

Applicant Number One

McLean, Don

Declaration of Ontario Residency:

I, Don McLean, am an Ontario resident and have been since .

Applicant Number Two

Korol, Robert

Declaration of Ontario Residency:

I, Robert Korol, am an Ontario resident and have been since .

Alleged Contravenor

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Neither Applicant Number One nor Applicant Number Two is an employee of the alleged contravenor.

The applicants offer their assistance in providing any information further to that provided in this application, that may assist an investigation.

Alleged Contravention

Name of Act: Environmental Assessment Act (R.S.O. 1990, c. E.18, as amended)

Section Number: 3.2 (“Declaration”), 38 (“Offence”)

Instrument: Red Hill Creek Expressway Exemption [Declaration] Order (Order in Council O.C. 582-97) approved and ordered March 5, 1997 (**Tab 1**: Order; **Tab 2**: “the submission”)

Brief description of contraventionContravention

The applicants allege that:

The City of Hamilton has failed to comply with certain terms and conditions of Order in Council 582-97 ("the order"), including provisions of other laws referred to in, and instruments incorporated by the order, as described in this application for investigation.

The order sets up a process of assessing, monitoring, public consultation, public reporting and other legal requirements that the City has not implemented adequately or at all.

Failure to comply with the order constitutes an offence under s. 38 of the Act, which provides that "every person who fails to comply with an order or a term or condition of an approval is guilty of an offence and on conviction is liable to a fine" of up to \$10,000 for a first offence, and of up to \$25,000 for each subsequent day of a continuing offence.

Particulars

The applicants submit that the particulars of the City's contravention may be summarized as follows:

1. The failure to comply with the order risks serious damage to the Red Hill Valley ecosystem including harm to endangered wildlife and sensitive wildlands, will make significant contributions to air pollution and will pose threats to human health.
2. Requirements for public consultation have not been followed, denying the public its right, legally mandated by the order, to be involved in decision-making about the undertaking. This failure to comply will result in environmental damage.
3. Reports required by the order to be publicly released for comment and improvement have been released only recently, either for the first time, or after long periods without legally mandated public involvement. In other cases, public comments have neither been acknowledged nor reflected in amended reports, also contrary to the order. This failure to comply will result in environmental damage.
4. Stages of construction already begun and other stages about to begin imminently may violate legal requirements to first obtain provincial and federal permits or authorizations. This failure to comply will result in environmental damage.
5. Some or all of these construction stages will be irreversible if allowed to proceed, lending the need for investigation greater urgency.

The evidence supporting the above-noted allegations is described below in detail.

Detailed description of contraventions

Background

1. Discussion of a proposed expressway in or near the Red Hill Valley for the City of Hamilton, Ontario dates to at least as early as October 1956. Various stages of planning (Official Plan Amendments; applications to Ontario Municipal Board (OMB); funding allocations and various studies) have continued since that date. (**Tab 4: Chronology**)
2. Various alternatives for roads connecting from Highway 403, crossing the Niagara Escarpment to the Queen Elizabeth Way (QEW) were considered. A study report describing a particular route comprising an east-west and a north-south road was adopted, by a vote of City council on August 28, 1979. The Region adopted this alternative by resolution in September 1979 (**Tab 4: Chronology**).
3. Review and approval of an undertaking was requested by a joint Ontario Municipal Board and Environmental Assessment hearing board under the Ontario *Consolidated Hearings Act* in April 1982. The undertaking was defined, in a Notice of Hearing dated August 30, 1984 as “Proposed Mountain East-West and North-South Transportation System Facility Corridor to connect Highway 403 in Ancaster to the Queen Elizabeth Way in the eastern portion of the City of Hamilton.”
4. A joint hearing began October 15, 1984 and was completed on June 20, 1985 after 99 days (Chronology, pp. 10, 12 and 13). The Joint Board rendered its decision, described below, on October 24, 1985. (The Joint Board decision and conditions are contained in “Conditions of Approval”, Appendix C of the order, but are included here for convenience as a separate tab: **Tab 3.**)
5. The 1985 Joint Board decision was a 2-1 split decision. The 116-page dissenting opinion was written by the sole Environmental Assessment Board member on the panel, and reflected concerns in evidence before the Joint Board about the environmental effects of the proposed undertaking.
6. The provincial Cabinet confirmed and modified the Joint Board’s decision by Order also described below, dated March 12 and June 11, 1987. (**Tab 4: Chronology**, p. 16; **Tab 3: Schedule “C”** to Joint Board decision).
7. The east-west portion of the undertaking as defined in 1985 was completed in 1997 and is now in operation as the Lincoln Alexander Parkway (the “Linc”). The current Linc is a significantly different roadway than what was proposed

in 1985. It was originally planned as an arterial road, and was eventually built as an expressway with limited access to local traffic.

8. The proposed north-south undertaking is also a distinctly different undertaking than was proposed and assessed in the past. Construction of the north-south expressway, connected to the Linc, will result in a road system that is primarily suited to truck traffic originating from and bound for points outside Hamilton, with little local social or economic benefit and with significant potential environmental impacts.
9. The provincial government cancelled funding in 1990 because of environmental concerns about the undertaking. The government also appointed David Crombie in 1993 to propose alternatives to the undertaking. Mr. Crombie's proposals were subsequently rejected by the proponent, but appear to have led to some project modifications.
10. The Region proposed an "Assessment Process" respecting the North-South Section of the undertaking in 1996, and proposed changes to the approved Expressway concerning three main elements, namely:
 - the type and location of a QEW interchange,
 - Niagara Escarpment crossing location and structure type, and
 - opportunities for public access to the Red Hill Creek Valley.

