

November 9, 2004

The Honourable Leona Dombrowsky  
Minister of the Environment  
12<sup>th</sup> Floor, 135 St. Clair Avenue West  
Toronto, Ontario M4V 1P5  
FAX: (416) 314-7337

**RE: Excavation of the Rennie Street Landfill in Hamilton and concerns regarding limited mandate of MOE to oversee this undertaking.**

Dear Minister Dombrowsky,

First, thank you again for taking the time to meet with us last week and to listen to our concerns. As promised, I have prepared a more detailed summary of the issues raised in our discussion. Again, I am speaking on behalf of the Rennie Street Landfill Community Liaison Committee. We remain concerned about the City of Hamilton's plans to excavate 70,000 tonnes of waste, including hazardous waste<sup>1</sup>, from the old Rennie Street landfill and the Ministry of the Environment's limited role, to date, in this process. As you know, the excavation is being undertaken for the sole purpose of accommodating the construction of the Red Hill Creek expressway.

The summary I have prepared and attached to this letter is divided up into three main sections as follows:

- **Section A: *Provincial Assessment Processes and the Rennie Landfill***  
Background information is provided in this section to support our assertion that *this landfill excavation was never adequately assessed through provincial environmental assessment processes undertaken for the Red Hill Creek Expressway.*
- **Section B: *Application of Relevant Provincial Environmental Law***  
In this section, we raise concerns about the manner in which provincial environmental law has been interpreted and applied to the Rennie excavation. We have concerns about the interpretation of the meaning of 'alteration' of the site and subsequent determinations regarding Part V approval, and we also have concerns about s. 46 as it applies to this site.
- **Section C: *Current Situation – Problems With Limited MOE Mandate***  
Finally, we provide evidence of how the lack of MOE oversight of the excavation plans is creating problems as the proponent moves closer to the actual excavation. Many of these problems are emerging from the fact that the only provincial approval required for this work – an amendment to the certificate of approval for the Rennie landfill leachate collection system - has nothing to do with the

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<sup>1</sup> Contaminants include polychlorinated biphenyls (PCBs)

excavation itself. MOE District Office staff have admitted that this limits their legal mandate to incorporate potential conditions and remedies into this CofA.

Based on the concerns we have raised in each of the sections outlined above, we implore you, as Minister of the Environment, to rectify the shortcomings that we are now facing in this situation as a result, we believe, of the limited mandate of the Ministry of the Environment in this situation. We are incredibly frustrated with the fact that we have had to push for concerns regarding the excavation of a toxic landfill to be addressed within an MOE approval that has nothing to do with a landfill excavation. It is no surprise that we have not been successful in seeing our concerns about the excavation work effectively addressed through this flawed approach. The attached pages outline for you the points along the way where we believe provincial processes, legislation, and regulations have failed to address the issues at the Rennie landfill and, in so doing, have failed the environment and this community.

But we do not believe it is too late or unreasonable for you and your Ministry to explore and to address these shortcomings. Otherwise we are left in a situation where the project proponent is driving the direction of this work on some of the critical issues related to the actual excavation of waste materials – including hazardous waste – from this site. Where does this leave us should something go horribly wrong, particularly as a result of activities associated with this excavation work? Further, where does this leave the provincial Ministry of the Environment, the agency charged with protecting the environment for the well being of all Ontarians?

Rennie CLC members implore you to put your attention to the request for review under s. 11.4 of the provincial Environmental Assessment Act submitted to the Ministry by Lake Ontario Waterkeeper Mark Mattson in August of 2003. We believe that a review of the Rennie situation, in light of new information, is clearly warranted. Further, we respectfully submit that a review of the Rennie situation is warranted in light of historical information about the handling of this site. We are also requesting that you, as Minister, assign a Special Investigator to explore the various concerns we have raised about the Rennie landfill as it relates to provincial environmental assessment and provincial environmental law.

