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VIA E-MAIL

Chair and Members of Council
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File No. T980334

Dear Chair Anderson and Regional Councillors:

**Re: Southeast Collector Trunk Sewer Environmental Assessment (“EA”) / location of the
Odour Control Facility (“OCF”)**

Summary

- 1. We are writing on behalf of property owners in Durham Region who will be expropriated for, and other Durham/Pickering residents concerned about, the Odour Control Facility component of the Southeast Collector (“SEC”) project.**
- 2. I specialize in environmental law, and have over 30 years of extensive experience in projects under the Ontario *Environmental Assessment Act*. I have been advisor to the Minister of Environment on EA Reform, and have acted as legal counsel on EA issues for a large number of Ontario municipalities and Regional Governments, including Halton Region, Peel Region, Niagara Region, Hamilton-Wentworth, the Cities of Windsor, Toronto, Hamilton, Burlington, and Towns of Markham, Ajax, Oakville and Milton.**
- 3. There are fundamentally serious legal issues regarding the EA Process as it pertains to the OCF. These serious legal issues are outlined in this letter. Fixing these problems does not require starting the process over.**
- 4. But, if these are not properly addressed now, the whole SEC project is in legal jeopardy. A short time out is required to review and fix these problems. These issues can be addressed in a matter of a few months, and certainly by next spring.**
- 5. A time out to fix these problems is in the interests of both those who support the SEC project, and those who are affected by it. For those who support it, fixing the serious legal issues over the next few months is clearly better than having the project**

thrown out later by the courts. For those with concerns about the OCF, the time out and review will allow for fair and required application of EA criteria and more appropriate solutions.

- 6. The Notices of Motion coming before Council today, to suspend the EA process to deal with these issues, are highly appropriate. If these steps, as well as those set out in paragraph 7 are carried out, this would go a long way to resolving the serious legal issues which now endanger the SEC.**
- 7. The review requested by Durham Council should include the following items and the resulting information should be presented at a public meeting to be arranged by York in the City of Pickering:**
 - (a) identify and evaluate alternative locations and design/technology for the OCF having regard to smaller property size requirements and the ability to move the untreated air to a facility at a location remote from the SEC Trunk Sewer;**
 - (b) take the information produced in (a) into account, and conduct a new evaluation of where the OCF should be located;**
 - (c) in so doing, consult the public about the proposed and the new alternative locations for the OCF identified in (a) & (b); and**
 - (d) amend the EA as necessary (including but not limited to changing the proposed location of the OCF) in order to take the comments received into account.**
- 8. We also ask Durham Council to pass a further resolution requesting York Region to suspend expropriation processes re the SEC until the actions set forth in Notices of Motion have occurred and Durham Council is satisfied that the EA should be considered for approval by the Minister of Environment.**

Introduction

We are writing today on behalf of property owners in Durham Region who will be expropriated for, and other Durham/Pickering residents concerned about, the Odour Control Facility (OCF) component of the Southeast Collector Trunk Sewer (“SEC”) project to ask for further consideration of the actions set out in a letter of the Regional Chair of August 21, 2009 to the Ministry of Environment to re-initiate the environmental assessment process for the SEC by submitting the Final Southeast Collector Trunk Sewer (Amended) Environmental Assessment Report (“Amended EA Report”).

This letter was apparently based on the assumption that the Amended EA Report satisfies the requirements of the *Environmental Assessment Act*¹ and that the currently proposed location for the OCF on the right-of-way owned by York on the west side of Townline Road (Regional Road 30) opposite Shaft 9 complies with Durham Council's resolution of March 11, 2009 to relocate the OCF to York.²

We respectfully submit, for the reasons set out below, that Durham Council should pass a resolution asking the Minister of Environment to suspend the environmental assessment process for the SEC, and requesting that certain actions be taken to correct the deficiencies with the EA. As a co-proponent of the Southeast Collector Trunk Sewer, Durham is empowered under ss. 6.2(2) & (3) of the *Environmental Assessment Act* to amend or withdraw the EA Report prior to or after the deadline for completion of the Ministry review to remedy deficiencies with the EA Report.