(**Tab 4:** Chronology, p. 22). This process was proposed in a written request for an exemption or declaration order (referred to in this application as "the submission") (**Tab 2:** submission).

11. "The [submission] indicated that the Region has decided to use the "exemption order" approach to obtain [*Environmental Assessment Act*] approval and indicates in this document it was not prepared to undertake a new individual EA as a new individual EA "will not change the basic need for the Expressway or result in the selection of an entire new corridor. Revisiting these issues would constitute an inefficient use of scarce resources.'" (**Tab 4:** Chronology, p. 22).
12. Provincial Order-in-Council 582/97 ("the order") approved and ordered March 5, 1997 under the *Environmental Assessment Act* declares that section 5 of the Act does not apply to the undertaking, and that the undertaking otherwise be approved *subject to the conditions in the order* (emphasis added) (**Tab 1:** Order, page 1).
13. The order incorporates and includes the Region's submission requesting the order. The submission defines the undertaking as

"the development and implementation of *improvements* to the north-south alignment of the Red Hill Creek Expressway as

approved by a Joint Board on October 24, 1985, and the detailed design and construction of an interchange connection to the Queen Elizabeth Way *as outlined in the exemption order submission* dated May 6, 1996” (emphasis added) (**Tab 2:** submission)

14. The submission, in turn, incorporates the 1985 Joint Board decision and the 1987 Order-in-Council varying the Joint Board decision. These elements, including the Region’s (now City’s) proposed approach for conducting the assessment, are thus all part of the order.

15. Failure to comply with the order constitutes an offence under s. 38 of the *Environmental Assessment Act*.

16. The order is based on three main “conditions”:

“This declaration order is subject to the following terms and conditions:

1. The Proponent must satisfy the conditions of the original 1985 Joint Board decision as confirmed by Cabinet in 1987 except as they have been specifically modified or superseded by or pursuant to this declaration order.
2. The Proponent shall carry out the planning and implementation for their project in accordance with their submission dated May 6, 1996, and their letter of November 19, 1996, to the ministry addressing matters raised by the Niagara Escarpment Commission.
3. Construction of the interchange with the Queen Elizabeth Way is only authorized if The Regional Municipality of Hamilton-Wentworth is implementing the Niagara Escarpment crossing as set out in the exemption order submission so as to ensure that the final alignment is an improvement over the 1985 approved Niagara Escarpment Crossing.”

(**Tab 1:** order)

17. The detailed obligations and provisions of the order reflect longstanding concerns about the environmental impacts of the undertaking on the part of members of the public, various government agencies, the Joint Board, the Niagara Escarpment Commission and the Hamilton Region Conservation Authority.

18. The submission defines the “Assessment Process” as comprising three parts: a Stakeholder Consultation Program; Approvals/Permits and Impact Assessment; and Expressway Design Changes (including, in turn, three “categories of changes”, namely the design and location of the QEW interchange; the Niagara Escarpment crossing location and structure type,

and community access opportunities) (**Tab 2:** Part 3.0 of the submission, pp. 12-45)

19. The proponent Region took over responsibility for arterial roads from the City in May 1977. (**Tab 4:** Chronology, p. 4). The Region and City have since been amalgamated, returning responsibility for all matters in the order to the City of Hamilton, which is now the proponent.
20. The Ontario Ministry of Transportation was identified by the 1985 Joint Board as the party responsible for determining the location and design of the QEW interchange. The submission notes the agreement by the Ministry of Transportation that the proponent “should carry out an assessment of the location, design and construction of the QEW interchange and that this should be done in conjunction with the overall assessment of the North-South section” and the order, accordingly, defines the undertaking as including the QEW interchange as the responsibility of the proponent (**Tab 2:** pages 1 and 2 of the submission).
21. In March 1996 Environment Canada advised the proponent of the likely application of the *Canadian Environmental Assessment Act* to the undertaking. (In **Tab 2**, in Appendix "B" ("Government Agency Comments") of the submission, see the letter from Environment Canada to the proponent)
22. In late 1997 or early 1998 the federal Department of Fisheries and Oceans advised the proponent that the undertaking required an authorization to alter fish habitat pursuant to the federal *Fisheries Act*, and that should the proponent wish to proceed, its application for such authorization would “trigger” the *Canadian Environmental Assessment Act* (the CEAA).
23. The screening level assessment under the CEAA was bumped up to the level of a review panel assessment in May 1999, when the federal Minister of the Environment determined that the project was likely to cause significant adverse environmental effects. The proponent challenged various elements of the application of the CEAA to the undertaking, in three applications for judicial review filed in Federal Court in 1999. The Federal Court found in April 2001 that the CEAA did not apply to the undertaking and consequently, that no federal assessment was required. An appeal by the federal Ministers of Environment and Fisheries and Oceans was dismissed in November 2001 by the Federal Court of Appeal, and the Ministers elected not to file a further appeal. (*Regional Municipality of Hamilton-Wentworth v. Minister of the Environment, Minister of Fisheries and Oceans et al.*, [2001 FCT 381]; *Minister of Environment and Minister of Fisheries and Oceans v. Regional Municipality of Hamilton-Wentworth* [(2001) FCA 347]. **The issue in that litigation concerned the application of the federal environmental assessment process, including the review panel level of assessment, not the status of the order at issue in this application.**

Non-compliance with the order

24. As described above, the order takes in a number of other legal instruments (the submission; the 1985 Joint Board decision; the 1987 Order-in-Council), each with its own terms and conditions, and various laws. The failure to comply with the order in these terms is laid out below.

