

ENVIRONMENTAL REVIEW TRIBUNAL

IN THE MATTER OF an appeal by St Marys Cement Inc. filed June 11, 2010 for a Hearing before the Environmental Review Tribunal pursuant to section 100 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O. 40, as amended with respect to a Notice of Refusal Permit to Take Water No. 3708-862GHB issued by the Director, Ministry of the Environment, on June 3, 2010, under section 34 of the *Ontario Water Resources Act*, regarding an application for the taking of water from a site located at Lot 3, Concession 11, E. Flamborough, in the City of Hamilton, ON.

AFFIDAVIT OF GRAHAM FLINT
sworn September 28, 2010

I, Graham Flint, of the City of Hamilton, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am Chair of and Spokesperson for Friends of Rural Communities and the Environment (“FORCE”). FORCE, is a federally registered not for profit corporation. FORCE was incorporated as a not-for-profit corporation on June 28, 2004 by Letters Patent. It is a citizen-based advocacy group with hundreds of supporters in Campbellville, Kilbride, rural Milton, Mountsberg, Freelton, and Carlisle. FORCE was formed to oppose the Lowndes Holdings Corp. (now owned by St Marys Cement Group CBM) applications to extract aggregate from its property in Northeast Flamborough in the amalgamated City of Hamilton, and to protect the surrounding natural and built environments. As such, I have knowledge of the matters to which I hereinafter depose, except where I have been provided with information by someone else. In the latter case I have provided the source of the information and, unless I indicate otherwise, I believe the information to be true.

Attached hereto as Exhibit “A” is a copy of the most recent FORCE corporation profile report.

2. On June 3, 2004, in response to rumours that Lowndes Holdings Corp. ("**Lowndes**") had acquired property on Concession 11 East in the former Township of East Flamborough, City of Hamilton (the "**City**") Councillor Margaret McCarthy called a community meeting. I attended the meeting. At the meeting, she invited Lowndes to disclose the use to which it intended to put the its property.

3. Lowndes advised that it intended to build an open-pit stone quarry on the 154 hectares comprising Lots 2, 3 and Part of Lot 1, Concession 11 East, bounded to the south by the 11th Concession Road East, to the east by Milborough Line/Town of Milton, to the north by the unopened 12th Concession Road Allowance and the Timberrun Court subdivision and to the west by Bronte Creek Condominium Estates residential development and other lands owned by SMC (the "**Subject Property**").

4. On June 30th, City Council passed the following resolution:

That staff report back on the compatibility of the proposed aggregate extraction land use north of Carlisle, including, but not limited to, its impact on the surrounding residential and rural land uses, its impact on current infrastructure and local roads, and its conformity with existing and proposed municipal and provincial policies.

5. In response to the resolution, Planning and Development Staff of the City ("**Staff**") prepared Report PD04244 outlining the existing use of the property, applicable planning policy and process, and the aggregate licensing process.

Attached hereto as Exhibit "B" is a copy of Report PD04244.

6. Staff reported as follows:

Existing Land Use

The subject lands contain lands from three former property holdings on the north side of the 11th Concession Road East. These lands have uses including: residential homes; barns; fields that have been used for agricultural purposes; watercourses and heavily wooded/vegetated areas.

...

Official Plan

The subject lands are subject to the policies of both the Hamilton-Wentworth Official Plan (HWOP) and the Flamborough Official Plan.

The Hamilton-Wentworth Official Plan (HWOP) designates the subject lands as "Rural Area". The Flamborough Official Plan designates the subject lands as "Rural".

Zoning

The Flamborough Zoning By-law No. 90-145-Z zones the subject lands as both "A" Agricultural Zone and "CM" Conservation Management Zone.

7. Staff indicated that any development application submitted would be evaluated for conformity with the HWOP and Flamborough OP, and in light of the Greenbelt Plan and the Provincial Policy Statement.
8. Staff further reported that it was their understanding that Lowndes intended to first seek the required Official Plan and Zoning By-law Amendments under the *Planning Act*, and then submit an application to the Ministry of Natural Resources for a quarry license under the *Aggregate Resources Act*. Staff reported that the reasons given for this sequence of approvals were:

...to first establish the proposed land use in the required planning documents; the planning process is a longer time line process; the Provincial quarry license requires finalized supporting documentation, which may change throughout the planning process; and that the quarry license includes site plan details that may not be able to be finalized at this time.

9. On April 1, 2005, in Report PD04244(a), following receipt of *Planning Act* applications (the "**Planning Act Applications**") and studies in support of the quarry proposed by Lowndes (the "**Proposed Quarry**"), Staff reported as follows:

On September 28, 2004, City of Hamilton Planning and Development staff accepted applications submitted from Lowndes Holdings Corp. for an Official Plan Amendment (OPA-04-17) to amend the Flamborough Official Plan, and a Zoning By-law Amendment Application (ZAC-04-89). These applications propose a redesignation from "Rural" to "Extractive Industrial" in the Flamborough Official Plan, and a change in zoning from "A" Agricultural and "CM" Conservation

Management to "EI" Extractive Industrial to permit a dolostone quarry for a 153.8 ha (380 acre) parcel of land, as Shown on Appendix "A".