Yours truly,

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Citizen Members, Rennie Landfill CLC

## **A) Provincial Assessment Processes and the Rennie Landfill**

Many of the Rennie CLC's concerns about the Ministry's limited mandate where this landfill excavation is concerned are rooted in our belief that a provincial assessment of expressway impacts on the landfill *has never taken place*. There have been two key assessment-related processes over the history of the expressway where the province could have weighed in on the Rennie landfill excavation and its impacts but, due to either lack of awareness of the existence of the site or lack of full information about the nature of the site, did not. These two processes are described in the sections that follow:

### ***Provincial Consolidated Board Hearing – Red Hill Creek Expressway (1985)***

First, we have good reason to believe that there was no provincial consideration of the plans to build the roadway through the Rennie landfill during the Consolidated Board Hearing because absolutely no mention was made of the Rennie Landfill site during this hearing. The only reference to any waste material within the vicinity of Rennie Street appears in a geotechnical report prepared by Trow Consultants (The Trow Group Ltd. 1980. Geotechnical Investigation Mountain East-West and North-South Corridor Study, Phase 4). In that document appears the following statement:

An extensive deposit of organic garbage fill was proven above the west bank of the valley near Rennie Street. *This deposit does not appear significant as it is beyond the limit of the proposed corridor.* (Trow 1980, p11)

This is the full extent of any acknowledgement of the presence of waste at the Rennie landfill, but this did not include actually acknowledging this area as the location of the Rennie Street landfill. Further, none of the borehole samples taken by Trow as part of its geotechnical investigation were taken within the area where the approved corridor did, in fact, appear to cross a portion of the Rennie landfill site. As a result, there is no indication that any information was available during the Consolidated Board Hearing to identify this as the Rennie landfill or to provide a full understanding of the hazardous nature of some of the waste material in this site.

And so, it is no surprise that the Rennie landfill is not mentioned in the written decision that emerged out of the Consolidated Board Hearing process. Nonetheless, the roadway corridor approved though the 1985 Consolidated Board Hearing did take the expressway through part of the Rennie landfill as well as through the Brampton Street landfill immediately north of Rennie. The Board's Chair, M. I. Jeffery, in his 100-page dissenting opinion, raised grave concerns about the lack of understanding of the impact on the landfills that the expressway would come close to or cut through – the Ottawa Street and Brampton Street landfills respectively. These are the only two landfills referred to in hearing documents. But even with the two landfill sites that were acknowledged to exist, Jeffery raised concerns about the lack of information presented regarding these sites and strongly criticized the MOE for its lack of attention to this situation:

For reasons which I fail to understand, little attention was given in this assessment to an investigation of any potential problems relative to the said landfill sites and it appears that the Ministry of the Environment was either unaware of the location of these landfill sites relative to the proposed roadway or, alternatively, was unconcerned with respect to any adverse environmental impact which might arise from the construction of the roadway. (CBH Decision, p274)

In specific reference to the Ottawa Street landfill, Jeffery continued by stating that:

Surely it is incumbent upon a proponent, and indeed the Ministry of the Environment, to investigate and adequately assess the impacts on a proposed roadway of a landfill site situated in close proximity thereto, and which contains hazardous chemical waste prior to the completion of the environmental assessment leading to the choice of a particular alignment. (CBH Decision, p275)

He then criticized 'the sole reference to the Brampton Street Landfill contained in the environmental assessment documents'<sup>2</sup> by explaining that:

Once again, the Ministry of the Environment neglected to comment on the possible impact of roadway construction on this landfill site, or vice versa, and a Ministry witness did not appear at the hearing to deal with this issue. It is of some concern to me that in reading the environmental assessment submission the public and reviewing agencies would have been substantially unaware of the possible environmental risks associated with these landfill sites, particularly as they relate to possible further impairment of the Red Hill Creek. (CBH Decision, p276-277)

The information we have been able to compile from the documentation produced as part of the 1985 Consolidated Board Hearing leads us to conclude with confidence that the Rennie Street landfill was not considered as part of this assessment process.