Assessment and monitoring

25. The proponent committed itself to conducting an assessment of the condition of the existing environment as it exists prior to construction: “The environment is described in order to predict the direct and indirect impacts the approved Expressway, proposed design changes and QEW interchange will likely have on the environment and to develop appropriate mitigation, compensation, and monitoring measures” (**Tab 2:** page 23 of the submission).

26. The “Impact Assessment Process” is described in detail in the submission beginning at page 22. The proponent proposed both to consider watershed-level impacts, and to assess data for specific sites in the undertaking (**Tab 2:** pp. 27-28 of the submission).

27. The proponent proposed that “the Project Team, in consultation with government agencies, interest groups and the public, *will determine whether or not proposed changes are less disruptive to the environment than the approved Expressway design.* ... The Project Team in consultation with the aforementioned stakeholders will develop evaluation categories, factors, and indicators that reflect the significant features identified through the watershed plan and site specific inventories” (emphasis added) (**Tab 2:** p. 31 of the submission).

28. The proponent’s inclusion of this obligation in the assessment, and Cabinet’s acceptance of it in the 1997 order, suggest a serious commitment to see it complied with: the *Environmental Assessment Act* does not include mandatory monitoring provisions, either pre- or post-construction of an undertaking. The monitoring requirements thus reflect a commitment to an enhanced assessment and monitoring process than what is provided in the Act.

29. The proponent committed in its submission that assessment and monitoring were to occur prior to project implementation. The importance of monitoring prior to construction cannot be underestimated, because of the way the order was drafted: the order is contingent on the proponent developing “*improvements to the 1985 project which will reduce its environmental impacts*” (**Tab 1:** order, p. 1).

30. Pre-project assessment and monitoring are essential to demonstrating that design changes to the project are indeed “improvements.” To date, the City has not met this obligation, for the following reasons among others:
- reports have not been released for public review, some for months or years (see “Reports”, below);
 - pre-construction monitoring has not been conducted as proposed, if at all. For example, the proponent wrote at p. 16 of the submission, “an air quality monitoring station to be installed at the King Street interchange ... will be used to monitor air quality one year prior to construction ...” . There is no evidence that one year of monitoring has taken place, and yet City Council gave approval in April 2003 for the commencement of construction (see “Construction Plans”, below) (**Tab 2**: page 16 of the submission).
31. The inclusion in the order of pre-construction and baseline monitoring reflects the importance of establishing a record of baseline environmental conditions. By contrast, the 1985 Joint Board decision required only post-construction modelling. (**Tab 3**: See Schedule "A", condition number 1.)

Public consultation

32. Part 3.0 of the submission (pp. 12-15) describes the proponent’s “Stakeholder Consultation Program”, the purpose of which is to “work cooperatively to develop an Expressway design that minimizes impacts to significant environmental features, functions, and linkages occurring within the Red Hill Creek Valley watershed” (**Tab 2**: pp. 12-15, submission).
33. “Key components of the Assessment Process that require stakeholder input include data collection, Expressway impact assessment, proposed design changes, impact mitigation and compensation plans, and the consultation program itself” (**Tab 2**: p. 12 of submission). In other words, consultation is intended to be an integral part of the assessment process.
34. The organization of the consultation is described at pages 13-15 of the submission. In addition to a “Project Team” of City officials, a Community Stakeholder Committee (CSC), a Landowner Committee and a Government Agency Committee were to be formed (**Tab 2**: pp. 13-15, submission).
35. The CSC was to be particularly integral to the assessment process, and “will be requested to be involved in all stages of the project in order to provide continuity to the consultation” (**Tab 2**: see p. 13 of the submission).
36. Both Mr. McLean and Dr. Korol were members of the CSC. Part of the mandate of the CSC, as developed once the CSC was formed, was to

participate in three public meetings organized by the proponent (then the Regional government), in about February 1998. Several hundred members of the public attended these meetings. A representative of the proponent reported back to the CSC that the main issues of concern raised by public participants in the three meetings were the need for, alternatives to and cost of the expressway project. These matters had been excluded from the terms of reference of the CSC from its inception; however, CSC members formulated a resolution to inform Regional Council of these public concerns, and consequently to ask Council to consider changing the terms of reference to incorporate one or more of the need, alternatives and cost concerns. The resolution was not permitted to reach Regional Council and in response, Mr. McLean and seven other CSC members representing a total of eight stakeholder groups resigned from the CSC. Dr. Korol remained as a member of the CSC. Mr. McLean and others continued to participate in the CSC meetings as members of the public. The CSC was disbanded in September 1998.

37. The “Assessment Process Schedule” set out in the submission (see Figure 3, between pages 12 and 13) has not been followed. At page 12, the submission reads, “Figure 3 illustrates the phasing of the project, the type of consultation and *the minimum level of input*” (emphasis added). Although it is not clear exactly which actual meetings correspond to which stages in Figure 3, the process appears to have been abandoned part-way through the third stage, “Proposed Changes to the Approved Design,” in September 1998. Thus, neither the temporal nor the substantive elements of the Assessment Process Schedule have been followed. (**Tab 2:** submission, pp. 12-13)
38. Two other elements of the Stakeholder Consultation Program set out in the submission have been ignored or abandoned completely. The Landowners Committee was never formed. The Government Agency Committee was formed, but never met. (**Tab 5:** April 17, 2003 letter from Hamilton Access & Privacy Officer to Vicky Sutherland).
39. The City does not intend to consult further with the public, including following the release of “final” reports. See also under “Reports” below. (**Tab 6:** “Red Hill Valley Program – What’s New” at city.Hamilton.on.ca/public-works/capital-planning/Red-Hill-Valley-Program/infrastructure-projects/whats-new.asp (project website); **Tab 7:** E-mail correspondence from Hamilton City Councillor Larry Dilanni to Don McLean, 18 November 2002)
40. The proponent attributes the interruption of “the exchange of information that had been taking place among the stakeholders ... [from] May 1999 to January 2002,” to the federal government’s decision to refer the undertaking to a review panel under CEAA, even though the proponent acknowledges stakeholder comments received in 1998 and 1999. (**Tab 6:** “Red Hill Valley Program – What’s New”)