The applications propose a limestone quarry, processing plant, conveyors, scales and house, and a utility plant. The maximum rate of extraction is estimated at three million tonnes per year. The proponent also indicates in its applications that it owns an additional 62 hectares (154 acres) directly adjacent to the west of the subject lands for a potential future expansion/phase of the quarry, as shown on Appendix "B".

....

The proposed quarry would also require approval under the *Aggregate Resources Act* and other legislation including the *Ontario Water Resource Act* and *Environmental Protection Act*, however no applications have been submitted under any legislation other than the *Planning Act* at the present time.

Attached hereto as Exhibit "C" is a copy of Report PD04244(a).

10. In December 2004 and January 2005, once the Planning Act Applications had been made, FORCE consulted with Kenneth Raven, P. Eng. ("**Raven**") of INTERA Engineering Ltd., to receive professional advice on the adequacy of Lowndes' hydrogeological characterization of the Subject Property and surrounding areas, and an assessment of potential adverse hydrologic and hydrogeologic impacts of the Proposed Quarry. Raven issued his first report to FORCE on March 28, 2005. He identified a number of shortcomings in the proponent's hydrogeological studies. In particular, Raven concluded, among other things, that:

The drawdowns that will occur in response to Quarry dewatering will adversely affect water levels in nearby residential and communal water supply wells which are typically drilled to only 15m in depth. Water supply wells for nearby housing developments on Glenron Road, at Timberrun Court, at Bronte Creek Estates, at the Lawson Park Campground and at private residences along Mountsberg Road, Millborough Line Road and Concession Road 11E are all at risk of being dewatered or adversely affected by the proposed Quarry dewatering.

The Provincially Significant Wetlands, Environmentally Significant/Sensitive Areas (Mountsberg East Wetlands) and nearby creeks and streams (that have been identified as fish habitat) are also at risk of being dewatered and adversely affected by the proposed Quarry operation. This is because these surface waters appear to be in direct hydraulic connection to the shallow bedrock that provides baseflow to these important wetlands, creeks and streams. Diminished baseflow to local surface waters is likely to occur over an area with radius of 2500m of the Quarry centre.

The Carlisle municipal water supply wells that draw drinking water from the Amabel Formation dolostone aquifer, are also at risk of being adversely affected by the proposed Quarry. Pumping of large volumes of groundwater from the Quarry will change the well capture zones and WHPAs of the Carlisle wells. The new well capture zones may encounter potential contaminant sources and other groundwater quality and quantity issues not previously identified or considered prior to Quarry operation.

Attached hereto as Exhibit "D" is a copy of Raven's March 28, 2005 Report.

11. In addition to retaining its own consultants to advise it on issues of interest to the community, FORCE engaged with City Staff with respect to the City's review of the Planning Act Applications. FORCE's involvement is documented in Planning and Economic Development Report PD04244(b), dated November 18, 2005.

Attached hereto as Exhibit "E" is a copy of Report PD04244(b).

12. In June 2006, St Marys Cement ("SMC") purchased Lowndes and thereby acquired Lowndes' land holdings, including the Subject Property.

Attached hereto as Exhibit "F" are copies of SMC's press release and correspondence to Councillor McCarthy announcing its purchase of Lowndes.

13. On September 28, 2006, SMC applied to the Ministry of the Environment (the "MOE") for a Category 3 Permit to Take Water (a "PTTW") for a series of pumping tests that were to be undertaken at the Subject Property. SMC's consultant, Gartner Lee, described the purpose of the proposed water taking as follows:

This testing is being conducted to support an application for the development of a quarry on the property. This is part of an ongoing assessment and is intended to address technical issues flagged by the City of Hamilton and various agencies including the Ministry of the Environment, on a draft document titled Hydrogeological Level 2 Report, Proposed Dolostone Quarry, which was prepared for Lowndes Holdings Limited by Gartner Lee (June 2005).

...

The objectives of the proposed pumping tests are to:

- collect additional geologic and hydrogeologic information on the bedrock to characterize a 'productive zone' within the Amabel Formation; and

- to undertake a pilot-scale evaluation of the preferred measure referred to as a Groundwater Recirculation System or GRS, that would be installed peripheral to the quarry to mitigate quarry dewatering effects.

Attached hereto as Exhibit "G" are copies of Gartner Lee's covering letter dated September 28, 2006, Gartner Lee's "Revised Work Plan for the Evaluation of Groundwater Recirculation System" and SMC's PTTW application, dated October 4, 2006.

14. On October 13, 2006, an Instrument Proposal Notice was posted on the EBR in respect of SMC's PTTW application to allow the MOE to receive comments from the public as part of its decision-making process.

Attached hereto as Exhibit "H" is a copy of the Instrument Proposal Notice.