And yet, the proponent continues to suggest that approval for construction of the roadway through the Rennie landfill was granted as part of the Joint Board Hearing. The municipality's argument for this position was outlined for your Ministry in September of 2002:

At the Hearing the exact boundary of the Brampton Landfill Site was not clearly demarcated and for practical purposes the discussion of the Brampton Street Landfill is to be considered as a surrogate for the concern expressed about waste existing in the general area of the alignment.  
(Letter from City of Hamilton to MOE Hamilton District Office, 09/04/2002)

However, this argument is problematic in light of the fact that there is a Certificate of Approval for the Brampton landfill and, therefore, there should be no question regarding the location of this site. Further, technical studies such as the work done by Trow reveal that the roadway corridor outside of the Brampton Landfill boundary but within the

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<sup>2</sup> This sole reference reads as follows "The Brampton Street Landfill site adds leachate to the Creek, but existing data does not allow analysis of its effects on water quality. (Hearing Exhibit 179 (c), p50)

Rennie Landfill area, was not characterized via borehole sampling and analysis. Finally, the apparent failure of the project proponent in its representation of information regarding the Brampton Landfill site in the Consolidated Board Hearing cannot now be used to argue that, because of this, the Rennie site was adequately considered as part of this hearing. Dr. Robert S. Dorney, an expert witness involved in the original hearing makes this point quite effectively by explaining the situation for what it actually is – a scenario where the proponent has provided inadequate levels of information:

The existing land use map (Figure 12, Volume II – Exhibits) does not identify by name or location the two dumps or landfills affected by the project – The Upper Ottawa Street Landfill and the Brampton Street Landfill. They are subsumed on the map under a Recreation/ Open Space designation. (Dorney 1985, p3)

Dorney adds that ‘(T)he Brampton Street Landfill site and its leachate zone (if any) are not shown’ (Dorney 1985, p4). Note too that Dr. Dorney is also unaware of the existence of the Rennie Landfill site.

### ***Provincial Declaration Order Issued in 1997***

In 1996, the municipality initiated the process of securing an Exemption Order (now called Declaration Order) from the province in order to avoid having to go through another full assessment of the expressway because of some roadway design changes. Proposed design changes included shifting the northern stretch of the expressway, where it reaches the QEW, to the east in order to avoid the Brampton Landfill. The modified roadway corridor still cuts through the Rennie landfill site. However, no mention is made in the Exemption Order document of the hazardous nature of the Rennie landfill site, again creating a situation similar to the situation Consolidated Board Chair Jeffrey raised concerns about back in 1985 about the need to provide adequate information regarding the characteristics of a landfill site prior to approving a roadway corridor through such a site. Even without knowledge of the problematic nature of this site, many citizens requested that a full assessment of the newly proposed roadway corridor be completed in order to address a variety of other emerging concerns including air quality impacts and subsequent impacts on human health.

It was not until July of 1998 that the proponent released a readily available public document indicating that the Rennie landfill was cause for concern. The document was the municipality’s Draft Summary of an Impact Assessment and Design Process Report, dated July 1998. The information about the Rennie Landfill included in this report read as follows:

Expressway construction will result in the excavation of 124,000 m<sup>3</sup> of material from the Rennie Street Closed Landfill. This includes 2000 m<sup>3</sup> of hazardous waste, 100,000 m<sup>3</sup> of non-hazardous waste and 22,000 m<sup>3</sup> of clean fill.

(Draft Summary, IA&DP Report, July 1998, p9)

No mention was made in this document of the presence of PCBs in the site or the fact that these contaminants were discharging from the site into the Red Hill Creek. The

information was extremely limited *and it should be noted that it was not provided until after the province granted the Declaration Order to the municipality in 1997*. We therefore believe it is highly problematic that the municipality contends that this process, in combination with the 1985 Joint Board Hearing, has served to adequately assess whether plans to excavate a portion of the Rennie Landfill are appropriate.

Our belief is only further supported by the events that unfolded several years after the granting of the Declaration Order. These events confirm that full disclosure of the nature of this landfill site was never provided by the municipality as part of the Consolidated Board Hearing or during the public process involved in applying to the Province for the Declaration Order. The Ministry also appears not to have been aware of the full extent of the problems at the site at that point in time. This is confirmed by the fact that the MOE did not lay charges against the municipality for problems associated with the discharge of leachate from the landfill to Red Hill Creek until the fall of 1999<sup>3</sup>, two years after the granting of the Declaration Order. The outcome of the case was a guilty plea from the city of Hamilton in November of 2000, involving an admission by the city that it was aware of the landfill site problems as far back as 1989. Further, the evidence confirming that the city was aware of the problems with leachate flowing from the landfill into the creek is contained in a consultant's report prepared as part of the preparatory work for expressway construction<sup>4</sup>.