41. Responses to those stakeholder comments have not been received to date.

Reports

42. A number of reports are required to be produced as part of the Impact Assessment Process described in the submission. These include “results from stormwater runoff and erosion studies”, “detailed grading plans”, “a detailed tree preservation and planting plan,” detailed proposals for the placing of fill, erosion control, sediment control,” “detailed construction and design plans” (**Tab 2:** pages 17-18 of the submission).
43. The proponent further committed to incorporating mitigation and compensation measures into construction plans. These measures are listed at pages 29-30 of the submission. (**Tab 2:** pages 29-30).
44. “Through the GAC and CSC, government agencies, interest groups and the public will participate in the review of the prediction of impacts and the proposed mitigation and monitoring strategies” (**Tab 2:** page 30 of the submission).
45. “The impact assessment process leading to a preferred alternative in the areas of proposed changes will be documented in an Impact Assessment Report” (**Tab 2:** page 32 of the submission).
46. Some of these reports and studies are to be produced for the purpose of obtaining approvals required by statute; for example the “detailed proposals for the placing of fill, erosion control, sediment control [are to be] submitted to the Hamilton Region Conservation Authority for approval.” (**Tab 3:** Schedule “C” to Joint Board decision”) As this work is also integral to public involvement in design of the undertaking, it must be made available to the public.
47. The reports produced as part of the assessment should reflect the findings as to whether and how impacts can be avoided (see Assessment and Monitoring, above), and how changes to the expressway route and QEW interchange constitute an “improvement” to the undertaking approved in 1985 (**Tab 1:** Term and condition number 3 of the order).
48. At the “detailed design and construction monitoring” stage, “*carried out in consultation with the Government Agency Committee and the Community Stakeholder Committee as well as the public*”, a “Design Report” is to be released that “details mitigation strategies and details construction and post construction monitoring plans”. “This document must be accepted by all of the agencies that grant permits and approval because this forms the basis for their approvals” (emphasis added) (**Tab 2:** Page 33 of the submission).

49. Draft reports were released in 1997 and August 1998. The reports included the following:

- Surface water and Stormwater Quality
- Air Quality Assessment
- Air Emission Inventory
- Thermal dynamics in the Red Hill Valley
- Noise Assessment
- Health Risk Assessment
- Contaminated Sites
- Visual Resources
- Groundwater
- Fisheries
- Terrestrial resources
- Cultural Heritage Resources Assessment
- Summary Impact Assessment and Design Report.

(**Tab 8:** “Project Update: Red Hill Valley Project”, 10/08/02, at pages 3-4)

50. Also in August 1998, the proponent requested written comments on the above reports. The Friends of Red Hill Valley and other groups and individuals responded in October 1998, and the proponent committed to written responses no later than January 1999. **No such response has been received to date.** (Letter from Don McLean, Friends of Red Hill Valley to Rob Nadolny, Project Officer, Ontario Ministry of the Environment, dated November 27, 2002).

51. “No further “draft reports” were released until 2002, when some further draft reports were released, including the following:

- Stream relocation
- Land use assessment
- Fisheries
- Economic assessment
- Flying squirrel study
- Stream Network Inventory
- Fluvial Geomorphologic Assessment
- Impact Assessment
- Preliminary Natural Channel Design of Red Hill Creek
- Pre-construction and post-construction air monitoring reports

In some cases, few or no changes have been made to later or "final" versions of reports.

(**Tab 9:** Letter from Don McLean, Friends of Red Hill Valley to Rob Nadolny, Project Officer, Ontario Ministry of the Environment, dated November 27, 2002).

52. Among a list of “Recently Asked Questions” on its project website, the proponent includes “Why didn’t the former Region respond to comments raised by citizens, interest groups and government agencies by January 1999?” The proponent’s response reads in part: “By mid-October [1998], all stakeholders – except the federal government – had submitted detailed responses to the draft reports. The former Region decided to await the federal government’s comments – which began in early 1999 and concluded in June 1999. In summary, the process of moving from draft document to final document was held up because the federal government chose not to meet the deadlines met by other stakeholders. However, all comments received in this process will be part of the consultation report that will be released when all documents are final and released to the public for information.” (**Tab 6:** “Red Hill Valley Program – What’s New” (project website)).
53. The proponent's failure to comply with public consultation requirements in the order has denied the public's legally mandated right to be involved in decision-making about the undertaking, and will result in environmental damage if the undertaking is carried out.
54. The proponent also appears to intend to substitute “reporting” for “consultation.” The proponent has recently released "for information", "final" reports on technical and other matters that were circulated for government / community comment in 1998 and 2002.
- “Staff will also be releasing a draft landscape management plan that covers habitat restoration, recreational features and cultural heritage.” (**Tab 10:** “Project Update: Red Hill Valley Project Re Construction Staging”, March 21, 2003).
55. There is no mention of the “Design Report” in the March 21, 2003 “Project Update” on “Construction Staging” that lists the status of reports to be released to Hamilton City Council on April 23, 2003.
56. On April 23, 2003, Hamilton City Council approved staff recommendations to begin construction of the north-south expressway.
57. In spite of the proponent's decision to proceed, among other requirements of the order it has not completed the Impact Assessment Report required by the order. At a City meeting on April 22, 2003 it released only a document entitled "Impact Assessment Summary Report: Executive Summary, April 2003." The text concedes that not all reports have been released. City council's decision to proceed is therefore a violation of the order.

