Brian Dubblestyne, a director of the appellant, advising as follows:

> …A Directive from NS Environment will be issued shortly to address the concerns of the Department. The Directive will include, but not be limited to the following: first, NS Environment will require the site owner and operator of a need for mitigation actions of certain properties and continued monitoring at others, with a contingency plan if conditions change at domestic wells or monitoring wells; second a site professional will be required to delineate the groundwater plume and third a revised Remedial Action Plan will be required for the site.

[33] According to the appellant, monitoring results from 2002-2009 indicates that levels of uranium had been increasing steadily since the earliest test events (i.e. 2002 for the earliest established monitoring wells, and June 2003 for residential wells).

[34] On July 13, 2010, NSDE staff including Andrew Teal, Melanie Haggart, and Norma Bennett met with RDM representatives Roy Brown and Brian Dubblestyne on behalf of the appellant, as well as Jim Fraser of H20 GEO Environmental Services Inc., a consultant hired by the appellant. Mr. Fraser indicated that he would be drafting a rebuttal letter to NSDE and voiced concerns regarding the methodology of NSDE's findings.

[35] NSDE staff met with the local residents on July 15, 2010 to inform them of their findings about the well water.

[36] NSDE staff again met with the appellant's representatives and consultant Jim Fraser on September 17, 2010. Jim Fraser reiterated his concerns and advised that a formal response to the July 15, 2010, letter would be provided on the appellant's behalf in a few weeks. On October 1, 2010, a response prepared by Mr. Fraser was received by NSDE. The response stated that on the totality of the information, based on both geological and hydrogeological considerations, it is questionable whether the C&D disposal site created the groundwater plume which is either likely or "very likely" adversely impacting neighbouring domestic monitoring wells. The response suggested that the observed impacts to the domestic wells are the result of road salt, surface water contamination, well construction and/or naturally occurring uranium contamination.

[37] NSDE responded to the appellant's submissions via correspondence on October 29, 2010. In summary, NSDE criticized the methodology of H2O GEO's submissions and stated that Jim Fraser's report did not provide a plausible alternative explanation for the observations of the progressive, downgradient only changes in the groundwater. The NSDE response noted a pattern of substantial adverse increases over the time period of the monitoring, and that the observations of the appellant's report focused more on average concentrations and did not focus enough on the trends over time (the cumulative issues).

[38] On November 5, 2010, the Minister issued an Order against a number of individuals and companies, including the previous and current operators of the site, stating:

**IN THE MATTER OF** Chapter 1 of the Statutes of Nova Scotia 1994-95, the *Environment Act*

- and -

**IN THE MATTER OF** an Order issued pursuant to the provision of the said Act to 3012334 Nova Scotia Limited (formerly RDM Recycling Limited), a body corporate, located at or near Harrietsfield, in the Halifax Regional Municipality, Province of Nova Scotia and Roy Brown of Halifax, in the Halifax Regional Municipality, Province of Nova Scotia and Michael Lawrence of Herring Cove, in the Halifax Regional Municipality, Province of Nova Scotia and Ernest A. Nicholson Limited, a body corporate, located at or near Harriestsfield, in the Halifax Regional Municipality, Province of Nova Scotia and 3076525 Nova Scotia Limited, a body corporate, located at or near Halifax, in the Halifax Regional Municipality, Province of Nova Scotia.

## MINISTERIAL ORDER

I. **WHEREAS** 3012334 Nova Scotia Limited, Roy Brown, Michael Lawrence, Ernest A. Nicholson Limited and 3076525 Nova Scotia Limited own, occupy, operator or are responsible for the operation of a plant, structure, facility, undertaking or thing, to wit: a construction and demolition recycling facility which is located at or near 1275 old Sambro Road, Harrietsfield in the Halifax Regional Municipality, Province of Nova Scotia, hereafter called the "Site";

II. **AND WHEREAS** the Minister of Environment believes on reasonable and probable grounds that the persons named in this Ministerial Order have contravened the *Environment Act*;

*Environment Act*

67 (2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause an adverse effect, unless authorized by an approval or the regulations.

III. **AND WHEREAS** the Minister is of the opinion that it is in the public interest to do all things and take all steps necessary to comply with the *Environment Act* or to repair any injury or damage, or to control, eliminate or manage an adverse effect;

**IT IS HEREBY ORDERED**:

That pursuant to subsection 125(1) of the *Environment Act*, the persons named in this Ministerial Order shall, at their own cost, comply with the terms and conditions, including compliance times, set forth in Schedule "A" attached to and forming part of this Ministerial Order.

**AND TAKE NOTICE** if the persons to whom the Ministerial Order is directed fail to comply with the Ministerial Order, or any part thereof, the Minister, pursuant to Section 132(2) of the *Environment Act*, may take whatever action the Minister considers necessary to carry out the terms of the Order and may recover any reasonable costs, expenses and charges incurred by the Minister pursuant to Section 132 of the *Environment Act*.

**AND FURTHER TAKE NOTICE** that the appeal provisions respecting the issuance of a Ministerial Order are more fully outlined in Section 128 of the *Environment Act*, including a 30 day time period from the date of the issuance of the Ministerial Order to file an appeal.

**ISSUED** at Halifax, in the Halifax Regional Municipality, Province of Nova Scotia, this 5th day of November, 2010.

Sterling Belliveau
The Honourable Sterling Belliveau
Minister of Environment

**SCHEDULE "A"**
**Ministerial Order 09-10**
**TERMS AND CONDITIONS**

**1. Site Assessment / Plume Delineation**

a) Engage the services of a qualified Site Professional (pursuant to the Nova Scotia Environment "Guidelines for the Management of Containment Sites"), by December 15th, 2010 and notify Nova Scotia Environment of the name and contact information of the Site Professional.

b) Under the supervision of the Site Professional, conduct a phased site assessment, starting with a Phase II assessment which shall include, but not be limited to, delineation in three dimensions of a groundwater plume containing dissolved uranium, boron, calcium, sulphate, and elevated alkalinity and total organic carbon, and any other contaminants of concern identified in the course of site

assessment or routine well monitoring; and evaluation of calcium, water soluble sulphates, alkalinity, organic carbon, heavy metals and any other contaminants of concern in site soils identified in the course of site assessment.

**2. Mitigation of Impacts to Domestic Wells**

Submit by January 15th, 2011 to Nova Scotia Environment for approval a mitigation plan, with implementation schedule, for the mitigation of the impacts of uranium in the domestic wells at 1321 and 1311 Old Sambro Road, and for the mitigation of the impacts of lead in the domestic well at 1300 Old Sambro Road.

**3. Site Assessment Submission**

Submit a report, prepared by or under the supervision of the Site Professional, on the results of the Phase II assessment to Nova Scotia Environment by February 28th, 2011.

**4. Groundwater monitoring Program**

a) Submit a Groundwater Monitoring Program to Nova Scotia Environment for review and approval by February 28th, 2011.

b) Implement immediately the following groundwater monitoring program as a minimum standard:

i) Under the supervision of the Site Professional, review the integrity of all monitoring wells and replace or repair wells as required to ensure results are representative of groundwater in the aquifer targeted for monitoring. Construct any new shallow wells such that the well screen crosses the water table and new deep wells such that the well screen monitors the shallow bedrock aquifer, or deeper in the bedrock aquifer as required for the purpose of vertical and horizontal plume delineation.

ii) For the following monitoring wells, quarterly monitoring for RCAp-MS (general chemistry and metals) and groundwater levels, and annual monitoring for VOC (volatile organic chemicals), TPH (total petroleum hydrocarbons) and BTEX (benzene, toluene, ethylene, xylene):

› MW-1; MW-2S, -2M, -2D; MW-3: MW-4; MW-5S, -5D; MW-6S, -6D; MW-7S, -7D, and any additional groundwater monitoring wells that are installed for purposes of delineating the groundwater plume or to replace damaged wells

iii) For the following on-site domestic wells, quarterly monitoring for RCAp-MS (general chemistry and metals), and annual monitoring for VOC (volatile organic chemicals), TPH (petroleum hydocarbons) and BTEX (benzene, toluene, ethylene, xylene):

› 1287 Old Sambro Road, 1291 Old Sambro Road, and 1269 Old Sambro Road

iv) For the following off-site downgradient domestic wells (if permission of the property owners and resident can be obtained), quarterly monitoring for RCAp-MS (general chemistry and metals):

› 1294 Old Sambro Road, 1300 Old Sambro Road, 1305 Old Sambro Road, 1311 Old Sambro Road, 1316 Old Sambro Road, 1321 Old Sambro Road, 75 Whitehead Road, and any additional domestic wells located within 200 metres of the property boundary of PID #41056102.

v) For the following off-site domestic wells (if permission of the property owner and resident can be obtained), annual monitoring for RCAp-MS (general chemistry and metals)

› 1251 Old Sambro Road, 1237 Old Sambro Road, 1219 Old Sambro Road, 12 Venus Drive, 36 Venus Drive, 50 Mercury Avenue.

vi) Sample all domestic wells at a point in the water lines before the water enters any treatment systems or purification devices, if feasible. If it is not feasible to sample before treatment, the presence and type of treatment system prior to sampling point shall be noted with all data reporting for that well. For all domestic wells, samples are to be collected without field filtration and analyzed as potable water supplies; a standard purge time of 5 minutes shall be used; and laboratory-supplied sample bottles with no head space shall be used.

vii) Monitor any additional wells or parameters in the groundwater monitoring program which may be required by Nova Scotia Environment

**5. Surface Water Management**

Under the supervision of the Site Professional, review the site drainage and surface water management plan and revise as required. Identify the locations of any surface water drainage locations past or presently in use. Identify locations where surface water which has come into contact with soluble C and D materials processed or kept on site for periods longer than

one week, that can infiltrate to the subsurface. Submit the surface water management plan for approval by Nova Scotia Environment before February 28th, 2011.

**6. Surface Water Monitoring**

a) Under the supervision of the Site Professional, evaluate current data for impact to Shea's Lake and submit copy of report to Nova Scotia Environment by February 28th, 2011.

b) Sample Shea's Lake quarterly at the locations previously sampled by RDM known as SW-1, SW-2, SW-3 and SW-4, and analyse for the following parameters: RCAp-MS (general chemistry and metals).

**7. Leachate Management and Monitoring**

Under the supervision of the Site Professional, review leachate management activities and monitoring for the site. Submit a revised quarterly leachate quality and level monitoring and management plan for approval to Nova Scotia Environment by February 28th, 2011.

**8. Reporting**

a) Quarterly reports on the results, including lab reports and a tabular summary, of groundwater quality monitoring for all monitoring wells, surface water quality monitoring and leachate sampling shall be submitted to Nova Scotia Environment within 30 days of the end of each quarter. Quarters shall be the following:

- January 1st – March 31st
- April 1st – June 30th
- July 1st – September 30th
- October 1st – December 31st

b) Reports shall be provided to the well owner and resident on monitoring results for each monitoring event in a domestic well, as soon as they are available from the lab. A copy of the report given to the well owner and/or resident shall be provided to the Nova Scotia Environment, within 30 days following the end of the quarter in which the samples are taken.

c) Monitoring reports provided to the well owner and resident and Nova Scotia Environment shall note the point in the water system at which the sample was taken (pre- or post- treatment, if applicable).

d) Monitoring reports provided to the well owner and resident and to Nova Scotia Environment shall highlight any instances or parameters which exceed Health Canada's Maximum Acceptable

Concentration (MAC) guidelines for drinking water, the most current MAC value, and whether the result represents an increase or decrease relative to previous results.

e) Reports shall include method detection limits.

f) Submit an annual report to Nova Scotia Environment within 30 days following December 31st of each year and include the following information:

i) a description of monitoring well construction for each monitoring well;

ii) a description of sampling methods and sample handling protocols;

iii) all monitoring well groundwater quality and water level results, in summary tables including all data from past monitoring events, ordered by sampling date. Method detection limit shall be noted for all results. A digital copy of summary tables in Excel or Quattro Pro format shall be attached;

iv) all domestic well results, in summary tables including all data from past monitoring events, ordered by sampling date. Method detection limits shall be noted for all results. A digital copy of summary tables in Excel or Quattro Pro format shall also be attached;

v) all surface results, in summary tables including all data from past monitoring events, ordered by sampling date. Method detection limits shall be noted for all results. A digital copy of summary tables in Excel or Quattro Pro format shall be attached;

vi) all leachate quality and level monitoring results, in summary tables including all data from past monitoring events, ordered by sampling date. Method detection limits shall be noted for all results. A digital copy of summary tables in Excel or Quattro Pro format shall be attached;

vii) laboratory reports for all analyses being reported for the first time;

viii) plots of concentrations versus sampling date in domestic wells and monitoring wells for the following parameters: alkalinity, calcium, hardness, pH, sulphate, uranium, boron, cadmium, lead, total organic carbon, any VOCs, TPH or BTEX detected in the well on any previous occasion, and any other contaminants of concern in groundwater identified during site assessment. For all plots, Health

Canada Maximum Acceptable Concentration shall be shown if applicable.

ix) plots of concentrations versus sampling date in surface water (Shea's Lake) for the following parameters: alkalinity, calcium, hardness, pH, sulphate, uranium, boron, cadmium. For all plots, the (Canadian Council of Ministers of the Environment (CCME) aquatic life guideline shall be shown if applicable;

x) observations about any significant changes or trends in results

**9. Submission of a Remedial Action Plan**

Under the supervision of the Site Professional, submit a Remedial Action Plan to Nova Scotia Environment for approval by February 28th, 2011 addressing identified impacts of the release of substance from site PID#41056102 outlined in the site assessment(s).

**10. Submission of Environment Management Plan**

Submit a copy of the environmental management plan for the Halifax Regional Municipality licensed operation on site PID #41056102 to Nova Scotia Environment by February 28th, 2011.

[39] It is the Minister's Order that is being appealed pursuant to s.138 of the *Act*. The appeal was filed by 3076525 Nova Scotia Limited on December 3, 2010. The appeal was held in abeyance while the parties made attempts to reach a resolution.

[40] In November 2013, Marlene Brown, Melissa King and Jonathan Brown were granted intervenor status. The intervenors are residents of Harrietsfield, Nova Scotia whose well water has been adversely affected by contamination from the RDM site. The intervenors Melissa King and Jonathan Andrews reside at 1300 Old Sambro Road and the intervenor Marlene Brown lives at 1316 Old Sambro Road.