## **B) Application of Relevant Provincial Environmental Law**

While we are extremely frustrated with how provincial environmental assessment processes have failed the community where the expressway and the Rennie landfill are concerned, we have become only more frustrated by interpretations of provincial environmental law as it applies to this site. We believe these interpretations have served to decrease the MOE's ability, as provincial environmental regulator, to influence the planning and direct key aspects of the implementation of the proposed landfill excavation.

### **Part V Approval and Definition of Alteration**

We are puzzled to this day over the Ministry of Environment Approvals Branch staff determination that the city's plans to remove 70,000 m<sup>3</sup> of waste from the Rennie Landfill *does not* constitute an alteration under Part V of the Environmental Protection Act. We struggle with this explanation because we have obtained copies of written communications between the MOE and the proponent regarding this very issue and see that, in the past, the Ministry did indicate the need for a Part V approval. What we learned is that the MOE's position in the past was that a Part V approval was required for Rennie landfill work. In a letter dated December 22, 2000, Mr. John Percy, District

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<sup>3</sup> The MOE and Lynda Lukasik, who served as a private informant, laid parallel charges against the City of Hamilton for allowing contaminants including PCBs, aldrin, and heptachlor to flow from the Rennie landfill into the adjacent Red Hill Creek. The municipality pleaded guilty to these charges and the subsequent negotiated settlement included a requirement that the site be remediated.

<sup>4</sup> Golder Associates Ltd., Geotechnical Investigation Rennie Street Landfill North-South Parkway, Golder Report No. 881-1416-A, March 1989a.

Manager with the Hamilton District Office of the MOE, explained to the Rennie CLC that a Part V approval was required back in 1998 because the proponent planned to excavate the site, haul away any toxic material and then pile the remaining, non-hazardous material at the north end of the site thereby changing the site's contours.

The current plan involves removing 70,000 m<sup>3</sup> of the site, but taking all of that material off-site (although it should be noted that clean cover material will likely stay on site). We are told that, by virtue of this change, a Part V approval is no longer required. Rennie CLC members remain confused to this day as to why the removal of this amount of waste from the landfill- including hazardous waste - does not constitute an alteration. The dictionary definition of alteration is 'a change or modification'. Surely the removal of 70,000 tonnes of waste from an old landfill site is an instance of a change or a modification. We are also troubled by documentation obtained through a Freedom of Information request. That documentation included a witness statement of an MOE Hamilton District Office staff person gathered as part of the MOE's investigation of the problems with the Rennie landfill discharging contaminated leachate to the Red Hill Creek. In that statement, the staff person makes reference to a meeting held on November 5<sup>th</sup>, 1998 at the MOE Approvals Branch in Toronto. The municipality had requested the meeting in order to discuss approval requirements for the relocation of waste from the Rennie landfill. The witness indicates that it was his understanding that the proponent was seeking a second opinion to the District Manager's opinion that a Part V approval was required. He also indicates that:

The Region was concerned about the public demanding an EPA hearing and they were hopeful they could avoid the need for a hearing. The Ministry wanted to know if the issue had been dealt with during the prior public consultations for the Expressway. The Region was concerned about further delays to the construction of the Expressway. They were hopeful that the site could be dealt with as a contaminated site rather than as a landfill and therefore avoid Part V and the need for a hearing. The thrust of the meeting was "How do we avoid any delays in the construction of the expressway?"

The apparent nature of the discussion that took place at that meeting concerns Rennie CLC members who are now questioning whether there is an appropriate level of provincial oversight of the proponent's activities when it comes to the excavation of this landfill site. The minutes prepared for that November 5<sup>th</sup> meeting indicate that an individual named Mr. Andrezej Dominski from the MOE Approvals Branch did ask 'how this project was handled under the EA process' and further 'that the sections in the EA document and the Exemption Order dealing with the landfill be highlighted and forwarded to him'. Our FOI request provided us with no information to confirm whether this information was ever provided to Mr. Dominski and further, whether the MOE Approvals Branch was ever satisfied that the landfill excavation had been properly addressed through these assessment-related processes. Based on our own review of these provincial EAA processes, we find it hard to imagine that anyone could demonstrate that the site was appropriately considered within these processes.

