

From: <http://envirolaw.com/2008/06/19/lafarge-victory/>

Major Victory for Lafarge Neighbours and ECO

by Dianne Saxe



The Ontario Divisional Court has given a resounding victory to the Environmental Review Tribunal and to neighbours who oppose tire burning at the Lafarge cement plant in Bath.

Last spring, the ERT granted neighbours leave to appeal two certificates of approval, issued by the Ministry of the Environment to allow Lafarge to burn tires at its cement plant. The tires were intended to displace fossil fuel in cement production, while providing a waste disposal solution for the mountains of used tires. While the test for granting leave is stringent, and the proposed emissions met the MOE's usual criteria, the ERT gave four precedent-setting reasons why the neighbors should be permitted to appeal.

1. The Directors had not explained how their decisions complied with the Ministry of the Environment's mission statement, its Statement of Environmental Values. The ministry had never given the SEV much practical effect, referring to it only in the drafting of new legislation.
2. Emissions from tire burning might adversely affect the common law rights of neighbouring landowners.
3. The ministry proposed to allow tire burning in Bath while prohibiting it in the remainder of the province, creating a risk of inconsistent environmental effects between communities.
4. The Ministry has limited experience with regulating tire burning which, on a precautionary approach, must be assumed to have the potential for serious environmental risks.

While the appeal is already proceeding, Lafarge sought judicial review to quash the leave to appeal that the ERT had granted. The Ministry of the Environment intervened in support of Lafarge; the Environmental Commissioner of Ontario intervened on the side of the neighbours, to defend the importance of the SEV.

On June 18, the neighbors won a convincing victory. On every point, the court held that the ERT had acted reasonably in granting leave to appeal. While an appeal is possible, the court's unusually strong wording would be difficult to overturn.

What will this mean? It's too soon to predict how the actual Lafarge permits will be decided. But the case is likely to be important for years to come. It suggests that, when issuing any instrument, the MOE Directors must explicitly apply "an ecosystem approach and a precautionary approach" and must take into account the common law rights of neighbouring landowners. In addition, it will be more difficult for the Ministry to justify allowing emissions in one location that it does not permit in other communities. These will be major changes that could produce unpredictable results for many major projects.