[41] According to the intervenors, for over ten years residents of Harrietsfield, Nova Scotia have been voicing concerns, including to the provincial government, about the Property. Because residents are dependent on their well water for drinking and domestic use, concerns about groundwater contamination have been one of the main issues raised.

[42] According to the intervenors, concerns about drinking water contamination pre-date the appellant's operations at the Property. The interveners point out that during the approximately seven years the appellant operated the C&D recycling

facility on the Property (five years between the appellant taking over operations on the Property and the issuance of the Ministerial Order), contaminant concentrations in domestic water wells have in many instances been steadily increasing. They argue that the nature of the groundwater contamination from the site appears to be cumulative and ongoing, having been caused over a lengthy period of time and resulting from the recycling and processing of various C&D materials at the site.

[43] The interveners argue that impacts observed in groundwater have increased over the time period that the appellant continued the C&D operations at the Property. The interveners believe that the nature of the hydrogeology of the site is such that precipitation passes through C&D materials, etc., and soils on the site, changing the chemistry of the precipitation water, which then infiltrates the subsurface into the shallow groundwater system connected to the deeper fractured bedrock system underlying the site. This impacted groundwater then flows downgradient towards the domestic wells. This results in a growing plume of impacted groundwater leaving the site and carrying groundwater contaminated with boron and other contaminants to domestic water wells.

[44] Monitoring results in 2010 indicated elevated concentrations of boron and sulphate in all wells for which data was reviewed, as well as high levels of uranium and cadmium in many wells. In some domestic wells downgradient from the site, uranium and cadmium concentrations regularly exceeded the Canadian Drinking Water Quality Guidelines. The interveners argue that through chemical and possibly microbial changes caused by the plume leaving the site, uranium is being mobilized into groundwater, leading to substantially elevated levels of uranium in the groundwater. The interveners point out that NSDE officials believed that homeowners should be made aware of their own water "situations" and that some of them should not be consuming their water.

[45] In February 2010, a community meeting was arranged and NSDE officials indicated that residents with an exceedance of the health based Drinking Water Guidelines should not drink their well water.

[46] In May of 2010, Linda Passerini, an environmental health consultant contacted by NSDE, indicated that there were "clear" exceedances of the Drinking Water Guidelines in some domestic wells and that she was concerned about residents' health. Ms. Passerini noted that a number of owners of impacted wells, including that at the home of the intervenors Melissa King and Jonathan Andrews

who reside at 1300 Old Sambro Road, should find alternate sources of water. In an email from Linda Passerini to Melanie J. Haggart dated May 28, 2010 she states:

> Hi Melanie,
>
> I've taken the opportunity to review the information you had forwarded by email – it is clear that there are some results that are in exceedance of the Drinking Water Guidelines. I have included the information each of the Drinking Water Guidelines which were reported as exceeded. Please review and let me know if this is the type of information you were looking for and/or you require further information. The first question I had was – Are the residents aware of the results to date and have they been informed about alternate sources of drinking water?
>
> As you noted in your information the current Guidelines for Canadian Drinking Water Quality state that drinking water Uranium levels should not exceed 0.02 mg/L. This level is determined by studying the effects of uranium on both animals and humans. Although little information is available on the chronic health effects of exposure to Uranium in humans, study show that as the level of exposure to uranium goes up there is a possible increased risk of kidney damage over a lifetime of exposure. The IMAC was adopted based on the risk management decision – suitably protective for the bulk of the population. One study involving humans revealed that people exposed to elevated levels of naturally occurring Uranium (up to 0.7 mg/L) in drinking water showed no relationship to overt renal disease or any other symptomatic complaint, however, there was the possible indication that an early tubal defect had been identified. The level indicated for 1321 Old Sambro Road are much higher than guideline value and the residents at this address should be notified of the results and associated risks. Results from 1311 Old Sambro Road also indicate exceedances of Uranium the residents should be notified of the results and risks associated with drinking the domestic well water. 1300 Old Sambro Road has had only one results lightly above the guideline value – the risk associated with Uranium exposure at this residence would be lower based on the short period of exposure.
>
> Arsenic is identified as a human carcinogen – study results suggest that consuming drinking water with very high levels of arsenic over a lifetime can increase the risk of cancer in internal organs such as the bladder, liver and lungs. The MAC was determined to be 0.01 mg/L – this value is above what has been determined to represent "essentially negligible risk" (the estimated lifetime cancer risk associated with the ingestion of drinking water containing arsenic at 0.01 mg/L is greater than the range that is considered to be no risk) because of limitations on available technology for treatment. Arsenic is a known carcinogen (meaning that exposure to any level in drinking water may increase the risk of cancer) and must therefore be removed by treatment where present at levels over this concentration. The levels shown of 1294 and 1300 Old Sambro Rd are

significantly higher than the Drinking Water Guidelines. The resident at the previously mentioned addresses should be notified of the results and advised to consider alternate sources of drinking water for drinking and food preparation.

Copper has an aesthetic objective of 1.0 mg/L – higher copper levels than this value may lead to objectionable taste in the water, staining of laundry and fixtures as well as may lead to corrosion of plumbing. Copper is an essential and beneficial element in human metabolism. Its recommended daily intake, based on essentially, is about 2 mg/day for adults, or 30 mg/kg body weight per day. At average concentrations, drinking water contributes approximately 11% of the daily copper requirement. Copper is generally considered to be non-toxic except at high doses, in excess of 15 mg/day. Acute copper poisoning is rare in humans and has usually been associated with accidental consumption. Based on this information a negative health effect from the levels indicated for 1305 and 1300 Old Sambro Road are unlikely.

Lead has a MAC of 0.01 mg/L in drinking water – lead ingestion should be avoided particularly by pregnant women and young children, who are most susceptible as it is a cumulative general poison. The health effects of lead are most severe for infants, children under six years of age, pregnant women and nursing mothers. For infants and children, exposure to high levels of lead in drinking water can result in delays in physical or mental development. For adults, it can result in kidney problems or high blood pressure. The residents at 1300 Old Sambro Road should be notified of the results and advised of health concerns and ways to reduce the exposure to lead (use alternate source of water for drinking, food preparation and infant formula. As well the residents at 1316 Old Sambro Road should be notified of the one exceedance and should continue to monitor the lead level in their water supply.

The taste related aesthetic objective for zinc in drinking water is 5.0 mg/L. Long Term ingestion of increased amounts of zinc has not resulted in adverse health effects. A MAC for zinc in drinking water has not been set based on the fact chronic zinc toxicity is unlikely. Water containing zinc at concentrations in excess of 5.0 mg/L has an undesirable taste and may produce a greasy film on boiling. The residents of 1300 Old Sambro Road may notice an intermittent off taste in the drinking water based on an increase in zinc.

The maximum acceptable concentration for cadmium in drinking water is 0.005 mg/L. Cadmium is a relatively rare element that is extremely unlikely to be present as a significant natural contaminant in drinking water. Cadmium compounds used in electroplated materials and electroplating wastes may be a significant source of drinking water contamination. Other than occupational exposure and inhalation from cigarette smoke, food is the main source of cadmium intake. Because it is difficult to reduce cadmium intake from food sources, intake from drinking water sources should be as low as possible. The

> residents of 1300 Old Sambro Road should be notified of the increase result and be aware that their water supply should be monitored in order to have an accurate assessment of exposure. The residents of 1311 Old Sambro Road should be notified of results [of results] exceeding the Drinking Water Guidelines. Further studies on cadmium levels in drinking water are required before an accurate assessment of exposure to cadmium in drinking water can be made.
>
> I hope this information helps and if you require additional information please feel free to contact me. I am away from the office this afternoon but will return on Monday.
>
> Linda

[47] Ms. Passerini noted a risk of kidney damage being associated with uranium exposure, and pointed out specific problems with the well at the home owned by the intervenors Melissa King and Jonathan Andrews, as well as two other homes. She explained further the health risks posed by arsenic exposure, including an increased risk of cancer. She indicated that lead ingestion can have a particularly significant health impact on infants. Therefore, Ms. Passerini indicated that Ms. King and Mr. Andrews should not use their well water to prepare formula for their infant. Cadmium and zinc (which can cause a bad taste in water) are noted as also being elevated in the well at the home of Ms. King and Mr. Andrews. Ms. Passerini referred to the well of the intervenor Marlene Brown, located at 1316 Old Sambro Road, as needing continued monitoring of lead levels.

[48] According to the intervenors, the data review conducted in early 2010 as a result of the appellant's request for a decrease in monitoring, indicates that all seven domestic wells downgradient of the site are very likely or likely influenced by the groundwater plume sourced from the site, such that the wells' chemistry has been changed. Three of these wells, including the well belonging to the intervenors Ms. King and Mr. Andrews, appear to require mitigation and management due to potential health risks. Four of these wells, including the well belonging to the intervenor Marlene Brown, require continued monitoring. In an exchange of emails between John M. Drage and Melanie J. Haggart between May 27, 2010, and June 10, 2010, they state:

> **John M. Drage to Melanie J. Haggart – May 27, 2010**
>
> Hi Melanie,
>
> I've attached the trend analysis results. Based on the trends, and a comparison to background chemistry levels, my opinion is that the following wells are very likely to be impacted by Leachate (1300 OSR, 1311 OSR, 1321 OSR and 75

Whitehead Rd) and the following wells are likely to be impacted by leachate (1305 OSR and 1316 OSR).

I selected the very likely wells as ones with trends in at least 2 leachate indicator chemicals and chemical levels above background values. The likely wells were ones that only had 1 trend of indicators present. The indicators I chose to use were: Ca, Alkalinity, SO4, C1, Conductance, pH, hardness, B and U. I chose these because they showed up as upward trends in at least 3 site monitoring wells.

Talk to you soon.

- John

**Melanie J. Haggart to John M. Drage – June 9, 2010**

Hi John – just a confirmation: you have considered an upward trend in one leachate indicator parameter to be indicative of likely impacted? If so, 1294 OSR has an upward trend in boron and therefore I would add to your "likely" list below.

Melanie

**John M. Drage to Melanie J. Haggart – June 9, 2010**

Hi, Melanie,

Yes, I must have missed that one, but it does have an upward trend and the boron level is slightly above background.

John

**Melanie J. Haggart to John M. Drage – June 10, 2010**

Hi again John,

We have scheduled to meet with RDM (site operators/lessees), the site owners (if they are willing to attend) and RDM's consultants (CRA) on Monday June 21st at 9:30 am, here in the Bedford office. Attending for NSE so far will be District Manager Steve Westhaver, Inspector Andrew Teal and myself.

This meeting will be to reply to RDM's request to reduce monitoring frequency, advise them of the results of our analysis of their data, and let the owners and operators know we'll be requiring some action.

Would you like to attend this meeting to explain your analysis and conclusions about impacted wells, or are you ok with me presenting this information?

We'll expect to be meeting with the private well owners shortly after that to advise them of the results as well, but it isn't scheduled yet.

Let me know,

Melanie

**John M. Drage to Melanie J. Haggart – June 10, 2010 (in part)**

Hi Melanie,

…With respect to the request to reduce monitoring, are you planning to ask them to keep monitoring at the same frequency while we are observing strong trends in the data?

- John

**Melanie J. Haggart to John M. Drage – June 10, 2010**

Ok thanks John. I appreciate your work on this and I'm fine with presenting your results (plus our interpretation of what has to be done about it) if you are ok with me doing it. Yes, we will be telling them the monitoring can't be reduced and in fact we are going to ask for an updated monitoring and mitigation plan which may require additional MWs.

**John M. Drage to Melanie J. Haggart – June 10, 2010**

Sounds good Melanie

- John

[49] In correspondence from Andrew Teal (NSDE) to Roy Brown (for the appellant) dated June 24, 2010, NSDE notes:

June 24, 2010

Mr. Roy Brown

**RE: RDM Recycling Request to Reduce Monitoring Requirements for PID#41056102, 1275 Old Sambro Road, Harriestsfield**

Dear Mr. Brown

**Background**

NS Environment has been provided with monitoring data by RDM Recycling on domestic wells and on-site monitoring wells for its Construction and Demolition Processing facility in Harrietsfield, which had been monitored by RDM Recycling and its predecessor company RDM Recycling Limited since 2003.

The data was first reviewed by NS Environment in the winter and spring of 2010 for two purposes: first, to address a request by the site operator to reduce the

frequency of monitoring: and second, to follow up on residents concern about the results for their private domestic wells, with which they had been provided by RDM.

These data were collected pursuant to a Remedial Action Plan implemented under the direction of NS Environment in the period of 2003-2005. NS Environment had directed the owners of the site at that time that quarter sampling of various on-site and domestic wells was required. The monitoring data was reviewed by two NS Environment Hydrogeologists. A summary of the results was provided for review and comment to an environmental health consultant at NS Health Promotion and Protection.

Conclusions:

1) All seven domestic wells located downgradient of the site are considered "very likely" or 'likely' influenced by a groundwater plume sourced from the site. This means that water in the wells has probably been influenced by water which has passed through the materials and soils on the site, and has changed in chemistry in the wells as a result.

2) Three of these domestic wells will require some form of mitigation or management action to be taken, as well as continued monitoring, because there are upward trends present in certain parameters of the water which may pose a health risk. It appears that the trends in these three wells have arisen due to impacts from a groundwater plume sourced from the site.

3) Four of the domestic wells required continued monitoring, but not immediate management action. While there are trends present in the groundwater chemistry that show an impact from the groundwater plume source from the site, there are not health concerns arising from these trends at this time.

4) There are upward trends in various parameters in monitoring wells located on the site. The site owner and operator will also need to take steps to understand better the extent of the impacts from the groundwater plume on the site.