## **Approval Under s.46 of the EPA**

The applicability of Section 46 of the EPA also had to be considered within the context of the Rennie landfill. The MOE District Office indicated in June of last year that it was satisfied with the city's evidence, presented in letter form, that no land filling had occurred at the site within the last 25 years and, therefore, that no approval was required under Section 46 of the EPA. The city's letter was never provided to Rennie CLC members. The only explanation from the municipality regarding applicability of s. 46 that we have been provided with appeared in a letter to the MOE District Office back on September 4 2002. The assertion read as follows:

No waste has been deposited at Rennie Street or at the Brampton Street landfill site (closed in 1974) within the last 25 years. Therefore s.46 of the EPA is inapplicable to the construction of the Expressway through these areas.

Because members of the CLC were never provided with a copy of the city's response providing the documentation and justification for their belief that s.46 does not apply to Rennie, we remain concerned. This is because we have received anecdotal information from several sources that points to the possibility that dumping of waste at the Rennie landfill *has occurred within the last 25 years*. We are very much interested in seeing the Ministry follow up on some of these assertions by interviewing the individuals who have provided this information in order to determine whether there is reason to believe that approval under Section 46 is, indeed, necessary.

## **C) The Current Situation – Problems With Limited MOE Mandate**

And so, it is our belief that the plans to excavate the southern portion of the Rennie Street landfill have never been appropriately evaluated through the provincial environmental assessment requirements for the Red Hill Creek expressway. We also have concerns about the manner in which relevant sections of the EPA have been interpreted and subsequently applied in this case.

We believe the manner in which this situation has unfolded has left the community in a particularly perilous position. And we would also like to note that it is a position that would have been that much more perilous were it not for the charges laid against the city of Hamilton by the MOE and private citizens for the problems at the Rennie landfill. Out of these charges, the subsequent guilty plea and the required site remediation came the requirement for a leachate collection system that needed a Certificate of Approval for a sewage works under the Ontario Water Resources Act. As you will see in the paragraphs that follow, an amendment to this Certificate was required in order for the proponent to be able to excavate the landfill. But the amendment does not address the excavation itself – only modifications to the landfill leachate collection system necessary to accommodate the excavation. MOE Approvals Branch staff pushed the envelope to the greatest degree possible in an effort to try to incorporate community concerns regarding the excavation into the Certificate of Approval for the leachate collection system. But, as we have discovered, they could only push so far and we believe this is simply not good enough.

But imagine the situation we would be facing today if no charges had been laid, no landfill clean-up was ordered by the courts and, subsequently, no leachate collector with a provincial Certificate of Approval existed. What, if anything, would the MOE have been able to grab on to in order to ensure that there were more eyes than just those of the proponent looking at the excavation plans? We respectfully submit that we may well have faced a situation where the MOE would have had no legal mandate to comment on the plans, even in the tangential manner that it has in the current situation. Contemplating this scenario only confirms in our minds our strong belief that there is something really wrong with the manner in which this landfill excavation plan has evolved over the years.

To recap, this scenario leaves us in this current situation where, were it not for:

- the charges laid against the municipality; and
- the subsequent requirement to install a landfill leachate collection system that required a provincial Certificate of Approval (sewage works); and
- the subsequent need to amend that CofA in order to modify the leachate collector so that excavation can proceed,

...The MOE would not have any mandate, not even this very indirect mandate, to intervene and impose any requirements on the municipality regarding the landfill excavation work prior to the work commencing. In other words, were it not for this CofA (sewage works) the only recourse the MOE would have would be to respond to any alleged violations of provincial environmental laws or policies resulting from the excavation work.