58. To give just one example of the need for public consultation on the reports and for greater transparency: the 1998 draft reports related to air and noise impacts were based on traffic projections that were substantially altered in the fall of 2002. The resulting new air quality predictions also require alteration of the health impact predictions. Opportunity must be given for consideration whether air quality considerations are acceptable in terms of human health and environmental impacts, before construction proceeds. This is one consideration among many in determining whether the undertaking is an “improvement” over the 1985 undertaking.

Permits, approvals, other legal requirements

59. The submission acknowledges the statutory approvals and permits potentially applying to the undertaking (pages 15-22 of the submission). The proponent acknowledged in the submission its expectation that the legislation, policies and guidelines listed would be “applicable to this project even if no changes to the Expressway approved in 1985 are made” (**Tab 2:** page 19 of the submission).

60. Legislative requirements for various activities are not tied to the *Environmental Assessment Act*; nor can the order be considered to exempt the undertaking from such requirements.

61. The *Niagara Escarpment Planning and Development Act* (NEPDA) requires that a development permit be issued not only before a person may undertake any development in an area of development control established by regulation, but also before any other “building permit, work order, certificate or licence that relates to development” or any other “*approval*, consent, permission or other decision that is authorized or required by an Act” may be issued. A substantial portion of the Red Hill Creek Valley (over half of it in terms of area) is part of the Niagara Escarpment Planning Area. (**Tab 11:** *Niagara Escarpment Planning and Development Act*, especially sections 2, 8, 13, 22-24) (emphasis added).

62. Schedule “B” to the 1985 Joint Board decision is titled “Conditions – The Niagara Escarpment Planning and Development Act” and includes the following conditions: “that a detailed grading plan be submitted for Niagara Escarpment Commission *approval* to minimize the effects of construction on Escarpment and Valley slopes”; and “that a detailed tree preservation and planting plan be submitted for Niagara Escarpment Commission *approval* to protect existing vegetation and to provide for a visual screen of the route” (emphasis added) (**Tab 3:** Schedule B of Joint Board decision).

63. The conditions in Schedule "B" to the Joint Board decision should not be viewed as the sole approvals that might be required under the NEPDA. In particular, given the passage of six years since the order directed that the project be built "in accordance with the original 1985 Joint Board approval," and eighteen years since the Joint Board approval, attention must be paid to ensuring that NEPDA approval is consistent with current standards established by that Act.
64. In a December 2002 letter to the proponent City, the Niagara Escarpment Commission (NEC) makes several recommendations and asks for clarification of certain matters relating to the City's "draft reports" respecting the undertaking. The NEC also notes, twice (at pages 2 and 8) the need for a Development Permit under the NEPDA. (**Tab 12:** December 10, 2002 letter from Ken Whitbread, Manager, NEC to Chris Murray, Director, Red Hill Valley Project Office, City of Hamilton)
65. In a letter of reply (addressed to a Director of the NEC rather than to the NEC staff member who wrote the December 10 letter), the City wrote that a Development Permit was issued May 8, 1987, and that "relevant comments or requirements for new approvals from governmental agencies such as the Niagara Escarpment Commission are only permitted only [sic] within a narrow ambit." The letter refers to the order's requirement that "the final [North-South] alignment [be] an improvement over the 1985 approved NEC crossing." The letter relies on excerpts from the Federal Court applications (concerning *federal* environmental assessment of the undertaking) in arguing that approval under the NEPDA is not required. Finally, "the City finds that the pertinent comments [by the NEC] which it will act on" are limited to a recommendation regarding additional planting of vegetation made under the heading "Snowdrifting Assessment." (**Tab 13:** Letter from Chris Murray, Acting Director, Red Hill Valley Project Office to Mark Frawley, Director, NEC, dated January 23, 2003)
66. In the April 22, 2003 "Impact Assessment Summary Report: Executive Summary, April 2003" document cited under "Reports", above, the proponent makes the following claim: "NEPDA - the City has a permit to undertake this project subject to meeting conditions prescribed by the province in 1985/87." This statement ignores the ongoing duty of the NEC to ensure compliance with the law.
67. Even if a permit was issued in 1987 pursuant to the NEPDA, the results of the assessment process and potentially significant design changes require that the NEC consider the undertaking as it is now proposed by the City. This requires determinations by the NEC as to its exercise of statutory permitting obligations.