## The Minister's Jurisdiction

[50] Section 129 of the *Environment Act*, S.N.S. 1994-95, c. 1 ("*EA*"), establishes guidelines that the Minister "shall" consider before issuing a Ministerial Order. In other words, s. 129 is a mandatory recipe that the Minister must follow when making an Order:

**Factors to be considered before making order**

**129 (1)** In deciding whether to issue an order pursuant to this Part, the Minister, an administrator or an inspector shall be guided by the following considerations, if such information is available or accessible to the Minister, an administrator or an inspector:

(a) when the substance became present over, in, on or under the site;

(b) in the case of an owner, occupier or operator, or previous owner, occupier or operator of the site

(i) whether the substance was present over, in, on or under the site at the time that person became an owner, occupier or operator,

(ii) whether the person knew or ought reasonably to have known that the substance was present over, in, on or under the site at the time that person became an owner, occupier or operator,

(iii) whether the presence of the substance over, in, on or under the site ought to have been discovered by the owner, occupier or operator had the owner, occupier or operator exercised due diligence in ascertaining the presence of the substance before the owner, occupier or operator became an owner, occupier or operator, and whether the owner, occupier or operator exercised such due diligence,

(iv) whether the presence of the substance over, in, on or under the site was caused solely by the act or omission of an independent third party,

(v) the economic benefits the person may have received and the relationship between that price and the fair market value of the site had the substance not been present over, in, on or under it;

(c) in the case of a previous owner, occupier or operator whether that person disposed of the interest in the site without disclosing the presence of the substance over, in, on or under the site to the person who acquired the interest;

(d) whether the person took all reasonable care to prevent the presence of the substance over, in, on or under the site;

(e) whether a person dealing with the substance ignored industry standards and practices in effect at the time or complied with the requirements of applicable enactments in effect at the time;

(f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance over, in, on or under the site;

> (g) what steps the person took to deal with the site on becoming aware of the presence of the substance over, in, on or under the site;
>
> (h) any other criteria the Minister considers to be relevant.
>
> **(2)** An order made by the Minister pursuant to this Part may
>
> (a) require the person to whom the order is directed to take any measures that the Minister considers are necessary to restore or secure the contaminated site and the environment affected by the contaminated site;
>
> (b) provide for the apportionment of the cost of compliance with the order;
>
> (c) in accordance with the guidelines or regulations, regulate or prohibit the use of the contaminated site or the use of any product that comes from the contaminated site.

[51] The s. 129 guidelines provide the Minister with certain boundaries. The Minister has considerable discretion to work within those boundaries. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada found at para. 53:

> [53] Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas – that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of

> administrative law governing the exercise of discretion, and consistent with the **Canadian Charter of Rights and Freedoms** (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

[52] Of course, in order to properly apply the s. 129 guidelines, the Minister must have a fair picture of the facts involved.

## Purpose of the *Environment Act*

[53] The purpose of this statutory regime is relevant to any consideration of the reasonableness of the Ministerial Order. The purpose of the *EA* impacts on the interpretation of the relevant statutory provisions. The purpose can also affect the overall assessment of whether the Minister created an Order outside the range of possible outcomes. If the Minister has made an Order contrary to the purpose of the statutory regime such Order is more likely to be found outside of the range of possible outcomes.

[54] Section 2 of the *EA* sets out the broad principles governing this important piece of legislation:

> **2** The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:
>
> (a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
>
> (b) maintaining the principles of sustainable development, including
>
> (i) the principle of ecological value, ensuring the maintenance and restoration of essential ecological processes and the preservation and prevention of loss of biological diversity,
>
> (ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation,
>
> (iii) the principle of pollution prevention and waste reduction as the foundation for long-term environmental protection, including
>
> (A) the conservation and efficient use of resources,
>
> (B) the promotion of the development and use of sustainable, scientific and technological innovations and management systems, and

(C) the importance of reducing, reusing, recycling and recovering the products of our society,

(iv) the principle of shared responsibility of all Nova Scotians to sustain the environment and the economy, both locally and globally, through individual and government actions,

(v) the stewardship principle, which recognizes the responsibility of a producer for a product from the point of manufacturing to the point of final disposal,

(vi) the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental management and that effective environmental protection depends on a strong economy, and

(vii) the comprehensive integration of sustainable development principles in public policy making in the Province;

(c) the polluter-pay principle confirming the responsibility of anyone who creates an adverse effect on the environment that is not *de minimis* to take remedial action and pay for the costs of that action;

(d) taking remedial action and providing for rehabilitation to restore an adversely affected area to a beneficial use;

(e) Government having a catalyst role in the areas of environmental education, environmental management, environmental emergencies, environmental research and the development of policies, standards, objectives and guidelines and other measures to protect the environment;

(f) encouraging the development and use of environmental technologies, innovations and industries;

(g) the Province being responsible for working co-operatively and building partnerships with other provinces, the Government of Canada, other governments and other persons respecting transboundary matters and the co-ordination of legislative and regulatory initiatives;

(h) providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment, including opportunities to participate in the review of legislation, regulations and policies and the provision of access to information affecting the environment;

(i) providing a responsive, effective, fair, timely and efficient administrative and regulatory system;

(j) promoting this Act primarily through non-regulatory means such as co-operation, communication, education, incentives and partnerships.

[55] While the Minister is obligated to consider s. 2 of the *EA* in its entirety, particular attention in this appeal has been focused on s. 2(b)(ii) "the precautionary principle" and s. 2(c) "the polluter-pay principle". In addition to the principles outlined in s. 2 of the *EA*, the comments of Saunders J.A. in *R. v. Hicks*, 2013 NSCA 89, at paras. 45-46, also provide insight as to the scope and breadth of the *EA*:

> [45] As noted earlier, neither the trial judge nor the SCAC gave any thought to the purpose and breadth of the **Act**. Even a cursory review of the statute reveals its vast scope and the broad powers accorded the Minister and government inspectors to enforce its terms. The statute effectively proclaims the stewardship of the environment as being the responsibility of both citizens and government. It establishes a mandate to find and hold accountable polluters and other offenders. It affirms an explicit goal of remediating adverse consequences. It expressly states that the **Act** is intended to provide a regulatory regime that is quick, effective and fair. The breadth of the legislation is reflected in the broad definitions of such terms as "air", "environment" and "water course". The statute targets the use or handling of waste, pollutants, and other contaminants, giving broad powers to inspectors in the investigation and enforcement of standards, as well as the prosecution of violators whose actions would negatively impact upon human health. The **Act** expressly provides that owners or occupiers have an obligation to co-operate and assist the inspectors in their work.
>
> [46] This brief overview of the scope and purpose of the **Act** serves to highlight the Legislature's clearly stated objectives of protecting the environment for the greater good while at the same time respecting private interests. In my respectful view, the interpretation I have placed upon the impugned words in this case recognizes the laudatory result achieved by permitting inspection – or the threat of it – without notice, as a practical means of encouraging compliance for the sake of the community at large while, at the same time, maintaining a proper balance between the public interest and the individual's right to privacy as described by the Supreme Court of Canada in **Comité paritaire, supra**.

[56] Clearly, the Minister has broad powers under the *EA* to protect the environment for the greater good. However, private interests must also be respected.

## ***The Ministerial Order***

[57] On November 5, 2010, the Minister issued an Order against a number of individuals and companies, including the previous and current operators of the site.

[58] The most significant issue raised by the appellant relates to Clause 7 of the Order, requiring it to develop a leachate management plan. All parties to this appeal agree that Clause 7 would require the parties named in the Order to develop a comprehensive leachate management plan for the entire Property, including the containment cell. The only evidence as to the scope and cost of such a plan comes from the Affidavit of Brian Dubblestyne:

> 42. On November 5, 2010, the Minister issued the Order that is the subject of 307 NSL's appeal, requiring 307 NSL, among other persons, to perform various monitoring and remedial activities in relation to contamination on the Property.
>
> 43. 307 NSL, while it has contested the Ministerial Order, has without prejudice to its rights under this appeal endeavoured to meet the terms and conditions of the Ministerial Order. 307 NSL believes it has either met the requirements of the Ministerial Order or has proposed a remedial plan satisfactory to NSE to address the terms of the Ministerial Order with the exception of the requirement to develop a comprehensive leachate management plan for the containment cell located on the Property.
>
> 44 Such a leachate management plan would necessarily require investigation into the efficacy of the containment cell built by RDM and approved by NSE. 307 NSL has never had the plans and as-built drawings for this cell; it has never been responsible for its operation and maintenance and it has refrained from touching it throughout its tenure as tenant on the Property. While 307 NSL has been prepared to remove and treat leachate as required, the levels of leachate appearing in the collection system have not, from 2005 to present, been sufficient to warrant removal and treatment.
>
> 45. Given the volume and type of material contained in the cell, and the apparent lack of leachate collected through the cell's leachate collection system, 307 NSL and its consultants believe the containment cell to be the most likely source of elevated levels of calcium, sulphate, alkalinity and boron in the groundwater (if indeed these contaminants emanate from the property.)
>
> 46. To remediate this failure of the containment cell to contain the leachate from approximately 120,000 tonnes of unrecyclable material would require significant effort and is beyond the financial capacity of 307 NSL. Recognizing that there are many variables that could affect the cost of a full remediation (i.e. removal) of the cell and surrounding impacted soil, 307 NSL has roughly estimated the cost of excavating and removing the material in the cell to be approximately $10.6 million. This estimate is based on the following assumptions:

| Action | Estimated Cost |
|---|---|
| Transportation Cost | $10.00 - $12.00 per tonne |
| Disposal Cost | $65 - $75 per tonne |
| Excavation Costs | $5 - $10 per tonne |

> Using the midpoint values in the above estimated cost ranges, multiplied by 120,000 tonnes, leads to a total estimated cost of $10.6 million. As noted, this expense is far beyond the final capacity of 307 NSL.

[59] The containment cell is really at the hub of the substantial issues on this Appeal. What the actual facts are relating to the containment cell versus what the Minister was apprised of by NSDE before he issued the Order is of great significance in determining the reasonableness of the Order.

***Containment cell***

[60] In 2003, in anticipation of approval from NSDE to dispose of C&D waste on the Property, RDM had already disposed of some C&D waste. NSDE investigated this unauthorized disposal and determined that it was having a detrimental environmental impact. The Minister then rejected RDM's proposal to dispose of waste on the Property.

[61] NSDE requested that RDM submit a Remedial Action Plan relating to the concern surrounding groundwater testing results. RDM later submitted a Remedial Action Plan in November 2003 that proposed, among other things, the onetime disposal of stockpiled material on the Property in an engineered containment cell.

[62] In a letter dated November 27, 2003, Christine Penney at NSDE wrote to the Terrain Group (acting for RDM), and within that letter advised that NSDE had changed its position regarding the disposal of waste on the Property. NSDE approved the Remedial Action Plan and agreed to permit the one-time disposal of accumulated materials on the Property in a containment cell and stated in part:

> The department has reviewed your November 19 and November 26, 2003 submissions regarding the initial remedial work at the RDM site in Harrietsfield. The department recognizes the benefits for containment of the existing C&D material to minimize exposure to surface and groundwater. This letter will serve as authorization to proceed with the initial remedial work involving surface water diversion, leachate collection system, liner construction, and containment cell

> wall construction. It is understood that the leachate collection outlet would be plugged until the treatment strategy is finalized.
>
> A suitable treatment strategy for the collected leachate and the capping design must be submitted to the department by **December 19, 2003** for review and approval.
>
> The initial remedial work must be conducted in compliance with the requirements specified in the NSDEL letter dated November 13, 2003 regarding liner requirements. **As stated, the liner and capping work must be certified by a geotechnical engineer. This certification shall be submitted within three weeks of the initial remedial project completion.** [*emphasis added*]

[63] In a letter dated November 13, 2003, from Gordon Check, Regional Hydrogeologist for NSDE, to Tim Veinot, Terrain Group (on behalf of RDM) NSDE states in part:

> 3) Liner Requirements:
>
> - Liner requirement of two (2) metre thick liner for all new areas in remedial cell, currently having no underlying C&D material
> - Permeability of base liner material to be no greater than 5E-07 cm/s
> - All liner, cell wall and cap materials must undergo adequate testing as determined by a **geotechnical engineer**.
>
> [*emphasis added*]

[64] The containment cell was constructed between October 2003 and September 2004. It is estimated that 120,000 tonnes of stockpiled material was moved into the cell in late September and early October 2004. The cell was capped in October 2004.

[65] While the early stages of the containment cell construction were inspected by Maritime Testing (1985) Limited ("Maritime Testing"), a group of professional engineers, there is nothing in the appeal record to suggest that a geotechnical engineer was involved in the inspection, tests, capping or certification of the containment cell. The lack of a geotechnical engineer was a significant aspect of the appellant's argument. No evidence was presented on this appeal to indicate that a geotechnical engineer was ever involved.

[66] According to the record, it was anticipated that large volumes (as much as 5 x 50 gallon drums per day) of contaminated leachate would accumulate due to water flowing through the containment cell/C&D material. The containment cell was to be constructed in such a way that this daily accumulation of contaminated leachate would be captured in crocks and would be professionally disposed of within appropriate environmental guidelines.

[67] The November 26, 2003, letter from the Terrain Group to Christine Penney at the NSDE states in part:

> Leachate Collection Volume
>
> We have reviewed the volume of water collected in the current stockpile. As we indicated earlier the situation of an open collection system must only be a temporary situation and reasonable control can only be exercised with an impermeable cap to shed surface water away from the product.
>
> To undertake this calculation we used Environment Canada historical precipitation values as attached. Using this data, the average monthly precipitation for December is 160.2 mm. The area anticipated for containment of the existing material is approximately 21,309 square meters as shown on the drawing. Anticipating that all precipitation will produce runoff, the flow calculates for an average daily flow of 24,848 igals per day. It is unreasonable to expect that a storage chamber hold 25,000 igals for this purpose since it is temporary. We are proposing to be permitted to cap the cell. We would like to calculate the expected leachate after capping so we can place an appropriate storage tank in place, keeping in mind that a tanker truck would hold about 2,000 igals, so we may want to limit the storage to 2,500 igals leaving a bit extra capacity.
>
> To address the problem of temporary storage, we propose to build an overflow retention pond that holds 25,000 igals.
>
> The need for surface control is apparent. In the meantime, we can accommodate the flow volume by installing an overflow line in the tank structure to a containment pond that measures approximately 30' by 30' with a maximum depth of 5'. This volume represents about 12 – 2,000 igal tanker trucks per day during rain events under the peak rainfall season.
>
> We are making the assumption that there can be one meter of head permitted in the cell consistent with the formal calculation for vertical velocity through the liner conducted by MGI. The capacity of storage in the lower edge of the cell is approximately 100,000 imperial gallons or about 4 days storage. This will allow for storage during extreme precipitation events.