The reasons for this request are:

- (1) the location of the OCF proposed in the Amended EA Report does not comply with Durham Council's resolution of March 11, 2009 to relocate the OCF to York;
- (2) the EA is fundamentally flawed and does not meet the requirements of the *Environmental Assessment Act* because;
 - (a) the EA Report does not comply with the approved Terms of Reference ("TOR") for this undertaking; and
 - (b) there has been a fundamental lack of required consultation during the site selection process for the location of the OCF.

Suspending the EA process will help to preserve, protect, and enhance Durham's efforts to foster accountability by engaging in *open and transparent governance*.³ In particular, providing the time for Durham staff to review and comment on the Amended EA Report, presenting that information publicly during Public Works Committee and Council meetings, and requiring York to engage Durham residents in a meaningful process of public consultation will enhance accountability. It will also protect the rights of Durham residents to be meaningfully consulted on important environmental matters. Suspending the EA process in order to take action to correct the above-noted deficiencies will also save Durham and York time, money and frustration. Delayed construction resulting from lengthy legal battles to determine the validity of the EA will increase the cost of the undertaking thereby increasing the financial burden on the Regions and their taxpayers.

¹ *Environmental Assessment Act*, R.S.O. 1990, c. E. 18.

² Letter dated August 21, 2009 from Roger Anderson, Regional Chair & CEO of the Regional Municipality of Durham, and Bill Fisch, Chairman and CEO of the Regional Municipality of York to Ms. Garcia-Wright, Director, Environmental Assessment and Approvals Branch, Ministry of the Environment re: Formal Resubmission of Durham/York Southeast Collector Trunk Sewer Individual Environmental Assessment.

³ The Region of Durham's core values are described in *Growing Together: Durham Region Strategic Plan 2009-2014* (Whitby: Regional Municipality of Durham, 2009), p. 14.

1. The proposed location for the OCF does not comply with Durham Council's resolution of March 11, 2009

The currently proposed location for the OCF does not comply with Durham Council's resolution of March 11, 2009. The purpose of that resolution was to ensure that any adverse effects caused by the OCF would occur in York where the waste transiting through the SEC Trunk Sewer is generated. This purpose has not been fulfilled because the OCF, if built in the currently proposed location, will have significant environmental and health impacts in Durham. Operational failures with the OCF may cause the sewer headspace to become positively pressurized, which "may lead to fugitive releases and potentially odour emissions at Shaft 9 and OCF."⁴ The currently proposed location is on the boundary between Durham and York, and prevailing winds will carry any and all emissions southeast into Durham.⁵ Building the OCF on the Durham / York boundary line does not address the concerns expressed by Durham residents that the OCF will negatively impact human health, safety, and the environment in Durham.

To comply with Durham Council's resolution of March 11, 2009, the OCF must be built in a location in York where the OCF will not negatively impact human health, safety, and the environment in Durham.

2. The EA Report is fundamentally flawed

The EA Report is fundamentally flawed because: (a) it fails to comply with the TOR, and (b) there has been a fundamental lack of required consultation during the site selection process for the location of the OCF.

(a) *The EA Report does not comply with the TOR*

York's failure to prepare the EA in accordance with the approved terms of reference for this undertaking violates a fundamental requirement of the *Environmental Assessment Act*,⁶ and constitutes a sufficient basis for the Minister to refuse to approve the SEC Trunk Sewer.⁷

The TOR for this undertaking were approved on February 28, 2006.

The approved TOR sets out the framework that must be followed during the preparation of the EA. The proposed undertaking was not explicitly defined in the TOR. The TOR generally restricts the undertaking to improvements required to provide the necessary increase in capacity to meet the future York-Durham Sewage System servicing needs.

The EA Report fails to comply with the TOR in three important ways.

⁴ Final Southeast Collector Trunk Sewer (Amended) Environmental Assessment Report, p. 6-115 [Amended EA Report].

⁵ Amended EA Report, p. 8-58.

⁶ *Environmental Assessment Act*, s. 6.1

⁷ *Environmental Assessment Act*, s. 9(2).

