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July 11, 2003

Mr. Don McLean  
68-151 Gateshead Crescent  
Stoney Creek, ON L8G 3W1

Mr. Robert Korol  
11 Edenbridge Court  
Dundas, ON L9H 3Y2

Mr. Alvin Lee  
Stormont, Box 72  
West Flamborough, ON L0R 2K0

Dear Mr. McLean, Mr. Korol and Mr. Lee:

RE: Application for an Investigation of alleged contraventions of s. 38 of the *Environmental Assessment Act* (EAA) by the City of Hamilton, in relation to the construction of the Red Hill Creek Expressway.

EBRO File Number: 03EBR006.I

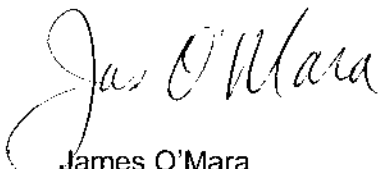
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Staff of this ministry have completed their consideration of the above noted Application for an Investigation and based on all available information, I have concluded that an investigation will not be conducted. The rationale for my decision is detailed in the attached decision summary.

The ministry takes compliance issues seriously. We will continue to closely monitor the City's compliance with the Declaration Order, O.C. 582/97.

In the event that you have any questions regarding the above, please contact Clarke Kirkland, Dispute Resolution Resource Advisor, at (416) 314-8688.

Yours sincerely,



James O'Mara  
Director  
Environmental Assessment and Approvals Branch

Attachment

c: Canadian Environmental Law Association  
P. Lapp, Environmental Commissioner's Office

# Environmental Bill of Rights Application for Investigation Decision Summary

**EBRO File Number:** 03EBR006.1

## **Issue:**

Application for an Investigation of alleged contraventions of s. 38 of the *Environmental Assessment Act* (EAA) by the City of Hamilton, in relation to the construction of the Red Hill Creek Expressway.

## **Application Summary:**

The applicants requested that the Ministry of the Environment (MOE) conduct an investigation to determine if the City of Hamilton (the City) has failed to comply with certain terms and conditions of the Declaration Order, O.C. 582/97 (the Order), including provision of other laws referred to in, and instruments incorporated by the Order.

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

The applicants allege that the failure to comply with the Order constitutes an offence under s. 38 of the EAA.

The applicants state that some construction has begun and other construction is about to begin, without provincial and federal permits or authorizations.

The applicants provided a detailed description of the contraventions.

## **Review Recommendation:**

Staff of this ministry have completed their consideration of the above noted application for an investigation. Having considered all the available information including consideration of s. 77 of the *Environmental Bill of Rights* (EBR), the Director has concluded that it is not in the public interest to conduct an investigation.

The ministry takes compliance issues seriously. We will continue to monitor closely the City's compliance with the Order.

## **Rationale for Decision:**

The specific alleged contraventions of the Order raised by the applicants included the following:

**Clause 30 – The pre-construction monitoring has not been conducted as proposed, if at all. Examples given included reports and pre-construction air quality monitoring at the King Street interchange.**

The City has released draft and final reports and has indicated that additional reports are under development.

The City's Exemption Order submission (May 10, 1996) states (pg. 16) that the air quality monitoring at the King Street interchange will be used to monitor air quality one year prior to construction, one year during construction and two years following construction.

The City has released a report called the "Pre-Construction Ambient Air Quality Monitoring", in April 2003. This report states that ambient air quality monitoring was completed in June 1998, in advance of the one year prior to construction date, at a station located near the King Street interchange. The survey duration and sampling protocol were discussed with and agreed to by the MOE. An independent audit of the site instrumentation was also performed by MOE.

As this air quality monitoring has been complete more than one year prior to construction, MOE will not be investigating the alleged contravention further.

**Clause 35 to 37, & 93 – Breakdown in the Assessment Process Schedule. Community Stakeholders Committee (CSC) disbanded despite commitment to consult with CSC throughout the process.**

The City's Exemption Order submission (May 10, 1996) clearly identifies that the Assessment Process will include a Stakeholder Consultation Program. The consultation plan and schedule, and Figure 3 under the Stakeholder Consultation Program is introduced in the document as "a discussion of the key stakeholder groups identified to date and how they could provide input". Also, the committee structure and Figure 4 is prefaced in the document with the statement "The following is a proposed structure for organizing all of the interests in the project. Figure 4 illustrates the relationship of each group to each other." These statements arguably provide the City with some flexibility to satisfy the "intent of the stakeholder consultation program" while responding to changes in the public environment.

In 1998 according to the city, several members of the CSC who were opposed to the project resigned. The applicants confirmed these resignations in clause 36. The CSC established a subcommittee which advised the City to refer the matter of the need for the expressway to the City's Vision 2020 Committee. The CSC attempted to recruit new members. In September 1998, the CSC unanimously resolved that its work was complete and disbanded.

The City has released a Public Consultation Report, March 2003, which highlights the work of the CSC. The Report also includes both background and context, a description of the City's public consultation activities, and an overview of the key issues raised by the CSC, the public and government and the City's response to them.

The City has also indicated that it will implement a "community relations program" during the pre-construction, construction, monitoring and maintenance phases of the project and that the program will be implemented by a community facilitator.

MOE will follow up with the City to determine that this program satisfies the requirements of the

Order through the pre-construction, construction, monitoring and maintenance phase of the project.

As this alleged contravention took place in 1998, MOE will not investigate further due to limitation periods in the *Provincial Offences Act*.

**Clause 38 – Stakeholder Consultation Program to include Landowners Committee (LC) and Government Agency Committee (GAC). LC was never formed, and GAC was formed but never met.**

The City's Exemption Order submission (May 10, 1996) provides some flexibility to satisfy the "intent of the stakeholder consultation program" while responding to changes in the public environment.