> Control can only be exercised by capping the cell. Estimates of the flow volume of leachate after capping are as follows:
>
> In Nova Scotia, typical values for the percentage of precipitation that becomes groundwater recharge are in the range of approximately 8-20%, with the low range typically being in areas of clay soils and the high end being sand and gravels. We should expect this to be even lower at the site, since we will be dealing with an engineered, graded, compacted clay cap designed to shed water, not hold it. The cap will reduce infiltration, so, as a worst-case estimate, we will use a conservative infiltration estimate of 10% of precipitation and also assume that all potential infiltration actually gets through the cap (i.e. infiltration through the cap is the same as if the cap wasn't there – very conservative). Then our daily average worst-case leachate generation volume will be 5mm times the area of the cell as calculated above. By straight math, this overly conservative estimate will produce a value of 10% of your pre-cap estimate (i.e. 2,484 igals per day). In reality, we know that we will probably only get about 10% of the flow. Additionally, the actual leachate generation rate will be monitored through operational monitoring and estimates will be adjusted with time.
>
> Leachate Treatment and Handling
>
> We have discussed leachate treatment with HRM and they may be willing to accept the leachate in the interim at the Highway 101 landfill. They indicate that a number of approaches can be accessed for leachate treatment. The characterization of the leachate is an important criterion in assessing other alternatives. HRM indicate that for biological oxygen demand (BOD) and total suspended solids (TSS) less than 300/300 mg/l, the leachate can be discharged into regular sanitary sewage disposal systems. For higher strength leachate, the application will be based on impact to their system. Such consideration will be given to conditions such as leachate volume, leachate strength, and time commitment required. As you may be aware, many of the outstanding issues can only be answered once the collection system is constructed. In the interim, a full laboratory analysis will be completed on the current leachate spring with the understanding that further adjustments in treatment may be required.

[68] The appellant interprets the volume of leachate anticipated to be produced in the containment cell to be within a range of 2,484 imperial gallons per day to one tenth of that volume, 248 imperial gallons per day.

[69] On February 3, 2004, the Terrain Group, wrote to Christine Penney of NSDE and stated in part:

> Since you wrote your letter we have made contact with Glenn Anderson at Atlantic Industrial Services. They have reached an agreement with RDM to take

> leachate collected from the site and treat it at their NSDEL approved facility in Debert. Attached is a letter from Glenn stating that they are in agreement with accepting the leachate from RDM. We understand that your office in Truro will need to review the leachate quality and quantity to authorize acceptance. Our estimates of leachate volume have been previously discussed as follows: for an uncapped cell, the volumes can be excessive, approximately 25,000 igpd; for a capped cell, approximately 2,500 igpd. Therefore, we propose to cap and line the material to reduce the volume to a manageable value. We have attached the chemical analysis data previously send to the Department to forward to the Truro office to facilitate their review. We trust this is satisfactory to the Department.

[70] On March 3, 2004, Maritime Testing confirmed on-site inspection and testing of the containment cell project. However, as noted earlier, there is nothing in the record to indicate that a geotechnical engineer inspected the containment cell before, during, or at any time after it was constructed, filled and capped.

[71] On December 15, 2004, representatives of the NSDE wrote:

> Myself & Frank MacNeil met on site with Roy Brown for a site inspection. Mr. Brown indicated that they are currently hauling some C & D material to a C & D disposal site in Colchester County near Stewiacke. Roy indicated that he inspects the leachate holding tank daily and to date there is insufficient amounts to pump. The sediment ponds appear to contain clear water. Asphalt shingles were being dumped at the rear of the site. The Cap on the Cell appear to be in good condition.

[72] A Memorandum dated February 5, 2010, authored by NSDE hydrogeologist Melanie Haggart, states in part at p. 4:

> In MW1-D, there are increasing trends in boron, sulphate, hardness, conductance, calcium, alkalinity, uranium, and cadmium. All parameters fluctuate considerably more than in MW6-D, with particular drops in concentration in April monitoring events, followed by rebounds to higher concentrations, since April 2006. **This variability could reflect surface water influence on this well, either due to leakage around the well casing or possibly due to the ingress of water through a leak in the C and D cell cover and/or berm just upgradient of the well. The integrity of the well construction and waste cell cover and berm should be evaluated.** [*emphasis added*]

[73] A letter from Stephen Westhaver, District Manager of NSDE, to Brian Dubblestyne dated October 29, 2010, included a "Review" by Melanie Haggart. NSDE was obviously in possession of this "Review" at the time of issuing the Order. The Review states in part:

> We conducted a Mann-Kendall statistical trend analysis on eighteen (not only nine) selected parameters, to determine if trends were present over time since monitoring started on each well. For the nine parameters selected as groundwater plume indicators, increases were present in 3 or more downgradient monitoring wells but were generally absent in wells upgradient of the site.
>
> The third paragraph in the introductory section of the H20 GEO submission makes reference to a source in the 'landfill' and to NSE conclusions about the presence of construction debris in the 'landfill' contributing to elevated calcium. This does not accurately state our conclusions.
>
> We have concluded that the identified plume is sourced from the RDM site (PID #41056102). This conclusion is based on the facts that groundwater upgradient of the site is not contaminated, groundwater on the site is contaminated, and groundwater flow directions, determined by the site operator's consultants, indicate that the impacted offsite groundwater can only be sourced from the site. **The site hosts both a capped disposal cell containing construction and demolition (C and D) debris, and a current C and D materials recycling operation, where water which has contacted C and D materials can infiltrate into the ground; both of these could be the source of the groundwater plume.**
>
> We believe that increased concentrations of several of the parameters in the groundwater plume, not only calcium as cited in the H20 GEO submission, are related to the addition of dissolved components sourced from C and D materials such as gypsum, wood, etc. The indicator parameters which are consistent with a direct C and D material source are calcium, sulphate, boron, hardness, alkalinity, chloride, and pH changes. I have concluded that uranium is elevated in the groundwater plume in bedrock, and lead is elevated in some well water, most likely due to localized chemical reactions between contaminated groundwater and aquifer solids, or contaminated groundwater and some domestic plumbing, respectively. [*emphasis added*]

[74] Ms. Haggart also noted in her report the impact the pollution has had on various wells in the area, in particular at civic address #1321 Old Sambro Rd., where she notes:

> The dramatic upward trend in uranium in this well is the most significant observation which has led NSE to the conclusion that the well is impacted by a groundwater plume. Uranium has increased by 500% since monitoring started. This occurs along with upward trends in calcium, alkalinity, sulfate, chloride, conductance and hardness in this well. These are the same trends observed in the downgradient bedrock wells on site in particular MW1-D, 2-D, and 6-D, and absent in upgradient wells. In monitoring wells on site, uranium has increased

> from 2 to 750 micrograms per litre in MW6-D and from 1 to 180 micrograms per litre in MW1-D.

[75] Ms. Haggart concluded her report by stating:

> 1) None of the observations made in the H2O GEO submission contradict NSE's conclusion that there is a groundwater plume sourced from the RDM site (PID # 41056102) which is causing increases in certain parameters in groundwater downgradient from the site, and impacting both domestic wells and monitoring wells.
>
> 2) H2O GEO's conclusion that the impacts to domestic wells arise from road salt, well construction causing contamination from surface water, or plumbing, or only from naturally occurring contaminants, is not consistent with the observations that these increases are occurring only in downgradient wells and not in upgradient wells, and occur in both properly constructed on-site monitoring wells and in domestic wells.

[76] The record includes a File Activity Report originating with the NSDE dated February 15, 2010:

> Went to Bailey residence at 1321 Old Sambro Road – Well was indicated by Mr. Bailey to be a 6 feet from house facing the RDM site, the well has a sub surface well head and not visible. Going out straight from the well following the maps available and the direction of water flow indicated under the ground through hydrogeologist's reports I then walked towards the RDM site and the berm in place. Over the berm is the operations of the present day transfer site. **It should be noted that the well is down gradient of the operations now taking place and not the capped cell. This property has the highest levels of Uranium, which may possibly be caused by current and past operations at the site.**
>
> [*emphasis added*]

[77] Following the request for a reduction of water sampling the following report was created by NSDE:

> Domestic wells cross gradient and down gradient from the recycling site have been impacted by the plume.

[78] The impact on the domestic wells was detailed in the email from Linda Passerini to Ms. Haggart dated May 28, 2010:

> Arsenic is identified as a human carcinogen – study results suggest that consuming drinking water with very high levels of arsenic over a lifetime can

> increase the risk of cancer in internal organs such as the bladder liver and lungs. The MAC was determined to be 0.01 mg/L – this value is above what has been determined to represent "essentially negligible risk" (the estimated lifetime cancer risk associated with the ingestion of drinking water containing arsenic at 0.01 mg/L is greater than the range that is considered to be no risk) because of limitations on available technology for treatment. Arsenic is a known carcinogen (meaning that exposure to any level in drinking water may increase the risk of cancer) and must therefore be removed by treatment where present at levels over this concentration. The levels shown for 1294 and 1300 Old Sambro Road are significantly higher than the Drinking Water Guidelines. The residents at the previously mentioned addresses should be notified of the results and advised to consider alternate sources of drinking water for drinking and food preparation.
>
> . . .
>
> Lead has a MAC of 0.01 mg/L in drinking water – lead ingestion should be avoided particularly by pregnant women and young children, who are most susceptible as it is a cumulative general poison. The health effects of lead are most severe for infants, children under six years of age, pregnant women and nursing mothers. For infants and children, exposure to high levels of lead in drinking water can result in delays in physical or mental development. For adults, it can result in kidney problems or high blood pressure. The residents at 1300 Old Sambro Road should be notified of the results and advised of health concerns and ways to reduce the exposure to lead (use alternate source of water for drinking, food preparation and infant formula. As well the residents at 1316 Old Sambro Road should be notified of the one exceedence [sic] and should continue to monitor the lead level in their water supply.

[79] The record on this appeal tends to suggest that the containment cell, housing 120,000 tons of unrecyclable material, was supposed to be inspected and certified by a geotechnical engineer. That never occurred.

[80] The containment cell was supposed to be producing large volumes of contaminated leachate that should have been collected in crocks for proper disposal. Was there any such leachate being produced and, if so, where was it going? We do not have a clear answer to this question.

[81] What the appeal record does show is that NSDE appears to have recognized, by way of their letter of October 29, 2010, that the containment cell could be potentially contributing unquantified amounts of contaminated leachate into the environment:

> …We conducted a Mann-Kendall statistical trend analysis on eighteen (not only nine) selected parameters, to determine if trends were present over time since monitoring started on each well. For the nine parameters selected as groundwater

> plume indicators, increases were present in 3 or more downgradient monitoring wells but were generally absent in wells upgradient of the site.
>
> The third paragraph in the introductory section of the H2O GEO submission makes reference to a source in the 'landfill' and to NSE conclusions about the presence of construction debris in the 'landfill' contributing to elevated calcium. This does not accurately state our conclusions.
>
> We have concluded that the identified plume is sourced from the RDM site (PID # 41056102). This conclusion is based on the facts that groundwater upgradient of the site is not contaminated, groundwater on the site is contaminated, and groundwater flow directions, determined by the site operator's consultants, indicate that the impacted offsite groundwater can only be sourced from the site. **The site hosts both a capped disposal cell containing construction and demolition (C and D) debris, and a current C and D materials recycling operation, where water has contacted C and D materials can infiltrate into the ground; both of these could be the source of the groundwater plume.**
>
> We believe that increased concentrations of several of the parameters in the groundwater plume, not only calcium as cited in the H2O GEO submission, are related to the addition of dissolved components sourced from C and D materials such as gypsum, wood, etc. The indicator parameters which are consistent with a direct C and D material source are calcium, sulphate, boron, hardness alkalinity, chloride, and pH changes. I have concluded that uranium is elevated in the groundwater plume in bedrock, and lead is elevated in some well water, most likely due to localized chemical reactions between contaminated groundwater and aquifer solids, or contaminated groundwater and some domestic plumbing, respectively. [*emphasis added*]

[82] Therefore, NSDE recognized that the containment cell, holding 120,000 tons of unrecyclable and potentially environmentally hazardous material, could be a source of the problem.

## Briefing Material Reviewed by the Minister

[83] A package of background material was prepared by NSDE staff for presentation to the Minister of the Environment in support of the Ministerial Order under appeal. This package was relied on by the Minister in deciding to issue the Order. It would therefore be imperative that this material present an accurate summary of the situation for the Minister's consideration, in order to provide a reasonable basis for the decision. This package includes, among other things, a Briefing Note, a Checklist, maps and sampling results. The Briefing Note to the Minister makes no mention of the containment cell at all:

RDM Recycling Limited and RDM Recycling of

1275 Old Sambro Road, Harrietsfield, Halifax Regional Municipality

Key Message:

- Monitoring results indicate that wells have been influenced by water which has passed through the Construction and Demotion materials and soils of the RDM property and are believed to have caused dissolved uranium, boron, calcium, sulphate, and elevated alkalinity, total organic carbon, and any other contaminants of concern.
- NSE staff have met with residents to inform them of the water monitoring results and steps take to date and to keep them informed.
- Nova Scotia Environment will be conducting further analysis to determine the cause of changes in well and groundwater as more data (2010) becomes available.

Current Situation:

- On August 6, 2010; a joint inspection of the facility was conducted by NSE and Halifax Regional Municipality.
- On July 15, 2010; a meeting was held between NSE and citizens of the community who are concerned about their wells and drinking water.
- Ongoing review of data from groundwater and surface water will be conducted by NSE as additional information is available (2010 data).
- Meetings have been held with NSE, RDM Recycling and RDM Recycling Limited in January 2010 regarding a request to reduce sampling and again on July 13, 2010 to inform them of our data analysis and findings.

Background:

- RDM Recycling operates a Construction and Demolition (C and D) Processing facility on a property in Harrietsfield which it leases from the former operators, RDM Recycling Limited.
- Through a Remedial Action Plan agreed with NSE in 2003, the owners implemented a groundwater and surface water monitoring program. A review of the data from this monitoring indicates that wells have been influenced from upgradient property and therefore the monitoring program must be updated/revised
- C and D processing facilities do not require an approval from NS Environment, as they operate under a permit issued by Halifax Regional Municipality.

- RDM Recycling approached NS Environment in December 2009 requesting a reduction in the frequency of their sampling program. Also, a group of concerned residents contacted NS Environment in January 2010 to express concern about the results of RDM's sampling of their private domestic wells.
- NSE reviewed groundwater data from 2003-2009 and have determined possible groundwater issues directly related to the RDM site.
- NSE has met with RDM in January 2010 to discuss their request for a reduction in sampling program and again on July 13, 2010 to inform them of the results of NSE analysis of the groundwater data.
- On July 15, 2010; NSE has met with the residents who are concerned about their wells and drinking water.
- On August 6, 2010; a joint inspection of the facility was conducted by NSE and Halifax Regional Municipality.