First and foremost, the environmental assessment process is an iterative process. The TOR explicitly recognizes that modifications during the preparation of the EA may be required. In particular, the TOR recognizes that York may be required to adopt additional:

- evaluation methodologies utilized to select alternative site locations for proposed infrastructure;
- studies to ensure that the environmental effects are accurately identified and mitigated; and
- consultation activities to discharge York's requirements under the *Environmental Assessment Act*.⁸

The EA does not comply with the TOR because York failed to objectively identify and evaluate alternative site locations for the OCF that fit the criteria used to select the currently proposed location for the OCF.

York originally proposed to build the OCF at Altona Road, south of the Hydro corridor, adjacent to Shaft 6/7. Public opposition to the location of the OCF led York to move the proposed location from Altona Road to the east side of Townline Road, between Tauton Road and 4th Concession Road, adjacent to Shaft 9, and eventually to its currently proposed location on the west side of Townline Road in the right-of-way opposite Shaft 9.

New technology and a smaller site size requirement were fundamental to York's decision to locate the OCF in the right-of-way on the west side of Townline Road opposite Shaft 9. York was able to re-locate the OCF from Shaft 6/7 to its currently proposed location west of Shaft 9 by using new technology, "air conveyance pipe(s)" ("ACP"), which can convey untreated air upstream to the alternative odour control site. York's consultants indicated that through the use of ACPs, air could be "conveyed to alternative OCF sites along the new SEC trunk sewer or to remote OCF sites away from the SEC trunk sewer alignment."⁹

York therefore had the opportunity to consider alternative OCF sites not only along the proposed SEC Trunk Sewer, but also to locate OCF sites at remote locations away from the SEC Trunk Sewer alignment. York has not made any attempt to look for new sites based on this new flexibility. York closed its mind to other locations that were originally rejected based on the initial site-selection criteria, but which became possible when York determined that the OCF could be built at smaller and/or remote sites.

York previously considered and rejected sites that did not meet the initial 25 acre,¹⁰ or subsequent 8 acre size requirement,¹¹ but then chose a final location of less than 1 acre for the site of the OCF. Potential sites in York along 14th Avenue were not selected as one of the five OCF locations for further assessment during the Impact Assessment based on their "restricted

⁸ York/Durham Southeast Collector Trunk Sewer Environmental Assessment, Approved Terms of Reference (February 2006) at p. 22 [TOR].

⁹ *Ibid.*, pp. 38-39.

¹⁰ *Ibid.*, pp. 9, 18.

¹¹ *Ibid.*, pp. 9, 18.

site dimensions.”¹² York considered and rejected those sites even though it was aware that the OCF structure could be constructed on a site of less than 8 acres.¹³ Following the initial submission of this EA, York considered additional 8 alternative OCF locations. Again, “suitable” alternative locations were restricted to at least 8 acres.¹⁴ York considered 5 additional alternative site locations in July 2009 (including the currently proposed location for the OCF), but during this process, York failed to re-consider sites that were previously rejected based on the new criteria that the OCF could be built on sites small than 1 acre in size at remote locations away from the SEC trunk sewer alignment.¹⁵

Environmental assessment is an iterative process. York cannot change its criteria, e.g. site size, and then validly select the current location for the OCF based on that new criteria without having applied the same criteria to alternative locations. York is required to objectively demonstrate that it had also considered other locations which meet the same criteria.

The TOR explicitly requires York to apply the site selection criteria to identify and evaluate alternative locations, to conduct a new evaluation of where the OCF should be located based on new criteria and to consult the public about the proposed and new alternative locations for the OCF. York failed to engage in the iterative process required by the TOR.

York’s EA does not comply with the TOR and is fundamentally flawed because York failed to consider alternative sites that could also be made available using this other technology and the less restrictive site size requirements.