A LC was never formed by the City. The City's Exemption Order submission states, "This group will provide a key input into the economic impact assessment". While the City never formed a LC, it did produce in March 2003, a report, "Economic Impact to Businesses at QEW Interchange" that provides an assessment of economic impacts, based on the landowner input. This is one example of where it appears the City is meeting the intent of the LC as stated in the City's Exemption Order submission.

Also, the City's Exemption Order submission states that the GAC will "participate in the study to the extent necessary to ensure that the government agencies mandated responsibilities are addressed. The GAC will not play an active role in public consultations although the Region will develop a communications mechanism to ensure that public concerns and issues are brought to the GAC's attention".

The City did initiate a GAC. This stated, the requirement of the City to satisfy the mandated responsibilities of all government agencies, remains.

The failure of the City to create a LC and the GAC to meet may be regarded as a potential non-compliance issue. However, the wording of the City's Exemption Order submission does create some doubt that the failure of the City to form a LC and the failure of the GAC to meet, could be successfully prosecuted.

As it appears the City has taken steps to address the intent of the LC and must satisfy the responsibilities of all government agencies, the ministry has decided not to investigate further under s. 77 (2) (b) of the EBR, which states, "the alleged contravention is not serious enough to warrant an investigation".

MOE will follow up with the City to determine how it has satisfied the mandate of the LC and GAC committees.

**Clauses 40, 41 & 50 – No responses to stakeholder comments have not been received yet.**

The City has released a Public Consultation Report, March 2003 which in part details the source, question/issue raised and the City's response.

There is no contravention.

**Clause 39, 51 & 54 – The proponent has released final reports on technical and other matters “for information” with no further consultation. Few or no changes have been made as a result of public consultation to final version of reports.**

The City conducted consultations on various draft reports in 1997, 1998 and 2002. The City has released a Public Consultation Report, March 2003. The City has also indicated that consultation during the pre-construction, construction, monitoring and maintenance phases will be in the form of “community relations” and that the program will be implemented by a “community facilitator”.

The Order does not specify that the City must consult on final technical reports that are issued for the project. There will be no further investigation of the alleged contravention.

**Clause 55, 82 to 85 – Design Report not completed and required prior for approvals prior to initiation of construction.**

At the Hamilton City Council meeting on March 31, 2003, it was stated that the City intends to complete the Design Report as part of the Detailed Design, Construction and Monitoring Stage.

There will be no further investigation of this alleged contravention as there is no time requirement for the completion of this report.

MOE will monitor the City on the development of this report.

**Clause 66 – Impact Assessment Report has not been completed.**

The City has issued the “Impact Assessment Summary Report – Executive Summary, April 2003”, which is a precursor to the “Impact Assessment Summary Report” (IASR). The purpose of the IASR is to summarize the results of several technical reports prepared for the project. There will be no further investigation this alleged contravention as there is no time requirement with respect to the completion of this report.

MOE will monitor the City for the development of the full report.

**Clause 68 – Addressing matters raised by the Niagara Escarpment Commission (NEC) as required by the Declaration Order.**

There will be no further investigation this alleged contravention as there is no time requirement with respect to the conditions in the Order.

MOE will consult with the NEC to determine if the issued permit fulfills the conditions of the Order.

**Clause 70 & 71 – City has not yet applied for permits under the Conservation Authorities Act. The approval process is also questioned.**

Schedule “C” of the Joint Board ruling gives direction to the City and to the Hamilton Region Conservation Authority on the components of the approval and the requirement for an approval.

The City is responsible and has taken the initial steps to make application and obtain the

required approvals or authorizations under the Conservation Authorities Act.

There will be no further investigation of this alleged contravention as there is no time requirement on the City to make application to the Hamilton Region Conservation Authority.

**Clauses 73, 74, 75, 76, 77, 78 – Approvals under various other Acts have not been obtained by the City.**

The City is responsible to make application and obtain the required permits or authorizations from the appropriate regulatory bodies. With respect to MOE approvals, the City is working with the MOE to fulfill approval requirements.

There is no further need to investigate of this alleged contravention because there are no time requirements on the City to make application for the identified permits or authorizations.

**Clause 97 – Order requires avoidance of work around the landfill sites**

The Order contemplates work around the landfill sites; therefore the ministry will not be investigating further. Potential impacts and mitigation measures to the landfills have been discussed, as well, by the City in the Red Hill Creek Expressway North-South Section – Impact Assessment and Design Process, Draft Summary Report, Vol. 2, July 1998.

**Clauses 103 & 104 – Changes in the environment and in the proposed undertaking mean more consultation should be done.**

The City has released a Public Consultation Report, March 2003. The City has also indicated that consultation during the pre-construction, construction, monitoring and maintenance phases will be in the form of “community relations” and that the program will be implemented by a “community facilitator”.

The city continues to develop reports that take into consideration the current environment and proposed undertaking.

There will be no for further investigation of this alleged contravention.

### **Conclusions:**

The MOE, through a review of documents and files and in discussions with staff of the Hamilton District and Hamilton Regional Office, has determined that the majority of the alleged contraventions raised by the applicants do not warrant further investigation.

The failure of the GAC to meet and the failure of the City to form a LC are potential non-compliance issues. But, the ministry has decided not to investigate further as the alleged contravention is not serious enough to warrant an investigation.

MOE takes compliance issues seriously and has identified as a result of this application, a number of matters that it will continue to monitor for the City's compliance with the Order. The Niagara Escarpment Commission will also be contacted.