Recommendation:

- Continue to review and assess groundwater and surface water data submitted by RDM.
- Approval of this Ministerial Order will provide NSE with the necessary enforcement ability to act on the existing operations and land owners in regards to the environmental impacts.
- As a commitment to the area residents; a joint inspection with NSE and RDM's consultant, Conestoga-Rovers Associates, is to be done in late September during the next groundwater monitoring event.

[84] The Checklist does mention the containment cell but does not include any significant details about its construction, NSDE's failure to involve a geotechnical engineer, the problem regarding the lack of accumulated leachate, or the amount of material in the containment cell:

**CHECKLIST ON THE ISSUANCE OF MINISTERIAL ORDERS UNDER PART XII OF THE ENVIRONMENT ACT**

**Environment** **May 14, 2008**

When preparing a draft Ministerial Order for consideration, assigned staff from the EMC Division must complete the following documents and forward the electronic version to the Solicitor for the EMC Division and the Executive Director's Secretary (EDS), Environmental Monitoring and Compliance Division (MO Designate). The signed-off copy of the Ministerial Order documents package, along with copies of all supporting documents must be retained by the Compliance & Inspection Coordinator:

| |
|---|
| √ Ministerial Order Checklist<br>√ APPENDIX "A" - Section 129 Checklist<br>√ APPENDIX "B" - Ministerial Order (with completed attached Schedule "A")<br>√ APPENDIX "C" - Ministerial Briefing Note<br><br>When the Ministerial Order is approved and returned to the originating Regional/District Office, it is the responsibility of the assigned staff to complete **APPENDIX "D" – AFFIDAVIT OF SERVICE** and have the Affidavit signed by a Commissioner of Oaths after the Ministerial Order has been served upon the individual(s) and/or company named in the order.<br><br>When preparing a draft Ministerial Revocation Order for consideration, the assigned staff are only required to forward the Ministerial Briefing Note and a draft of the Revocation Order.<br><br>□ APPENDIX "C" - Ministerial Briefing Note<br>□ APPENDIX "E" - Revocation Order |
| Identify Draft Ministerial Order with **"Draft"** watermark and assign **Regional Office Version Number and Date.** Markings will be removed by Regional Office upon confirmation of final draft and before sending to EDS |
| |

**ENVIRONMENT ACT MINISTERIAL ORDER CHECKLIST**

**A. TYPE OF ORDER**

1. (a) **Control Order** - Section 125 Yes X No □

   (b) **Stop Order** - Section 126 Yes □ No X
   Identify the "likelihood of irreparable adverse effect" _____
   _____
   _____

   (c) **Litter Control Order** - Section 127 Yes □ No X

   (d) **Emergency Order** - Section 128 Yes □ No X

   (e) **Revocation Order** - Section 131 Yes □ No X

## B. CONTRAVENTION INVOLVED

1. **Section 125**

(a) What are the reasonable and probable grounds that the persons named in the Ministerial Order have or will contravene the Act or Regulations? Specify the Sections:

| | SECTION | | SPECIFICS |
|---|---|---|---|
| (a) | Section 67(2) | Release causing adverse effect<br>Yes X No □ | Impacts observed in off site wells (domestic drinking water) and indicate dissolved uranium, boron, calcium, sulphate, elevated alkalinity and total organic carbon. |
| (b) | Section 68(2) | Release in excess of approval or regulation<br>Yes □ No X | |
| (c) | Section 71 | Person responsible to take remedial measures<br>Yes X No □ | |

(b) Have the parties been advised that they are or will be in contravention of the Act or regulations? (Note - this is not required under the legislation).

Yes X No □

Verbally? Yes In writing? Yes
Letters attached with Briefing Note.

(c) Have charges been laid: Yes □ No X

(Note – laying charges is not necessary before a Ministerial Order is issued)

## C. PARTIES TO BE NAMED

2. Who are the persons to be named in the Ministerial Order?

**2 (i) Present Day Landowners/Occupiers/Operators**

› Identify present day landowners?

3012334 Nova Scotia Limited (formerly RDM Recycling Limited)

1275 Old Sambro Road, Harrietsfield, NS
and,

Ernest A. Nicholson Limited
1275 Old Sambro Road, Harrietsfield,, NS

› Identify present day land occupier/operators?

3076525 Nova Scotia Limited
Suite 900, 1959 Upper Water Street, Halifax, NS

› Do they lease the property? Yes X No □
Copy of the lease attached

› Is a corporation involved? Yes X No □

Printout from Registry of Joint Stock Companies for all three companies are attached.

› Is a lender, receiver, trustee in bankruptcy involved? Yes □ No X

Name: _____

› Is there an insurer involved? Yes □ No X

Name: _____

› Are there directors/officers to be personally named in the Ministerial Order? Yes X No □

Names: Roy Brown and Michael Lawrence are Directors for 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson Limited. These companies currently own and/or lease the property to 3076525 Nova Scotia Limited. 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson Limited have been revoked for non-payment, so their Directors will be named.

**2 (ii) Previous Owners/Occupiers**

› Are previous owners or occupiers or other persons to be included?

(Retroactive liability, Section 130(4)) Yes □ No X

(a) Is an "Abstract of Title" available on historical ownership of the property?

Are deeds available? Yes □ No □

(b) What evidence is available the past owner/occupier caused the problem?

(c) Who will give evidence to this effect? Will the present day owners/occupiers supply the above information and give evidence in court?

(Full Name & Address)_____
_____

(d) Were there any rules/regulations in effect when the past owner/occupier owned/operated the site? Yes □ No □

What defences will or might they present?

**D. SECTION 129 CHECKS AND BALANCES**

**1.** Checklist form attached. **APPENDIX "A"**.

**2.** ***Note:*** **The form must be completed in its entirety.** If a specific question is not applicable, indicate this by inserting **"Not Applicable"** in the Comments box of the question and continue with the next question.

**E. CONTENT OF ORDER**

**1.** Fill out draft Ministerial Order including Schedule "A" Terms and Conditions. See attached **APPENDIX "B"**.

**2.** Note Section 125(3) respecting contents of the Order.

**3.** Is the contamination located

| | |
|---|---|
| on site? | Yes X No □ |
| off-site? | Yes X No □ |
| unknown? | Yes X No □ |
| Is a consultant needed? | Yes X No □ |
| Has one already been involved? | Yes X No □ |

**4.** Is a consultant's report needed? Yes X No □
Is one/more already prepared and given to NSE? Yes □ No X

**5.** Is a remediation plan required with specific time frames? Yes X No □

**6.** Is potable drinking water needed? Yes X No □

**F. ORDER**

**1.** **Briefing Note** to the Minister (see attached **APPENDIX "C")**

- › outline a chronology of events
- › identify contravention of Act involved
- › Have there been attempts to resolve this matter before the Ministerial Order was requested (detail)?
- › Were parties advised that a Ministerial Order might be issued if they did not comply?
- › Were the contents of the Ministerial Order discussed with named parties?

**2.** **Minister or Deputy Minister** is presented written materials and is verbally briefed by staff.

**3.** Six copies of Order are normally prepared.

**4.** **Minister or Deputy Minister** must sign Ministerial Orders.

**5.** In an emergency, note **Administrators** can issue interim Emergency Orders under Section 128 and the *Emergency Spill Regulations*. The Emergency Orders are only valid for 3 business days unless ratified and confirmed by Minister or Deputy Minister.

**G. SERVICE/FILING**

**1.** **Section 24 of the Environment Act**

| | | | |
|---|---|---|---|
| › | personal service (Recommended) | - | Section 24(1)(a) |
| › | fax and receipt - | | Section 24(1)(b) |
| › | 5 days after mailing to last known address | - | Section 24(1)(c) |
| › | Registered owner - 5 days after sent to address on assessment role | - | Section 24(1)(d) |
| › | recognized agent | - | Section 24(2) |
| › | substitute service ordered by court | - | Section 24(3) |

**2.** **Affidavit of Service to be completed by NSE Staff. (APPENDIX "D").**

**3.** File copy available through the **Environmental Registry.** Section 10(1)(d).

**H. AMENDING/REVOKING MINISTERIAL ORDERS**

**1.** Section 131(1)(b) [revocations] - Section 131()(a) [amendments]. Each year staff should review outstanding orders and determine whether they should be revoked. Sample revocation orders are attached.

**2.** Section 131(2) of *Act*. Formal amendments and revocations to be served following the same process used in serving the original Ministerial Order.

**I. DEPARTMENT DOING WORK**

**APPENDIX "A"**

**SECTION 129 CHECKLIST**
**Section 129 – *Environment Act***

Before issuing a Ministerial Order, staff need to consider the following matters. Section 129 recognizes there will be cases when this information is not available or accessible. If this is the case, note this on the form.

| | *Section No.* | *Question* | *Answer* | *Comments* |
|---|---|---|---|---|
| 1 | S. 125<br><br>S. 126<br><br>S. 127<br><br>S. 128 | Who is/are the persons to be named in the Ministerial Order? Are they present day owners/occupiers/operators or past owners/occupiers/ operators? Are they directors/officers, employees of the corporation?<br><br>Identify current and last owners/operators and include rationale for naming or not naming them in the Ministerial Order. | 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) - Revoked for non-payment<br><br>Ernest A. Nicholson Limited - Revoked for non-payment<br><br>Michael Lawrence<br><br>Roy Brown<br><br>3076525 Nova Scotia Limited | Current Property Owner<br><br>Named on lease agreement as co-lessor<br><br>Director of 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson Limited<br><br>Director of 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson Limited<br>Mr. Brown is at the site regularly and still exercises some care and control over the site<br><br>3076526 Nova Scotia Limited is the current operator and named as Lessee" on lease agreement. They have continued C and D recycling operation from 2005 to present. |
| 2 | S. 129(1)(a) | When did the substance become present on site? | Unknown - NSE determined in 2010 review of data from ground water monitoring program that an offsite impact to domestic wells is occurring from the property at 1275 Old Sambro Road, | Roy Brown and Michael Lawrence - Directors of 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) stockpile material in anticipation of an approval to dispose of construction and demolition debris. This was not approved and a further appeal was |

| | *Section No.* | *Question* | *Answer* | *Comments* |
|---|---|---|---|---|
| | | | Harrietsfield | denied by Nova Scotia Environment. A Remedial Action Plan allowed for an engineered cell to be constructed and debris to be disposed. In December 2005 Halifax Regional Municipality allowed for a C and D recycling operation to be licenced on the site for processing and transfer only and 3076525 Nova Scotia Limited began a 5 year lease of the operation. |
| **FOR OWNER, OCCUPIER OR OPERATOR ASK (PRESENT/PREVIOUS)** | | | | |
| 3 | s. 129(1)(b)(i) | Was the substance present when the person came an owner, occupier or operator? | Unknown<br><br>YES | The owner, 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) are believed to have caused the initial release.<br><br>3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson Limited (as the "Lessor") are in a lease agreement with 3076525 Nova Scotia Limited (as the "Lessee").<br><br>3076525 Nova Scotia Limited - signed the lease agreement for PID # 41056102, known as 1275 Old Sambro Road, Harrietsfield on November 1st, 2005 and they were aware of the initial release and contamination. It is believed they have caused a further release. |
| 4 | S.129(1)(b)(ii) | Did the person know, or should the person have reasonably known, that the substance was present? | YES | Water quality monitoring has been done quarterly on the site for the last 5 years and there are |

| | *Section No.* | *Question* | *Answer* | *Comments* |
|---|---|---|---|---|
| | | (Subjective test) | | samples going back to 2003 indicating impacts and concerns in the groundwater on the site. Results from the water monitoring program were delivered to Nova Scotia Environment from the companies 3076525 Nova Scotia Limited and 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) prepared by their consultants. |
| 5 | S.129(1)(b)(iii) | Would the substance have been discovered if the person had exercised due diligence in ascertaining the presence of the substance before taking ownership, occupation or operation? (objective test) | YES | The company 3076525 Nova Scotia Limited (formerly RDM Recycling Limited) had all the data from the groundwater monitoring program as copied and presented to NSE. |
| 6 | S.129(1)(b)(iii) | Did the person exercise due diligence in ascertaining the presence of the substance before taking ownership, occupation or operation? | Unknown | |
| 7 | S.129(1)(b)(iv) | Was the presence of the substance caused solely by an independent third party? | NO | The site has been used by other contractors but under the care of the present owners |
| 8 | S.129(1)(b)(v) | Would the person have received an economic benefit based on the relationship between the price paid and the fair market value if the substance had not been present on the site? | YES | 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) and Ernest A. Nicholson Limited (as the "Lessor") are in a lease agreement with 3076525 Nova Scotia Limited (as the "Lessee") with an expiry of October 31st, 2010. At that time there is an option that the contract can be either renewed another 5 years or the property can be purchased. |
| **FOR PREVIOUS OWNERS, OCCUPIERS, AND OPERATORS ASK:** | | | | |
| 9 | s.129(1)(c) | Did the previous owner | | Not Applicable |

| | *Section No.* | *Question* | *Answer* | *Comments* |
|---|---|---|---|---|
| | | dispose of the site without disclosing the presence of the substance? | | |
| **FOR ALL PERSONS RESPONSIBLE ASK:** | | | | |
| 10 | s.129(1)(d) | Did the person take all reasonable care to prevent the presence of the substance? Address the "due diligence" defence. | Unknown | |
| 11 | S.129(1)(e) | Did the person ignore industry standards in effect at the time? Are there industry standards? | NO | There is no approval for disposal on this site and C and D Recycling is not covered under the Acts and Regulations of NSE. The company 3076525 Nova Scotia Limited has been compliant in operating under HRM By Laws and permits for the last 5 years. |
| 12 | S.129(1)(e) | Did the person comply with the requirements of applicable enactments in effect at the time? | Not applicable. | |
| 13 | S.129(1)(f) | Did the person contribute to further accumulation or continued release of the substance after becoming aware of it? | Unknown | The impacts observed in the groundwater increase over the time period that the operators continued the operations of the previous owners. Cannot separate a time where contamination stopped or decreased. |
| 14 | S.129(1)(g) | Did the person take steps to deal with the substance after becoming aware of it? | NO | NSE informed the owners and operators in July 2010 of the impact. This Order is to lay out directions to take. |
| 15. › Are there any other factors that are relevant? No<br>› If yes, explain? S. 129(1)(h)<br>› Could the pollution be coming from adjacent lots? NO | | | | |
| 16. › Enclosed find copies of deeds to the property. YES | | | | |
| 17. › If corporations/partnerships/businesses are named, enclosed find a printout from the | | | | |

| | Section No. | Question | Answer | Comments |
|---|---|---|---|---|
| | | Registry of Joint Stocks (424-7770) YES<br>› Who is the recognized agent?<br>› Recognized Agent for 3012334 Nova Scotia Limited (formerly RDM Recycling Limited) Is Dawn Lawrence<br>› Recognized Agent for Ernest A. Nicholson Limited is Dawn B. Lawrence<br>› Recognized Agent for 3076525 Nova Scotia Limited is Richard K. Jones | | |
| 18. | | A briefing note needs to be prepared for the Minister. Address items set out in Section 125 of the *Environment Act* (what are the reasonable and probably grounds). The note should address measures taken to achieve compliance before the Order is prepared. | | |
| 19. | | A draft of the Ministerial Order including Schedule "A" terms and conditions to be forwarded. Note S. 125 and S. 129(2). | | |

## Standard of Review

[85] The standard of review of reasonableness applies to both the terms of the Order and to the naming of parties in the Order.