Second, the TOR requires York to expand the Study Area for the purpose of establishing the full impact of an identified environmental effect if the effect “has the potential to have an impact outside of the Study Area.”¹⁶ Emissions from the OCF and other parts of the odour control system will negatively affect Durham residents and businesses residing south of Finch Avenue. York specifically states in the Amended EA Report that:

“[d]uring operation, if the proposed SEC Trunk Sewer is not properly ventilated, the sewer headspace may become positively pressurized, which may lead to fugitive releases and potentially odour emissions at Shaft 9 and OCF.”¹⁷

York reaches the same conclusion about odour emissions at Shaft 6/7.¹⁸ Prevailing winds will carry untreated odour emissions at Shaft 9 and/or Shaft 6/7 southeast to residences and places of business located south of Finch Avenue. Despite being aware that untreated odour emissions released at Shafts 6/7 and 9 will cause negative impacts in neighbourhoods and communities south of Finch Avenue, York failed to extend the Study Area to include and document the project’s environmental effects in this area. York’s failure to do so is important because the EA Report is incomplete to the extent that it fails to document the environmental effects of the OCF

¹² *Ibid.*, p. 10.

¹³ *Ibid.*, pp. 18-19.

¹⁴ *Ibid.*, p. 26.

¹⁵ The only remote site considered during the third round of identifying alternatives sites was Option 17, which is located on the West side of York Durham Line at 407 ETR.

¹⁶ TOR, p. 5.

¹⁷ Amended EA Report, p. 6-115.

¹⁸ Amended EA Report, p. 6-127.

and more generally, the undertaking, on the neighbourhoods and communities residing south of Finch Avenue.

Third, the TOR requires that a draft of the EA Report must be made available for public review before it is formally submitted to the MOE.¹⁹ York failed to comply with the TOR by not making a draft of the Amended EA Report publicly available following its decision to re-locate the OCF in July, 2009 to its currently proposed location and prior to its formal resubmission of the Amended EA Report on August 21, 2009. Once York asked the MOE to suspend the environmental assessment process and amended the EA (including moving the location of the OCF), the TOR required York to make the new draft of the EA Report publicly available. York's failure to comply with this requirement imposed by the TOR is important because it deprived Durham residents of their right to be consulted on the adequacy of the EA Report and, wherever possible, to have their concerns resolved in advance of the completion of the EA.²⁰ Durham residents' concerns with the Amended EA Report were not identified nor were they resolved before the EA was completed precisely because York failed to make the Amended EA Report publicly available, and to consult Durham residents about it.

(b) *There has been a fundamental lack of required consultation during the site selection for the proposed OCF*

The *Environmental Assessment Act*, regulations adopted pursuant to that Act, the *Code of Practice: Consultation in Ontario's Environmental Assessment Process*²¹ ("Code"), and various decisions by the Environmental Review Tribunal (and its predecessor) the Environmental Assessment and Appeals Board, and the Divisional Court all recognized that satisfactory and adequate public consultation is fundamental to the approval of an environmental assessment.

The Code establishes particularly high consultation requirements for the SEC Trunk Sewer EA.²² Consultation must involve interested persons in the planning, implementation, and monitoring of the proposed undertaking.²³ It must be a two-way communication process. This means that York must respond to public comments, and do so in a meaningful way. Meaningful consultation requires the proponent to make changes to its proposed action, where appropriate, based on information obtained through consultations.²⁴

The consultation requirements are "high" or more stringent for this undertaking because:

- The undertaking is complex and involves consideration of many alternatives, including the nature and proposed location of the OCF;

¹⁹ TOR, p. 24.

²⁰ TOR, p. 19.

²¹ *Code of Practice: Consultation in Ontario's Environmental Assessment Process*, Ontario Ministry of Environment (June 2007) ["Code"].

²² Code, p. 13-14.

²³ Code, pp. iii,

²⁴ This requirement is specifically mandated by the TOR.

- The undertaking is located in an environmentally sensitive setting. In particular, the OCF is located at a site that is in the Greenbelt, in a provincially-recognized Agricultural Preserve, in the vicinity of Bob Hunter Memorial Park and the Rouge Park, and its nearest neighbour is the Reesor Mennonite Meeting House. That house has a Heritage Designation plaque on it and approximately 185 people are buried in the cemetery on its property;
- The significance of potential environmental effects are unknown. The OCF will be equipped with new technology that has not been tested at similar facilities. Moreover, the environmental effects of the OCF are likely to be significant. OCF facilities using some of the same technology in York, Ottawa, and Edmonton caused significant environmental effects; and
- The level of interest in and controversy of the SEC Collector Trunk Sewer is extremely high in the City of Pickering, and more generally, in Durham. The level of public interest is evidenced by public participation in notification sessions held by York. It is also exemplified by the resolutions passed by Durham and the City of Pickering. Durham Council passed a unanimous resolution on March 11, 2009 that the OCF should be located in York based on the level of opposition to the original proposed location of the OCF in Durham. Pickering Council also passed a resolution on September 21, 2009 instructing the City's Clerk to write to the Minister (letter dated September 22, 2009) asking for the EA process to be suspended until a suitable location for the OCF could be identified. The City of Pickering is also considering taking legal action in this matter. The City's actions clearly evidence the significant level of interest and controversy about the location of the OCF.