68. Determinations must be made as to whether the proponent has carried out “the planning and implementation for their project in accordance with their submission dated May 6, 1996 [the submission] and their letter of November 19, 1996, to the ministry addressing matters raised by the Niagara Escarpment Commission,” and whether the City “is implementing the Niagara Escarpment crossing as set out in the exemption order submission so as to ensure that the final alignment is an improvement over the 1985 approved Niagara Escarpment Crossing.” (**Tab 1:** Terms and conditions number 2 and 3 of the order)
69. Pursuant to the *Conservation Authorities Act* and Ontario Regulation 151 (*Fill, Construction and Alteration to Waterways – Hamilton Region*), “no person shall construct a building [or structure of any kind]” in certain areas including the Red Hill Creek Valley and its tributaries within the City of Hamilton, “except pursuant to a permit given under section 4” of Regulation 151. (*Conservation Authorities Act*, **Tab 14:** O. Reg. 151, especially sections 1-7 and Schedule 4).
70. The Hamilton Conservation Authority has not yet received applications for permits under the *Conservation Authorities Act*.
71. The 1987 Order-in-Council confirmed the obligation of the proponent to submit its proposals to the Hamilton Conservation Authority for approval, adding “However nothing in this condition will interfere with the issuance of the permit pursuant to subs. 28 (3) of the Conservation Authorities Act or the overall proceeding of the project in accordance with the decision of the Joint Board.” (**Tab 3:** 1987 Order, reproduced below Schedule “C” of the Joint Board decision)
72. At best, the Cabinet direction cited in the preceding paragraph creates uncertainty as to the need for Conservation Authority approval. To require that “detailed proposals ... be submitted ... for approval”, but implying that a permit should issue regardless of the Authority’s review of those proposals, suggests that the preparation and review of the proposals is meaningless. At a minimum, a determination must be made whether the *Conservation Authorities Act* applies to the undertaking, before further construction proceeds.
73. The *Lakes and Rivers Improvement Act* (LRIA) requires permits for working within a water course. It is unknown whether plans or applications for such permits have been submitted to the Ministry of Natural Resources, although City staff reported at the April 22, 2003 meeting of the City Council's Committee of the Whole that LRIA approval was expected by the end of April 2003.

74. The *Ontario Water Resources Act* (OWRA) requires Certificates of Approval for the establishment, alteration, extension or replacement of new or existing water or sewage works.
75. "Surface Water & Stormwater Quality Technical Reports" are included in the list of "final" reports to be released in late April 2003. It is unclear whether these have been released. These reports are to be relied upon in determining the acceptability of plans for OWRA purposes. These reports are expected to be extensive, allowing little time for examination by Ministry of Environment or federal Department of Fisheries and Oceans officials before the commencement of construction. A report entitled "Fisheries Existing Conditions and Predicted Impact" is among those listed on the project website as having been released, but it is unknown whether it satisfies regulatory requirements.
76. The landfill site at Rennie Street is currently subject to a Certificate of Approval (C of A) issued under the OWRA. The proponent's apparent current intention is to remove some 70,000 m³ of waste located at the site, and to obtain an amendment to that C of A, for relocation of a leachate collector pipe. (**Tab 15**: Letter from Chris Murray, City of Hamilton to Geoff Carpentier, District Manager, Ministry of the Environment, September 4, 2002)
77. Waste concerns relating to both the Ontario *Environmental Protection Act* and OWRA will need to be resolved and regulatory approvals obtained where necessary, before work commences. The City's construction plans (See "Construction Plans", below) appear to anticipate commencement of significant construction activities, including adjacent to the Rennie Street landfill site, in a relatively short time period.
78. The federal *Fisheries Act* will apply to all plans involving proposed alteration, disruption or destruction of fish habitat. Authorization for such activities will be required. These determinations must be made by the federal Department of Fisheries and Oceans officials before such authorization can be issued, and will require that the officials review the necessary "final" reports.
79. City staff reported at the April 22, 2003 meeting of the City Council's Committee of the Whole that they hoped to receive *Fisheries Act* authorization "in the very near future."
80. Determination whether to issue an authorization would normally require a federal environmental assessment, but the federal court decisions described above appear to preclude that respecting the north-south expressway undertaking.
81. A planned re-routing of a natural gas pipeline may be considered a separate "project" as defined by the CEEA that is subject to authorization and a federal

environmental assessment by the National Energy Board. That undertaking would also require consideration before work may begin. (**Tab 16:** "Friends of Red Hill say city 'desperate' to break ground," by Eric McGuinness in the Hamilton Spectator, March 29, 2003)

Construction plans

82. The submission identifies the "Detailed Design and Construction Monitoring" stage as coming after the "Impact Assessment" stage, and requiring a "Design Report" that "must be accepted by all of the agencies that grant permits and approval because this forms the basis for their approvals." (**Tab 2:** Page 33 of the submission)

83. However, the proponent indicates it is ready to proceed with construction imminently. The proposed work appears to involve significant components of the undertaking in respect of which Assessment and Monitoring, Public Consultation, Reports, and Permits and Approvals as described above, have not been completed. (In some cases, it is unclear what level of work is entailed by a proposed work item, but the accompanying map suggests significant work in the Red Hill Creek Valley.)

(**Tab 17:** "Fact Sheet: Construction Staging – Red Hill Valley and accompanying map)

84. Stages 1, 2 and 3 identified as beginning in Summer 2003 include

- CNR structure [Other documents indicate that "CNR work" is scheduled for Spring 2003, and tree cutting has already taken place in and around the CN train bridge in the area of the undertaking.]
- Mud St. structure
- Greenhill structure, watermain, noise walls and berms, Greenhill extension grading, stormwater management ponds

(**Tab 17:** "Fact Sheet: Construction Staging – Red Hill Valley and accompanying map)

85. Stages 4, 5, 6 and 7, identified as beginning in Fall 2003 include:

- Nash/Brampton connection
- Structures, clearing, creek works, grading, drainage, utilities, combined sewer overflow pipe (Melvin-King)
- Structures, clearing, creek, grading, drainage, utilities, combined sewer overflow pipe (King-Glencastle)
- Detour, clearing, grading, rock blasting and crushing, Trans Northern Pipeline works, drainage, stormwater management ponds (Glencastle – Mud Street interchange)