[86] In *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2014 NSSC 191, Murphy J. determined an appeal by IMP from a Ministerial Order brought under s. 125 of the *EA*. Beginning at para.19, Murphy J. reiterated that the standard of review on such an appeal is one of reasonableness:

> STANDARD OF REVIEW
>
> [19] The parties agree, and so do I, that the test to be applied on this appeal is whether the Minister acted reasonably in issuing the Order. That standard of review applies to both issues; that is, to the terms of the Order and to the naming of parties. I am going to make some general comments on the standard, not detailed because the principle is not disputed, and then I will weigh each issue in the context of that standard.
>
> [20] **Dunsmuir v. New Brunswick**, 2008 S.C.C. 9 ("**Dunsmuir**") significantly updated the law on judicial review and held that a minister's decision must fall within a range of possible acceptable outcomes which are defensible in respect of the facts and the law. The parties agree that the onus is on IMP as the appellant to establish that the Order was outside the scope of the Minister's reasonable options. It is also acknowledged by the parties and not in dispute that a statutory appeal of a discretionary Ministerial decision is a form of judicial review which attracts the reasonableness standard; that was noted in **Dunsmuir**, and also in

**Canada (Citizenship and Immigration) v. Khosa**, [2009] 1 S.C.R. 339 ("**Khosa**").

[21] In **Attorney General of Canada v. Abraham**, 2012 F.C.J. No. 1324 [FCA] the Federal Court of Appeal ruled that decision makers have a margin of appreciation within the range set by **Dunsmuir**. The breadth and the range of the reasonableness of an order is affected by the context: the more factual or policy oriented the matter is, the broader the range; the greater the legal content in a discretionary matter, the narrower the range. Those range spectra are all in the context of deference under **Dunsmuir**.

[22] In **Almon Equipment Ltd. v. Canada (Attorney General)**, 2010 F.C.J. No. 948 [FCA] the Court held that to act reasonably a tribunal must make its decision in accordance with the prescribed statutory procedures or recipe. The elements of the recipe must be meaningful and completely considered. The law in Nova Scotia is that the Minister must take relevant considerations into account and not act on irrelevant ones (**Pinsonnault-Flinn v. Nova Scotia (Minister of Environment and Labour)** 2004 N.S.J. No.613 [NSSC], **Margaree Environmental Assn. v. Nova Scotia (Minister of Environment)** 2012 N.S.J. No. 430 [NSSC]).

[23] Proper application of the reasonableness standard was outlined as follows in **Khosa**, supra, at para.59:

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir, at para.47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[24] I agree with the Attorney General that exercise of Ministerial discretion under the *EA* involves questions of fact and policy and the legislation contemplates substantial Ministerial discretion. The Minister's decision invites review with considerable deference, as the range of outcomes for his decision making process leans more toward the broader end of the spectrum.

[25] The ultimate question for the Court is not whether the Court agrees with the Minister's decision to issue the Order; it is whether the Minister's Order falls within "a range of possible acceptable outcomes which are defensible in respect of the facts and law." In any such case, the Court may doubt the correctness of an administrative decision, but nevertheless uphold its reasonableness. I will conclude reference to authority on the reasonableness test by noting that the Nova Scotia Court of Appeal has recently summarized what is required in **Egg Films**

**Inc. v. Nova Scotia (Labour Board)** 2014 N.S.J. No.150. Justice Fichaud said as follows:

> Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't – What does the judge think is correct or preferable? The question is – Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy.

[87] Murphy J. went on to state at paras. 35-39:

> [35] One possible outcome of the Minister's review process was to accept the Dillon/IMP position and it is not for me to decide whether that view is the better one. What I must decide is whether it was reasonable for the Minister to make the Order that he did – was it a possible reasonable outcome in the context of the Record before him, including the Dillon Reports and IMP submissions?
>
> [36] In doing so, I must essentially determine if it was reasonable for the Minister to issue the Order despite the information IMP provided, not whether it was correct for him to reach one result or the other.
>
> [37] I have carefully reviewed the Record, considered counsel's submissions and I am satisfied based on the information before the Minister as disclosed by the Record that he acted reasonably in issuing the Order. Doing so was one of the reasonable outcomes in the circumstances. The Record, in my view, supports one reasonable outcome of the Minister's deliberation to be requiring the use of off site monitor wells as a component of a hydrogeological field study to assess and characterize groundwater contamination as a first step in the four stage process outlined in the Order's terms and conditions.
>
> [38] In short, I find the two directives in paragraphs 1.0(a) and (b) of the 'Terms and Conditions' are supported by the Record and represent a reasonable outcome which should not be set aside on appeal, given the level of discretion the Act gives the Minister and the deference to which his decision is entitled.
>
> [39] I have identified the information in the Record which supports the Minister's decision -- information which I find to be sufficiently compelling that the outcome is not unreasonable in the context of the contradictory opinions provided by Dillon and IMP. The Record gives the Minister a rational basis to require a hydrogeological field study off site using groundwater monitor wells,

not domestic wells. Relevant portions of the Record include those referenced in the following paragraphs.

[88] Murphy J. also stated, at para. 28:

> [28] In my view the Court may only review for error. The determination whether the matter is necessary for the preservation and protection of the environment was for the Minister to decide. No fresh evidence has been admitted under s.138(3) in this case – my role is to decide if the Minister erred by making an unreasonable decision, not to decide if the Order was necessary for the preservation and protection of the environment.

[89] Murphy J. concluded, stating at para. 50:

> [50] All of the documents to which I have referred were before the Minister; they are in the Record. Mr. Check's memorandum of October 22, 2014 (Tab 156) shows that the Department considered IMP's position and the alternatives it proposed, but that the Department's hydrogeologist was not persuaded. Mr. Check's recommendations set out in the Record are reflected in the Minister's Order which is under appeal.
>
> [51] One reasonably possible outcome of the Minister's deliberations was to issue the Order that he did. It was not unreasonable for him to issue the Order, which was strongly supported by the information provided by the staff in the Department of Environment after considering the alternative positions advanced by IMP and Dillon.
>
> [52] I have reviewed the particulars of the Order against the provisions of s.125 of the *Environment Act* and find all the directions in the Order to be within the authority provided to the Minister under the Act.
>
> [53] The first ground of appeal, therefore, fails.

[90] A similar issue was raised in *Almon Equipment Ltd. v. Canada (Attorney General)*, 2010 FCA 193, wherein Stratas J.A. stated for the majority at paras. 31-33:

> **31** In both of the applications before this Court, the parties agreed that the standard of review of the Tribunal's decision is reasonableness.
>
> **32** Almon urged this Court to apply less deference than usual, owing to the circumstances of this case. This is against the Supreme Court's conclusion in *Dunsmuir*, [2008] 1 S.C.R. 190 *supra* that there are only two standards of review, namely correctness and reasonableness, rather than correctness and a reasonableness standard embracing multiple degrees of deference: *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 at paragraphs 18 to 21; *International Association of Machinists*

> *and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc.*, 2008 ABCA 400, [2009] 2 W.W.R. 215 at paragraph 12; *Guinn v. Manitoba*, 2009 MBCA 82, [2009] 9 W.W.R. 1 at paragraph 29.
>
> **33** For the purposes of these applications, I shall simply apply the now classic formulation of the reasonableness standard of review in *Dunsmuir, supra* at paragraph 47: this Court can interfere only if the Tribunal's decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[91] Clearly, the Ministerial Order in this case was discretionary. As such, it must be afforded considerable deference by this Court. The standard of review is reasonableness.

## ***Analysis***

[92] The Ministerial Order requires all of the named parties, including the appellant, to undertake a number of different remediation-type projects, including the development of a leachate management plan for the Property. The Property includes the containment cell. The estimated cost of cleanup relating to the containment cell is $10.6 million.

[93] In *Almon Equipment*, Stratas J.A., stated at paras. 38-41:

> **38** As mentioned in paragraph 18, above, subsection 30.15(3) of the Act is a mandatory recipe that the Tribunal must follow when considering remedies. Put in the language of the law of standard of review set out in *Dunsmuir, supra*, the range of possible, acceptable outcomes open to the Tribunal includes only those outcomes that are reached in accordance with this mandatory statutory recipe.
>
> **39** Turning to this statutory recipe, the word "shall" in subsection 30.15(3) requires the Tribunal, when considering remedies, to consider all of the criteria in that subsection. If the Tribunal fails to consider meaningfully or completely any of these criteria, or if it artificially cuts down or limits any of these criteria, it is disobeying Parliament's requirement in the subsection and is not reaching an outcome that can be viewed by a reviewing court as within the range of the possible or acceptable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraphs 39 and 41. Finally, as mentioned in paragraph 23, above, while considering these criteria, the Tribunal must have the purposes of this regulatory regime front of mind.
>
> **40** In this case, the Tribunal did touch on all of the matters under subsection 30.15(3) of the Act, including the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*) of the Act. But it inappropriately narrowed its examination under that paragraph, and in so doing,

> failed to follow, meaningfully and completely, all parts of Parliament's mandatory recipe under subsection 30.15(3). Under paragraph 30.15(3)(*c*), the Tribunal looked at whether the evaluators applied the proper criteria to Almon's proposal. But there was a larger live issue potentially casting into doubt the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*). Before the Tribunal was an entire body of evidence, which it largely accepted, showing that the evaluators' record-keeping and procedures during the evaluation were less than desirable, and perhaps unacceptable.
>
> **41** This body of evidence (at paragraphs 39 to 41) could certainly be capable of casting into doubt the "integrity and efficiency of the competitive procurement system" under paragraph 30.15(3)(*c*), especially when one recalls the important purposes underlying this regulatory regime.

[94] Similarly, before me is a body of evidence that shows the Briefing Note and Checklist relied on by the Minister to explain the relationship between the appellant (and certain other parties named in the Order) and the containment cell was deficient. The s. 129 *EA* factors cannot be properly considered by the Minister without a fair picture of the situation being presented.

[95] As Stratas J.A. concluded in *Almon Equipment*, at paras. 53-54:

> **53** In these applications for judicial review, this Court must ask whether the Tribunal made a decision that is within the range of possible, acceptable outcomes which are defensible. The range of possible and acceptable decisions that was available to the Tribunal includes only those where the Tribunal has made its decision in accordance with the statutory recipe set out by Parliament. The elements of that recipe must be meaningfully and completely considered. Having not considered how the evaluators' conduct affected the integrity of this procurement process, the Tribunal did not meaningfully and completely consider subsection 30.15(3)(*c*) of the Act, as it was required to do. Further, the Tribunal did not consider the range of remedies available to it under subsection 30.15(2) of the Act, as it was required to do. As a result, the Tribunal has not reached a decision that is within the range of possible, acceptable outcomes which are defensible.
>
> **54** So that there is no misunderstanding, I wish to emphasize that I have made no findings concerning what I have described above as "the body of evidence." That is for the Tribunal to do if the matter is remitted back to it, as I shall suggest. After the matter is remitted back to it, the Tribunal's job will be to receive whatever additional evidence it considers appropriate in light of these reasons, examine all of the evidence including "the body of evidence", make appropriate findings from that evidence, and apply subsections 30.15(2) and 30.15(3) of the Act, all in accordance with the important purposes of this regulatory regime.

[96] The appellant argues that the lack of information provided to the Minister about the containment cell is relevant to the integrity and efficiency of the Ministerial Order. Additionally, the appellant argues that requiring it to develop a comprehensive leachate management plan for the Property that includes addressing the containment cell issues is inequitable. The appellant argues:

> 2. The Ministerial Order does impose a specific requirement on the named entities to develop a leachate management plan. Your Lordship's letter asks whether the Ministerial Order requires a management plan that applies to "the containment cell located on the Property". The Ministerial Order required that a management plan be submitted "for the Site", which included the area of the containment cell.
>
> 3. The Ministerial Order issued November 5, 2010 provides as follows with respect to leachate management and monitoring:
>
> > ***7. Leachate Management and Monitoring***
> >
> > *Under the supervision of the Site Professional, review leachate management activities and monitoring for the site. Submit a revised quarterly leachate quality and level monitoring and management plan for approval to Nova Scotia Environment by February 28, 2011.*
>
> 4. Section 1 of the Ministerial Order defines the "Site" as "a construction and demolition recycling facility which is located at or near 1275 Old Sambro Road, Harrietsfield in the Halifax Regional Municipality".
>
> 5. The Appellant submits that there is no dispute between the parties that the term "the Site" as used in the Ministerial Order refers to both the area of the Property on which the Appellant conducted its operations, and the larger area on which the previous operator, 3012334 Nova Scotia Limited (formerly RDM Recycling Limited; hereinafter, "**RDM**"), conducted its operations. (Brian Dubblestyne, in his Affidavit, identifies the different geographic extent of RDM's operations as compared to the Appellant's operations, at para. 27 and Appendix "B" to the Affidavit.)
>
> 6. The appeal record shows that Nova Scotia Environment ("**NSE**") used the term "site" to refer to an area of the Property that includes the containment cell. NSE'S November, 2003 letter to Terrain Group (RDM's consultants) approving the disposal of C&D waste in the containment cell refers to the "remedial work at the RDM site" (Appeal Record, Tab 73, p. 1). A later "Field Inspection Report" of NSE Hydrologist Melanie Haggart describes a "site visit… to check site operations and disposal cell…" (Appeal Record, Tab 122). This usage is consistent throughout the appeal record.
>
> 7. Further, the Appellant submits that an interpretation of Section 7 of the Ministerial Order that requires a "comprehensive" leachate management

plan applicable to the entire site – including the containment cell – is the only reasonable interpretation of that Section.