York's consultation of interested citizens in Durham about the location and effects of the OCF does not satisfy the high consultation requirements for this undertaking. All of the evidence points to the fact that York's consultation was clearly a one-way communication process that simply involved notifying interested residents of the location of the OCF. York failed to respond to the concerns expressed by interested citizens by changing the proposed location of the OCF to adequately address the information that it obtained through the public meetings that it hosted.

Landowners/residents living near the currently proposed OCF location were never consulted prior to being told by York that it had "selected" the location of the OCF on the west side of Townline Road at Shaft 9. The public information meeting held by York on July 23rd, 2009 only provided landowners/residents with notice of the proposed location. The purpose of the public meeting was to "provide the opportunity for residents to learn more about the York location..." York pre-selected the location prior to the meeting, did not involve residents in the planning aspects to determine the site location, and was not responsive to the comments that it received at that meeting. York did not make changes to the currently proposed location of the OCF or consider any other alternative locations based on information that it obtained through the public meetings.

Moreover, York was not responsive to the feedback that it received at the Public Information Session that in held in the City of Pickering on May 12, 2009. Moving the proposed location of

the OCF at Shaft 9 from the east side of Townline Road (York Regional Road 30) to the right-of-way owned by York on the west side of Townline Road (across the street from the previously proposed location) clearly does not address the concerns expressed by Pickering/Durham residents that the OCF, and its associated environmental effects, should be located in York where the sewage is generated. Nor did it comply with the spirit of the resolution passed by Durham Council that the OCF should be located in York. **The OCF, if built at the currently proposed location, will have significant environmental and health impacts in Durham identical to the effects that it would have had if the OCF was built on the previous location on the east side of Townline Road.** It is patently absurd to assert that moving an OCF across the street adequately addresses the nature of the expressed concerns about human health, safety, and negative environmental effects.

The deficient consultation process conducted for the currently proposed location of the OCF is a sufficient basis on its own to conclude that the EA does not meet the requirements of the *Environmental Assessment Act*.

3. Conclusion

For the reasons mentioned above, the Amended EA Report does not comply with Durham Council's resolution of March 11, 2009. Nor does it meet the requirements of the *Environmental Assessment Act*.

To cure the substantive deficiencies of the Amended EA Report, we ask that Durham Council pass a resolution requesting the MOE to:

- (1) suspend the environmental assessment process for the Southeast Collector Trunk Sewer to provide Durham the opportunity to review and comment on the Amended EA Report;
- (2) require York to undertake the following items noted below and provide the resulting information at a public meeting to be arranged by York in the City of Pickering:
 - (a) identify and evaluate alternative locations and design/technology for the OCF having regard to smaller property size requirements and the ability to move the untreated air to a facility at a location remote from the SEC Trunk Sewer;
 - (b) take the information produced in (a) into account, and conduct a new evaluation of where the OCF should be located;
 - (c) in so doing, consult the public about the proposed and the new alternative locations for the OCF identified in (a) & (b); and
 - (d) amend the EA as necessary (including but not limited to changing the proposed location of the OCF) in order to take the comments received into account.

(3) require York to expand the study area to include the urban areas south of Finch Avenue in Pickering to assess the potential health, social, and environmental impacts of the OCF and its infrastructure on Durham residents and businesses.

During such time that actions referred to in items 1-3 have not been completed as requested, we ask that Durham require York to suspend its acquisitions of lands and interest in Durham, whether by purchase or expropriation.

Please do not hesitate to contact me if you have any questions or require any further information about the issues raised in this letter.

Yours sincerely,

GOWLING LAFLEUR HENDERSON LLP



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