(**Tab 17:** “Fact Sheet: Construction Staging – Red Hill Valley” and accompanying map)

Seriousness of the Contravention and Potential for Environmental Harm

86. A Declaration Order may set out that a project is exempt from some or all of the requirements of the *Environmental Assessment Act*. A Declaration Order usually includes conditions that must be met. In the case of the Red Hill Creek Expressway Declaration Order, it sets out a series of conditions, while exempting the project from s. 5 of the Act. (**Tab 1:** Order)
87. The Cabinet declared the undertaking not subject to section 5 of the *Environmental Assessment Act*. It was open to the Cabinet to declare the undertaking not subject to the entire Act, but it restricted the declaration order’s exemption to section 5 only.
88. A Minister and Cabinet may choose pursuant to s. 3.2 of the *Environmental Assessment Act* to issue an order with or without conditions. In this case, the proponent, in requesting an order, designed an “assessment process” (as the proponent itself identified this term in the submission) that it intended to be a mandatory part of the order, tailoring the proposed process to the circumstances. Rather than simply ordering that the Act not apply to the undertaking without conditions, the Minister and Cabinet ordered that the assessment process proposed by the proponent be followed, declaring that s. 5 of the Act, rather than the entire Act, not apply to the proposed undertaking. The assessment process must therefore be followed.
89. Provisions of the *Environmental Assessment Act* other than s. 5 apply to the order. In particular, s. 38 provides that every person failing “to comply with an order or a term or condition of an approval issued or given under this Act” commits an offence under the Act.
90. Allowing a proponent to flout either substantive or procedural terms and conditions of a binding legal instrument such as an Order-in-Council suggests that it is not necessary to obey such Orders. To the contrary, allowing non-compliance with an Order is an abuse and violation of the rule of law.
91. The passage of time due to various factors and delaying implementation, whether due to circumstances that are foreseeable or otherwise, cannot excuse the proponent from complying with the order, or with the laws and other obligations referred to in the order.
92. The procedural requirements of the order and the substantive requirements to undertake tests, monitoring and other elements of the Impact Assessment Process are interlinked and mutually interdependent. For example, page 12 of

the submission reads “*Key components of the Assessment Process* that require stakeholder input include data collection, Expressway impact assessment, proposed design changes, impact mitigation and compensation plans, and the consultation program itself.” At p. 13: “A Community Stakeholder Committee (CSC) will be formed *to provide input into the assessment process* described in Sections 3.2 and 3.3 of this report. Members of this group will be requested to be *involved in all stages of the project* in order to provide continuity to the consultation” (all emphasis added) (**Tab 2:** pages 12 and 13 of the submission).

93. The “stakeholder input” process proposed by the proponent has not been followed. This cannot be viewed merely as a procedural irregularity, because the process as developed by the proponent and approved by Cabinet in the order includes the community accountability safeguards as noted above.
94. One of the reasons given by the Minister of Environment in ordering that it was “in the public interest” that section 5 of the *Environmental Assessment Act* not apply to the undertaking was that the proponent “has agreed to implement an assessment process to establish a forum for government agencies, community groups and the public to exchange ideas and information, clarify positions and expectations, and work cooperatively to develop an Expressway design that reduces impacts to the Red Hill Creek watershed.” That process clearly has neither been followed by letter nor in spirit.
95. The proponent cannot commit to following a particular process in pursuit of a Cabinet order, then substitute that process for a very different process that does not include the basic elements of public involvement that it committed to as a condition of the order.
96. The proponent cannot rely on the federal government’s decision to refer the undertaking to environmental assessment by review panel, as an excuse for the proponent’s own failure to consult with the public between October 1998 and October 2002. The consultation process initiated in October 2002 was limited to an opportunity to provide comments. There were no meetings of the CSC; nor were other public meetings held as part of the 2002 process.
97. Compliance with the order is made more necessary by the compromised nature of the project as approved in 1985: the order notes that the QEW interchange had received no approval, and that “its location (based on the 1985 proposal) would have a serious impact on the sensitive Red Hill Marsh and Van Wagner’s Marsh by requiring its construction on top of this wetland complex and in close proximity to two existing landfill sites.” Current activities related to the undertaking involve sensitive work around the landfill sites. The order requires that such work will be avoided by “improvements” to the undertaking.

98. The requirements in the order to “reduce environmental impacts” and to determine “improvements” to the design and undertaking make the assessment a “moving target” because it is not explained against what standard “reduced impacts” and “improvements” are to be measured. However, the undertaking is subject to the order, which is a substitution for section 5 of the Environmental Assessment Act.
99. The Ministry of the Environment must determine whether the tightly integrated procedural and substantive elements of the order have been complied with. Without the Ministry making such a determination, there would be no accountability mechanism for ensuring compliance with the order, and the order would become meaningless.
100. By failing to comply with both the procedural and substantive aspects of the order, the proponent has enhanced the “moving target” nature of evaluating compliance. Without a timely determination whether the proponent has complied to date, irreversible environmental damage is likely to result because the proponent is prepared to proceed imminently with major stages of construction of the undertaking. Deferring an investigation into compliance with the order on the basis that implementation of the order is ongoing would risk the occurrence of that environmental damage. At a minimum, meaningful public consultation must be conducted to assess the contents of the “final” reports and determine whether the undertaking meets the “reduced impacts” and “improvements” tests.
101. Significant changes to the undertaking as approved in 1985, as well as design changes and technical details contained in the final reports to be released imminently, are cause for caution in allowing irreversible stages of the undertaking to proceed. For example, it is expected that far-reaching changes in surface and storm water flows will be proposed in the final reports, accompanied by significant changes in the flow of Red Hill Creek and the construction of elaborate storm water management ponds (at least three in the Red Hill Creek Valley and several more in the proposed QEW interchange area).
102. In summary, the potential environmental harm resulting from non-compliance with the order is any harm that may result to the Red Hill Valley ecosystem.
103. Changes in the environment and in the proposed undertaking necessitate more consultation, not less, or a new consultation process.
104. Changes in the nature of the project have not been reviewed, either by the committees that were to be established, or by members of the public generally. If the purpose of the Assessment Process including the