8. First, the appeal record does not suggest that NSE was concerned with leachate emanating from the Appellant's operations or even that the Appellant's operations were producing leachate. If Section 7 of the Ministerial Order was intended only to require a leachate management plan for the Appellant's operations, it would have been easily satisfied.

9. Second, in requiring the Appellant to submit a comprehensive leachate management plan for the "site" (including the containment cell), the Appellant reasonably understood the Ministerial Order to require the preparation of a leachate management plan for the *entire cell*, and not just for the leachate appearing in the existing leachate collection crock.

10. The low volumes of leachate in the leachate collection crock did not require a "management plan". Mr. Dubblestyne's Affidavit notes that there was never, from 2005 to 2014, a sufficient amount of leachate in the crock to warrant collection (Affidavit of Brian Dubblestyne, para. 44). The leachate collection system that fed into the leachate collection crock appeared to have failed. It was that leachate collection system that most required monitoring and "management".

11. The leachate management plan required by the Ministerial Order would therefore entail assessing the leachate collection system related to the containment cell, and monitoring/managing the source(s) and quality of leachate produced by the cell.

12. This type of monitoring and/or management of leachate would involve an investigation into the efficacy of the containment cell itself, and the containment cell's leachate collection/management system, as Mr. Dubblestyne states at paragraph 44 of his Affidavit:

> *44. Such a leachate management plan would necessarily require investigation into the efficacy of the containment cell built by RDM and approved by NSE…*

13. As noted in the Appellant's brief and the Affidavit of Brian Dubblestyne, the Appellant felt it was unable to comply with this requirement since the Appellant has never had the plans and as-built drawings for this cell and has refrained from touching it throughout its tenure as tenant on the Property (Affidavit of Brian Dubblestyne, para. 44). Without construction plans or drawings, the Appellant was not prepared to excavate in or around the containment cell in order to assess the leachate collection system.

[97] The respondent argues that requiring the appellant to remediate the Property, including the containment cell, is perfectly reasonable**:**

> 2. At outset of our response, the Respondent wishes to reiterate that what the Appellants have or have not done on the site since the issuing of the Ministerial Order is not relevant in considering whether or not the order Issued by the Minister was reasonable when it was issued in November 2010.
>
> 3. Item 7 of the Ministerial Order states "Under the supervision of the Site Professional, review leachate management activities and monitoring for the site. Submit a revised quarterly leachate quality and level monitoring and management plan for approval to Nova Scotia Environment"… Furthermore section 1 of the Ministerial Order defines the "Site" as "a construction and demolition recycling facility which is located at or near 1275 Old Sambro Road, Harrietsfield in the Halifax Regional Municipality.
>
> 4. The MO does not specifically state that a 'comprehensive leachate management plan for the containment cell' is required. The requirements were set for all sources of leachate on the site. At the time of the issuance of the Ministerial Order there were multiple potential sources of leachate.
>
> 5. Leachate was sourced from materials being processed on the site by 307 NSL, including gyprock and plaster required a management plan, in addition to the leachate in the containment cell. Materials including wood with gyprock and/or plaster attached to it were being stockpiled on bar[e] ground by 307 and then ground up by 307 into a product known as "matrix". Matrix was stockpiled on bare soil and exposed to precipitation.
>
> 6. At Tab 124 of the Appeal Record is an Inspection Report dated February 15, 2010 notes "Plaster (lath and plaster) is ground on site and is directly upgradient of wells having uranium exceedances…there are cement barriers on site separating material, but these are not water tight". Also at Tab 141 a site inspection dated August 6, 2010, contains the observation of 'grinding off pad (some gyprock mixed in). Photos 2, 10, 11, 14, 15 and 19 at Tab 183 were taken during the site inspection of August 6, 2010.
>
> 7. Leachate and runoff from 'matrix" product which included ground gypsum and plaster and the stored gyprock likely had elevated calcium and may have entered groundwater. This was a possible source of changes in groundwater quality on the site and the domestic wells located directly downgradient (ie in the primary direction of groundwater flow) from the processing area. This is consistent with groundwater flow directions reported by the Appellant's consultants (Tab 8 page 6 of the Supplemental Appeal Record).

8. With regards to the containment cell, the Appellant has stated that they have not had the plans and as-built drawings for this cell. It is not clear if the Appellant has made any attempt to obtain copies of the plans from the firm which designed and oversaw the building of the cell, or if the Appellant has made any attempt for additional information and obtain copies of the plans from the former operator/site owner, with whom they had a contractual relationship that apparently included monitoring the containment cell.

9. The Appellant was measuring the leachate in the crock, exercising some degree of care and control over the leachate. The Appellant's staff showed NSE staff the leachate in the crock during site inspections (see for example, Appeal Record, Tab 124). The Appellant did not provide information to NSE about consistency of the leachate levels in the crock or any conclusions they had come to about the efficacy of the leachate collection system after NSE communicated concerns about impacts to groundwater.

10. The Appellant did not provide documentation to NSE of a contractual relationship with the site owner which included monitoring but excluded responsibility for the management of the leachate collection system in the cell. There is nothing in the record to show that 307 NSL referred any concerns about the low levels of leachate in the crock to the site owners whom they consider responsible for the cell and the leachate.

11. No definitive evidence has been presented by any party prior to, or since the Ministerial Order was issued that the containment cell is actually leaking, or that the impacts to domestic wells are attributable only to a leaking containment cell rather than to leachate derived from 307's recycling operation. There is also nothing in the record to support Mr. Dubblestyne's inference that 307 NSL's observation of a consistently low level of leachate in the crock means that the containment cell is leaking. In fact, it could indicate that the cap on the cell is working successfully to prevent infiltration of water into the cell and that the volume of whatever leachate was released from the encapsulated waste and captured by the collection system, after it was capped, has stayed the same, with no additional infiltration of water.

12. In fact, the Appellant's own consultant, Jim Fraser of H2OGEO, in Appeal Record Volume 3, Tab 151, in his response to NSE on 307 NSL's behalf, addressing NSE's concerns about groundwater impacts, prior to the Ministerial Order being issued, stated in his Conclusions (page 5), "…it is extremely questionable as the (sic) whether the C & D waste disposal site has created a groundwater contaminant plume which is either 'likely' or 'very likely' adversely impacting neighbouring domestic wells.' In other words, prior to issuance of the MO, 307 NSL's own consultant made the opposite conclusion of whether the containment cell was leaking than the

position which 307 NSL is attempting to assert in this Appeal, that the containment (disposal) cell is responsible for the groundwater contamination.

13. Given the evidence available to NSE in October 2010, therefore, it was reasonable for NSE to include a requirement for a 'revised' leachate management plan in the Ministerial Order and to name 307 NSL as one of the persons responsible. While further investigative work may be necessary, the Minister must weigh and consider the Precautionary Principle set out in 2(b)(ii) if the *Environment Act* when issuing a Ministerial Order. It is submitted that the Minister acted reasonably based on the facts before him in issuing the Ministerial Order.

[98] In reply to the respondent's arguments in this regard, the appellant argues:

11. Beyond the transaction that resulted in the purchase of certain RDM's assets in November, 2005 and its lease, the Appellant had no contractual relationship with RDM, in relation to site monitoring, or otherwise. As indicated in the Affidavit of Brian Dubblestyne, the Appellant assumed the monitoring requirements for the site that were set out in the Remedial Action Plan ("**RAP**") that RDM had submitted to Nova Scotia Environment ("**NSE**") in 2003 (see Appeal Record, Tab 70; Supplemental Appeal Record, Tab 4). The Appellant, however, did so voluntarily (Affidavit of Brian Dubblestyne, para. 31). The Appellant was not contracted by RDM to perform the monitoring, and did not receive any compensation for doing the monitoring.

12. Finally, the Respondent's submissions are not correct in stating that there is "nothing in the record to support Mr. Dubblestyne's inference that 3076525 Nova Scotia Limited's observation of a consistently low level of leachate in the crock means that the containment cell is leaking" (Respondent's submissions, para. 11).

13. On the contrary, the RAP prepared by Terrain Group and submitted to NSE for approval, suggests that a conservative estimate of the amount of leachate that might be produced by a *properly constructed* and capped containment cell would be in the range of 250 to 2,500 imperial gallons per day (Supplemental Appeal Record, Tab 4, p. 2). The RAP states that "the cap [of the containment cell] will reduce infiltration"; it does not state that the cap will eliminate infiltration. A more recent NSE Memorandum dated February 5, 2010, indicates that NSE itself proposed a leak in the containment cell as one possible factor explaining the levels of certain parameters in some monitor wells. The Memorandum states at page 4:

> *In MW1-D, there are increasing trends in boran, sulfate, hardness, conductance, calcium, alkalinity, uranium and cadmium. All parameters fluctuate considerably more than in MW6-D, with*

> *particular drops in concentration in April monitoring events, followed by rebounds to higher concentrations, since April 2006. This variability could reflect surface water influence on this well, either due to leakage around the well casing or possibly due to the ingress of water through a leak in the C and D cell cover and/or berm just upgradient of the well. The integrity of the well construction and waste cell cover and berm should be evaluated.*
>
> (Appeal Record, Tab 118, p. 4; Emphasis added)

14. Mr. Dubblestyne's conclusion that the containment cell is likely leaking, is, therefore, supported by the evidence in the record.

[99] From the overall record in this appeal, it appears unlikely that the containment cell is the sole source of contamination originating from the Property. The Ministerial Order is therefore reasonable in all aspects except one. Is it reasonable and equitable to require the appellant to undertake what could be a $10.6 million dollar cleanup of the containment cell if the Ministerial Order was fundamentally and detrimentally affected, in that the Minister was not made aware of the relationship or lack thereof between the appellant and the containment cell? Can that aspect of the Order be considered reasonable if the Minister was not provided a fair picture of the situation?

[100] There are no facts that substantiate the containment cell is the sole source of contamination originating from the Property. At the time the Ministerial Order was issued, the Minister was aware:

1. from an analysis of data collected from wells from 2002-2009, all seven domestic wells located downgradient of the site are considered "very likely" or "likely" influenced by groundwater plume source from the site;

2. the plume is believed to be the source of dissolved uranium, boron, calcium, sulfate and elevated alkalinity, total organic carbon and other contaminants of concern;

3. the worst impacts to the domestic wells were to wells that were immediately downgradient of the area of the site on which the appellant was operating, in the direction of the groundwater flow as determined by the appellant's consultant; the Property hosts a containment cell containing C&D debris;

4. the property hosts [at the time of the ministerial order] a currently operating C&D recycling operation where water has contact with C&D materials and can infiltrate into the ground;

5. the same C&D materials, including gyprock, which were believed to have caused impacts in the groundwater in 2001 – 2002, were also processed and stored on the property after the Appellant started operating business there between 2005 – 2010;

6. both the containment cell and the appellant's business could be the source of the groundwater plume.

7. the identified plume is sourced from the RDM site. This conclusion is based on the facts that groundwater upgradient of the site is not contaminated, groundwater on the site is contaminated, and groundwater flow directions, determined by the site operator's consultants, indicate that the impacted offsite groundwater can only be sourced from the site. The site hosts both a capped disposal cell containing construction and demolition (C&D) debris, and a current C&D materials recycling operation, where water which has contacted C&D materials can infiltrate into the ground, both of these could be the source of the groundwater plume.

[101] I want to emphasize that I make no findings concerning the quality or nature of the evidence presented on this appeal. That will be for the Minister to do if and when the matter is remitted back to him, as I will recommend in relation to Clause 7 of the Order. After the matter is remitted back to the Minister, his job will be to receive whatever additional evidence he considers appropriate in light of these reasons, examine all of the evidence, including the evidence presented on this appeal, and make appropriate findings from that evidence. The Minister will then apply the s. 129 *EA* factors, all in accordance with the legislative principles delineated by the *EA*.

[102] For the foregoing reasons, I allow the appeal in part and remit the matter back to the Minister for redetermination solely in relation to Clause 7 of the Order, which refers to cleanup of the containment cell and states:

> **7. Leachate Management and Monitoring**
>
> Under the supervision of the Site Professional, review leachate management activities and monitoring for the site. Submit a revised

> quarterly leachate quality and level monitoring and management plan for approval to Nova Scotia Environment by February 28th, 2011.

***The Majority of the Order***

[103] In relation to the majority of the Order, there is no evidence to indicate that the containment cell is the sole cause of the contamination in question. In fact, the body of evidence presented on this appeal suggests otherwise. Just because some of the contamination pre-dates the appellant's use of the Property does not lead to the inescapable conclusion that the factors in s. 129(1)(a) and s. 129(1)(b)(l) of *EA* have been met. For at least five years, the appellant stored gyproc and other potentially hazardous materials on its site exposed to the elements for thirty days at a time. The leachate created by the appellant's operations could have contributed to some of the cumulative harm being considered on this appeal.

[104] The apportionment of blame for the contamination does not have to be quantified with exactitude by the Minister for the purposes of issuing a Ministerial Order. As the appellant acknowledges, in *Pracz v. Nova Scotia (Environment and Labour)*, 2004 NSSC 61, Pickup, J. noted at para. 43:

> [43] These comments by the Alberta Court are equally appropriate here. The Minister here, similar to the Minister in Alberta must balance many interests and policies which flow from the *Act* and therefore deference to these decisions are appropriate. Although these Orders have been issued against the Praczes with particular sanctions, there is nothing to prevent an action by the Praczes against others whom they consider responsible or liable. The Minister has not fixed civil liability on the Praczes but rather based on his mandate under the *Environment Act* has decided a course of action to deal with an environmental issue and as such requires deference from the Court.

[105] The quantification of blame attribution as between the entities subject to the Ministerial Order is not critical as long as the *de minimus* standard has been met. The Minister has broad discretion and the reviewing Court cannot impose a standard of review approaching an exacting level of scrutiny. As Duncan J. determined in *Elmsdale Landscaping Ltd. v. Nova Scotia (Environment)*, 2009 NSSC 358, at paras. 27-30:

> [27] The **Environment Act** does not contain a privative clause, however, this does not imply a high standard of scrutiny, where other factors bespeak of a lower standard. It is but one of the four factors to consider. I note the broad powers of this court when sitting on appeal but that is not conclusive of the analysis.