### ***Problems With Limited MOE Mandate Begin To Emerge***

We have now experienced firsthand the problematic nature of the MOE's limited mandate where the excavation of the landfill is concerned. The municipality has developed a series of plans related to the proposed excavation work. These include critically important plans such as the Supplemental Health and Safety Plan – Site Contaminants, which addresses issues related to protecting workers and adjacent residents from any impacts associated with landfill contaminants. But four of these plans (including the Supplemental Health and Safety Plan), were not reviewed by the Ministry nor were they incorporated into the Certificate of Approval for the leachate collection system. This is an important point to make. As currently worded, the Certificate contains a condition requiring the MOE District Manager to review and deem acceptable certain plans. And, by virtue of their inclusion in the Certificate, these plans become legally enforceable by the MOE.

Understanding this reality, Rennie CLC members expressed strong concerns over this lack of MOE review and inclusion of these key plans in the Certificate and subsequently arranged to meet with MOE Hamilton District Office Manager Geoff Carpentier. Mr. Carpentier explained to us in our meeting on October 1<sup>st</sup> of this year that to include these four key plans *was beyond the Ministry's mandate within the context of the Certificate*

*of Approval amendment and would be open to legal challenge.* This confirmed our suspicions that this lack of MOE mandate where excavation of this hazardous landfill is concerned would lead us to a point where the MOE was in no position to play a proactive role in overseeing and commenting on the excavation plans as they developed. As mentioned, there are four plans that the MOE has refused to include in the Certificate of Approval. These include:

- Supplemental Health and Safety Plan – Site Contaminants
- Waste Stabilization Plan
- Decontamination Plan
- Surface Water Management and Control Plan

These are all plans that are very much associated with the landfill excavation activities and plans that we believe the MOE should be reviewing and commenting on.

As of two weeks ago, the city's consultants indicated to Rennie CLC members that the MOE had yet to be provided with a copy of the Supplemental Health and Safety Plan. This has created a situation where the proponent's plans for safeguarding the health of workers and residents adjacent to the excavation zone has not been reviewed by any outside regulatory agency. Instead independent experts retained by the Rennie CLC are doing their best to provide comment on this plan. Staff members from the city's Public Health Department are also providing comment.

But a discussion that took place at our last Rennie CLC meeting, held on Monday of last week, reveals that the manner in which efforts to safeguard workers and residents from exposure to contaminants are being reviewed and appropriately amended is seriously flawed. All of the parties currently at the CLC table<sup>5</sup> have acknowledged that any migration of contaminants from the landfill excavation zone into adjacent residential neighbourhoods and the wider environment is most likely to occur through these contaminants adhering to dust. The control of dust generated during the excavation is therefore critical. This also means that monitoring dust levels is an important way to determine whether excavation dust is migrating off-site. Should monitoring confirm that dust levels are increasing, this would trigger some sort of response in an attempt to reduce or eliminate the dust problem, thereby reducing or eliminating the risk of contaminants migrating beyond the excavation zone and into the surrounding environment.

But monitoring for particulate matter requires that a baseline level of particulate matter in the area surrounding the landfill be established. At our most recent meeting, the municipality's consultant reported that efforts were undertaken one day in August of this year to determine the baseline levels of particulate matter. The results indicated that particulate levels on that day were as much as twice the provincial ambient air quality

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<sup>5</sup> It should be noted that the MOE District Officer is no longer represented at the Rennie CLC table. This is the case even though CLC members expressed a strong desire to have an MOE representative at the table. We managed to get a commitment for the MOE to remain until the CofA amendment went through. But MOE staff now suggest that their role has shifted to that of regulator and it would be inappropriate for them to be present.

criterion for total suspended solids. Our expert raised concerns about the method used to establish the baseline and the city's consultants have conceded that they need to do some additional monitoring to establish an appropriate baseline value.

This instance leaves Rennie CLC members wondering where the MOE has been while all of this is unfolding. Ideally, an MOE review of the monitoring plans included in the Supplemental Health and Safety Plan – Site Contaminants would lead to a situation where we would not be debating the problems with the estimated particulate level baseline when landfill excavation work is set to commence in mid-November! This is a particularly great concern given that all have agreed that particulate matter is the key parameter to track as an indicator of possible off-site migration of contaminants. We would have assumed that there would have been some logical process whereby the MOE and its technical experts would have weighed in on the city's proposed monitoring protocols and the methods by which the city established baseline particulate levels. At this point, we have confirmed that the city has not even consulted with MOE West Central Region staff who have expertise in air quality issues.