consultation process designed by the proponent was “to establish a forum ... and work cooperatively to develop an Expressway design that minimizes impacts to significant environmental features, functions, and linkages occurring within the Red Hill Creek Valley watershed,” (**Tab 12:** p. 12 of the submission) then the potential harm to the environment is very significant and, because of the failure to provide information throughout the process, is currently unknowable.

105. Ministry of Environment correspondence to Friends of Red Hill in October 2001 indicated that “the ministry takes compliance issues seriously and will be monitoring the City’s compliance with the declaration order.” The Ministry also wrote: “The City of Hamilton is required to fulfill the conditions of the 1997 declaration order, including the commitments it made with respect to public consultation, before beginning construction on the north-south section of the Expressway.” (**Tab 19:** Letter to Don McLean from Michael J. Williams, Director, Environmental Assessment and Approvals Branch, Ministry of the Environment, November 22, 2001)

Summary of Evidence

Further documentation and personal knowledge are available from the Applicants.

List of Tabs

- Tab 1:** Order (Order in Council 582/97 and Order Made Under the Environmental Assessment Act: Declaration Order - The Regional Municipality of Hamilton-Wentworth, 1997)
- Tab 2:** Submission (Regional Municipality of Hamilton-Wentworth: Red Hill Creek Expressway Exemption Order Submission, May 1996)
- Tab 3:** 1985 Joint Board decision
- Tab 4:** Chronology (Applicant’s Summary Chronology in Federal Court Files T-1400-99 and T-1993-99, November 2000)
- Tab 5:** April 17, 2003 letter from David Cochrane, City of Hamilton Access & Privacy Officer to Vicky Sutherland
- Tab 6:** “Red Hill Valley Program – What’s New” at city.Hamilton.on.ca/public-works/capital-planning/Red-Hill-Valley-Program/infrastructure-projects/whats-new.asp (project website) (accessed at April 20, 2003)
- Tab 7:** E-mail correspondence from Hamilton City Councillor Larry DiIanni to Don McLean, 18 November 2002
- Tab 8:** “Project Update: Red Hill Valley Project”, 10/08/02, at pages 3-4
- Tab 9:** Letter from Don McLean, Friends of Red Hill Valley to Rob Nadolny, Project Officer, Ontario Ministry of the Environment, November 27, 2002
- Tab 10:** “Project Update: Red Hill Valley Project Re Construction Staging”, March 21, 2003

Tab 11: *Niagara Escarpment Planning and Development Act* (R.S.O. 1990, Chapter N.2, as amended)

Tab 12: December 10, 2002 letter from Ken Whitbread, Manager, Niagara Escarpment Commission to Chris Murray, Director, Red Hill Valley Project Office, City of Hamilton

Tab 13: Letter from Chris Murray, Acting Director, Red Hill Valley Project Office to Mark Frawley, Director, Niagara Escarpment Commission, January 23, 2003

Tab 14: O. Reg. 151 (*Fill, Construction and Alteration to Waterways – Hamilton Region*)

Tab 15: Letter from Chris Murray, City of Hamilton to Geoff Carpentier, District Manager, Ministry of the Environment, September 4, 2002

Tab 16: “Friends of Red Hill say city ‘desperate’ to break ground,” by Eric McGuinness in the Hamilton Spectator, March 29, 2003

Tab 17: “Fact Sheet: Construction Staging – Red Hill Valley” and accompanying map (<http://www.hamilton.ca/public-works/capital-planning/Red-Hill-Valley-Program/reports/staging.pdf>; accessed 22 April 2003)

Tab 18: Map

Tab 19: Letter to Don McLean from Michael J. Williams, Director, Environmental Assessment and Approvals Branch, Ministry of the Environment, November 22, 2001

8. Previous Contact with the Ministry or Environmental Commissioner of Ontario

The applicants have had frequent previous contact with the Ministry of the Environment, the proponent and others. Details in addition to what is provided in this application are available from the applicants.

Name, address and telephone number of the person or office contacted and date contacted

Details of reason for contact

Outcome of the contact

CANADA
Province of Ontario

: IN THE MATTER OF
:
: Section 74 of the Ontario
: Environmental Bill of Rights

I, Don McLean, of the City of Hamilton in the Province of Ontario,

SOLEMNLY DECLARE THAT the attached documentation and statements are true to the best of my knowledge.

AND I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

DECLARED before me at the

of

in the Province of Ontario

:
:
:
:
:

this day of , 2003.

A Commissioner, etc.

CANADA
Province of Ontario

: IN THE MATTER OF
: Section 74 of the Ontario
: Environmental Bill of Rights

I, Robert Korol, of the City of Hamilton in the Province of Ontario,

SOLEMNLY DECLARE THAT the attached documentation and statements are true to the best of my knowledge.

AND I make this solemn Declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

DECLARED before me at the

of

in the Province of Ontario

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this day of , 2003.

A Commissioner, etc.