> [28] The **Environment Act** is a public interest statute which contains a discrete administrative regime. The words of Justice Coughlan in *Fairmount Developments Inc., v Nova Scotia (Min of Environment)* 2004 NSSC 126, at para 45 are, in my view, pertinent:
>
> > The purpose of the **Environment Act** is to support and promote the protection, enhancement and prudent use of the environment, while recognizing certain specific goals. It is a polycentric issue involving a balancing of various contingencies and factors to achieve its purpose. It is more political than legal in nature. Thus, the appropriateness of the court's supervision diminishes suggesting great deference.
>
> [29] The Minister, in the context of this application, is provided all necessary powers to review applications and can approve or refuse approval, or vary, or set terms and conditions for approval. In doing so, he is charged with balancing a number of interests identified in the purposes of the **Act**. There is a large measure of policy that must enter into the decision making process.
>
> [30] I conclude that the Minister's decision is afforded a high level of deference rather than exacting scrutiny.

[106] As noted previously, s. 2(b)(ii) of the *EA* states:

> (ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.

[107] The appellant points out on this appeal that it took many steps to differentiate its use of the site from the previous operators, RDM. According to the Appeal Record, some of the most noteworthy activities include: 1) the appellant properly disposed of 6,000 tonnes of non-recyclable material that had been stockpiled by the previous owners following the capping of the containment cell; 2) the appellant created an asphalt pad to store the recyclable materials brought to the Property to try and reduce groundwater run off; 3) the appellant did not allow materials to be exposed to the elements for more than approximately thirty days; 4) the appellant restricted the amount of non-recyclable materials that would be accepted on site (but did not eliminate receipt of those materials); 5) the appellant continued to fund groundwater testing. None of this alleviates the possibility that the appellant's operations have contributed to the cumulative harm reported.

[108] The appellant ran a recycling company on the Property from 2005 at least through to the issuance of the Ministerial Order in 2010. The appellant's recycling company handled materials similar to the previous recycling company on the same

property and allowed "problem" materials to be stored on site, exposed to the elements (even if on an asphalt pad) for approximately thirty days. I am not determining liability. Instead, I am determining whether the Ministerial Order was reasonable. The appellant has filed the affidavit of Brian Dubblestyne, director and secretary of the appellant company. The affidavit of Mr. Dubblestyne was not available to the Minister at the time the Order was issued. Instead, the affidavit was sworn almost four years after the issuance of the Ministerial Order. Nonetheless, it is interesting to note that in discussing the operations of the appellant, Mr. Dubblestyne swore:

> 25. Since starting C&D transfer operations on the Property in November, 2005, 307 NSL has taken significant care to prevent the presence of any contaminant over, in, on or under the Property.
>
> 26. Upon starting operations 307 NSL immediately commenced removal of over 6000 tonnes of unrecyclable material that had been stockpiled on the Property by RDM, including carpet, wood, gyproc, plastics, tires and roofing shingles. This stockpiled material was located in four distinct areas, highlighted in yellow in the annotated RDM Site Plan attached at Exhibit "B". The material removed from each area is described in the list of site improvements attached as Exhibit "C".
>
> 27. 307 NSL also significantly reduced the overall footprint over which sorting and processing activities took place, effectively decommissioning the areas marked 1 to 3 on the attached RDM Site Plan (see Exhibit "B"), and concentrating all activities in "Area 4". After decommissioning Areas 1-3, 307 NSL graded those areas and added ditching to control surface water run-off.
>
> 28. Within "Area 4", where 307 NSL concentrated site operations, 307 NSL implemented the following physical features to decrease the change of environmental harm arising from its operations on the Property:
>
> (a) after removing stockpiled material from Area 4 and any other base material present, 307 NSL added 600 cubic yards of clay to the area;
>
> (b) 307 NSL segregated the of receiving and processing areas, as indicated in the diagram attached as Exhibit "D";
>
> (c) 307 NSL paved the receiving area and increased the size of the paved processing area, again as indicated in the attached diagram;
>
> (d) 307 NSL created storage bunkers for specific material, as indicated on the attached diagram;
>
> (e) improved loading and unloading materials;

29. 307 NSL has spent approximately $723,874 implementing the above site and operational improvements. The table attached at Exhibit "E" indicates the approximate cost associated with the improvements in the list of site improvements at Exhibit "C".

30. Whereas the RDM's operations involved the storage of material on the Property for months/years, 307 NSL's operations involved only the temporary storage of C&D waste, typically less than 30 days. In addition, because of its imposition of controls over the nature of the waste which it accepted, 307 NSL received approximately 60% of the volume of material received by RDM when it oversaw operations. Tonnage receipts for RDM versus those for 307 NSL for select years for which records available are as follows:

| Year | Annual Receipt RDM | Annual Receipts 307 NSL |
|---|---|---|
| 2003 | 26,981.46 | |
| 2004 | 27,913.46 | |
| 2007 | | 19,200 (approximate) |
| 2008 | | 16,368.39 |
| 2011 | | 16,598.32 |
| 2012 | | 11,518.77 |
| 2013 | | 9,758.69 |

The listed tonnage for 307 NSL are representative, and years for which records are available but which are not shown had similar values. The figures for RDM's tonnage receipts are the only ones available to 307 NSL.

31. 307 NSL, although not legally obligated to continue the monitoring obligations of RDM pursuant to the remedial action plan, voluntarily continued monitoring the wells specified in that plan on a quarterly basis, at an approximate cost of $32,000 per year. 307 NSL undertook the monitoring because it was concerned the monitoring would be terminated once RDM was no longer operating. The cost of monitoring has since increased to approximately $50,000 per year as a result of 307 NSL's response to the Ministerial Order.

> 32. 307 NSL carried on most of its receiving and sorting operations on a paved pad. In this area of the site any materials accepted for receipt were deposited and sorted by type into containment bins for loading and removal by truck to customers or to HRM's approved C&D disposal site. 307 NSL did not accept materials that were not classified as construction and demolition material. In addition, it only received gyproc board in small volumes incidental to the receipt of other material.

[109] As referenced in the October 29, 2010 report of Melanie Haggart, the appellant had provided their own experts' reports to NSDE. It is clear that Ms. Haggart had reviewed the appellant's report but was not in agreement with their position. It is equally clear that NSDE was aware that leachate and run off predating the appellant's involvement at the site likely had a detrimental impact on the downgradient and crossgradient properties. Additionally, NSDE acknowledged that leachate or runoff from the containment cell likely had a detrimental impact on the impacted properties. NSDE determined that the ongoing operations on the Property, including the appellant's operations, may have cumulatively caused the detrimental impact on the environment. It appears, according to the unrefuted evidence of Mr. Dubblestyne, that when the appellant took over operation of the site in 2005 it instituted standards of care that were far superior to those of the previous operations.

[110] Based on the record, the majority of "blame" for the pollution would appear to fall on the previous businesses located on the site, in particular the previous version of RDA. That earlier business left unrecyclable materials exposed to the elements for years, leaching chemicals into the soil, the groundwater, etc. Additionally, in cooperation with NSDE, that earlier business created a containment cell holding 120,000 tons of unrecyclable material, which according to the record, may be leaching pollutants into the local water supply. However, the appellant operated a recycling facility from 2005 onward and Mr. Dubblestyne agrees that some of the more environmentally hazardous material, including gyproc, were accepted onto the Property between 2005 and 2010 (and beyond). Although the post-2005 materials were not exposed to the elements for the same length of time as would have been the case prior to the appellant's taking over the site, these materials were still exposed to the elements for approximately thirty days.

[111] As is noted by NSDE, the level of contaminants in the downgradient and crossgradient domestic wells has increased during the course of the appellant's tenure at the site. One reasonable interpretation of the record is that the appellant's

operations have contributed to this pollution. The "polluter pay" principle as legislated in s. 2(c) *EA* catches the appellant in its net. The precautionary principle as delineated in s. 2(b)(ii) *EA* also supports the issuance of the Ministerial Order, with the exception of Clause 7, in relation to the appellants.

[112] The appellant blames NSDE for approving the containment cell and failing to ensure that it was constructed properly. The appellant also points to ss. 129(1)(d), 129(1)(e), 129(1)(f), and 129(1)(g), which state:

> **129 (1)** In deciding whether to issue an order pursuant to this Part, the Minister, an administrator or an inspector shall be guided by the following considerations, if such information is available or accessible to the Minister, an administrator or an inspector:
>
> (d) whether the person took all reasonable care to prevent the presence of the substance over, in, on or under the site;
>
> (e) whether a person dealing with the substance ignored industry standards and practices in effect at the time or complied with the requirements of applicable enactments in effect at the time;
>
> (f) whether the person contributed to further accumulation or the continued release of the substance on becoming aware of the presence of the substance over, in, on or under the site;
>
> (g) what steps the person took to deal with the site on becoming aware of the presence of the substance over, in, on or under the site.

[113] While the appellant may have taken giant steps to run a more responsible business than the previous owners when it took over operations in 2005, that does not preclude the possibility that it also continued to cause contamination to the Property and the environment. Reducing the risk of environmental harm and eliminating the risk are two very different results. The asphalt pad constructed by the appellant where some of the materials were stored was not watertight. As the respondent notes, surface water from the appellant's storage areas ran downhill toward one of the impacted monitoring wells and domestic wells:

> **FILE ACTIVITY REPORT**
>
> **Folder Name:** RDM Recycling Limited - 1275 Old Sambro Rd - Harrietsfield Incident
>
> **Approval Holder:**
>
> **File #:** 33000-40-BED-2010-1861424
>
> ---

**Contact Name:** Mr. and Mrs,. Bailey

**Staff:** Andrew Teal

**Date:** February 15, 2010

**Time:** 15:23

**Topic:** Well location and High Uranium in Well

Went to Bailey residence at 1321 Old Sambro Road - Well was indicated by Mr. Bailey to be 6 feet from house facing the RDM site, the well has a sub surface well head and not visible. Going out straight from the well following the maps available and the direction of water flow indicated under the ground through hydrogeologist's reports I then walked towards the RDM site and the berm in place. Over the berm is the operations of the present day transfer site. It should be noted that the well is down gradient of the operations now taking place and not the capped cell. This property has the highest levels of Uranium which may possibly be caused by current and past operations at the site.

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. . .

**INSPECTION REPORT**

| | |
|---|---|
| **ISSUED TO:** | Brian Dubblestyne |
| **INSPECTION DATE:** | February 15, 2010 |
| **MAILING ADDRESS:** | 105 Ketch Harbour Road Herring Cove Road, Nova Scotia B3V 1J4 |
| **SITE NAME:** | RDM Recycling Limited – 1275 Old Sambro Rd – Harrietsfield |
| **SITE ADDRESS:** | 1275 OLD SAMBRO RD. HARRIETSFIELD, NS |

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**OVERVIEW OF INSPECTION**

Went to RDM site with Melanie Haggart (Hydrogeologist for NSE) We introduced ourselves at the office and were given a tour by Austin Way - Site Manager of Operations 221-3622 (Cell) Notes to mention are no springs obvious around capped cell, some leachate in well but not much (still question of who hauls leachate for site) Many of the monitoring wells had no locks or broken locks. some are forced up out of ground so cover won't close. #2 wells located in a stream or wetland environment. Present operation is as a transfer site although there is processing of some material. Plaster (lath and plaster) is ground on site and is directly up gradient of the wells having Uranium exceedances well above

> the community baseline. There are cement barriers on site separating material, but these are not water tight.
>
> ---

[114] It appears that the appellant's efforts to reduce contamination were not wholly successful. And, while laudable, any efforts the appellant made to prevent contamination after the Ministerial Order was issued are not relevant to the reasonableness of the Ministerial Order at the time the Order was issued.

[115] One reasonable conclusion from the record is that the appellant was responsible for an adverse effect on the environment that is not *de minimus*.

[116] The appellant also argues that it was "inequitable" for the Minister to issue the Ministerial Order and that the Minister was estopped from doing so. The appellant relies on *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, where Sopinka J. said, at p. 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. …

[117] The appellant claims that it relied on various implicit and express representations made by NSDE that the operations taking place at the Property were compliant with the *EA* and were satisfactory to NSDE.

[118] The appellant claims that when meeting with NSDE representatives prior to purchasing the property, its representatives were not advised by NSDE of any concerns about ongoing C&D operations on the Property. The appellant claims that it relied on the fact that RDM was operating under a C&D licence from HRM when the purchase occurred as proof that there were no concerns about the property or the recycling operation.

[119] The appellant also claims that NSDE inspections during the five years of operation prior to the Ministerial Order being issued did not alert them to any significant problems under the *EA*. The appellant submitted quarterly monitoring results to NSDE during that time period.

[120] The appellant also says it did not receive a copy of the Remedial Action Plan prior to the Minister's order being issued.

[121] Finally, the appellant complains that NSDE's depth of knowledge regarding the environmental issues at the Property were far greater than its own and that as a result of the imbalance of knowledge it is "inequitable" for the Minister to include the appellant in the Order without providing it with full disclosure in advance to allow it to make complete representations.

[122] NSDE points out that they are bound by the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("*FOIPOP*"), and therefore cannot freely provide information to prospective purchasers. NSDE further argues that the appellant could have, as is the case with any prospective purchaser, applied under *FOIPOP* for information about the property it may have been interested in obtaining. The appellant was aware that the Property housed a recycling business and was home to a containment cell housing unrecyclable material. The fact that the appellant did not ask for further information about the containment cell from the previous owners, those involved in its construction or anyone else prior to purchasing the business, goes directly to the issue of due diligence. The appellant cannot blame NSDE for its own failure to conduct a proper investigation about the Property or the business prior to taking over this type of operation.

## ***Disposition***

[123] In accordance with the principles outlined in *Almon Equipment Ltd.*, *supra*, *Canada Post Corp. v. Connolly*, 2006 NSCA 3 and *Creager v. Provincial Dental Board of Nova Scotia*, 2005 NSCA 9, the appeal is granted in part. Clause 7 of the Ministerial Order is quashed in relation to the appellant and is remitted back to the Minister for redetermination in accordance with these reasons.

Arnold, J.