15. On November 30, 2006, FORCE submitted a comment letter to the MOE outlining its concerns with the issuance of the proposed PTTW, and attaching copies of the technical reports it had commissioned which informed its position. FORCE's position was as follows:

1. Giving permission to a pilot test of this scale now is premature. There is substantial outstanding work required to understand this watershed, its vulnerabilities and risks, and implications for source water protection. Equally, there is work required on the overall proposed quarry application. This body of work should be substantially advanced, if not completed, before a test evaluating a proposed mitigation system for the proposed development in the watershed should be considered.
2. Permitting the PTTW as it stands and in light of outstanding work in this watershed would not respect the duty to protect groundwater and evaluate risks first - duties spelled out as Director's considerations in O. Reg 387/04 pertaining to permits to take water and in the new *Ontario Clean Water Act*.
3. The GRS being proposed for the Flamborough Quarry is still unproven technology without any precedent in the world. Permitting a pilot test of this scaled under these circumstances, and in the absence of more complete understanding of the watershed, would be using our community as a laboratory experiment.
4. There are a range of technical content and process issues which are not addressed in the PTTW application and the companion pilot test material. They require consideration for improvement of the proposed testing framework and may result in terms and conditions that may be attached to the approval of a PTTW permit.

Attached hereto as Exhibit "I" is a copy of FORCE's November 30, 2006 comment letter to the MOE.

16. In November, 2006, The City, the Regional Municipality of Halton, and Conservation Halton also submitted letters to the MOE commenting on the Instrument Proposal. They raised water quality and quantity concerns about, among other things, possible impacts of the water taking on private water supplies, on the Carlisle municipal well system, and on adjacent natural features.

Attached hereto as Exhibit "J" are copies of correspondence to the MOE from the City, the Regional Municipality of Halton, and Conservation Halton.

17. On April 11, 2007, the MOE corresponded with SMC to advise that it had reviewed approximately 600 individual responses to the posting of SMC's PTTW application on the EBR. The MOE advised that the PTTW application was on hold pending the receipt of additional technical information including detailed work plans for both surface and groundwater aspects of the proposed pumping test. The MOE also advised that the review of the application before it involved technologies which have not previously been applied in these circumstances, and that it was therefore proceeding with caution to ensure the protection of local water resources.

Attached hereto as Exhibit "K" is a copy of the MOE's April 11, 2007 correspondence.

18. Additionally, Public Health Services Hamilton ("PHS") issued a notice to the MOE pursuant to section 11 of the *Health Protection and Promotion Act*, as it was of the view that issuance of the PTTW before its concerns were addressed by SMC could have an adverse effect on human health in the form of groundwater shortages or groundwater contamination.

Attached hereto as Exhibit "L" is a copy of PHS's October 26, 2007 correspondence.

19. SMC prepared revised Hydrogeological Work Plans in August 2007 and March 2008, both of which FORCE retained Raven to review. In both of Raven's reports reviewing SMC's work, Raven expressed ongoing concern with respect to the "great difficulty and potential hazards of undertaking the pilot scale GRS and of implementing such a system to a full Quarry scale."

Attached respectively hereto as Exhibits "M" and "N" are copies of Raven's November 19, 2007 and April 30, 2008 Reports.

20. On May 7, 2008, the MOE posted a draft PTTW on the EBR and sought public comment on it.

Attached hereto as Exhibit "O" is a copy of the EBR posting of the draft PTTW.

21. FORCE asked Raven to review the draft PTTW to provide it with a technical basis for comment to the MOE. Raven reported to FORCE on May 31, 2008 that his previous concerns remained outstanding, and that the proposed pumping tests would not provide data representative of full quarry drawdown or be demonstrative of the long-term viability of the groundwater recharge system (the "GRS"). On the basis of his technical hydrogeological advice, as well as other concerns, FORCE submitted its comments on the draft PTTW to the MOE on June 3, 2008.

Attached respectively hereto as Exhibits "P" and "Q" are copies of Raven's May 31, 2008 Report and FORCE's June 3, 2008 correspondence.

22. On July 8, 2008, the MOE issued PTTW No. 8461-7CFLG5 to SMC, and posted it on the EBR. FORCE is aware of 485 e-mail submissions to the Director regarding this EBR posting.

Attached respectively hereto as Exhibits "R" and "S" are copies of the July 8, 2008 EBR posting and PTTW No. 8461-7CFLG5.

23. On July 18, 2008, FORCE sought leave to appeal the issuance of the PTTW to the ERT, notwithstanding that the EBR posting of the PTTW notified the public that no leave to appeal provisions were available in respect of the MOE's decision. FORCE's position was that the PTTW had been issued for a duration of approximately 11 months and 3 weeks, and that by having the PTTW expire in less than a year from the date it was issued, the MOE was attempting to prevent the PTTW from being considered a Class I Instrument on which leave to appeal could be sought.

Attached hereto as Exhibit "T" are copies of FORCE's Application for Leave to Appeal and Supplementary Application for Leave to Appeal (without attachments).

24. Following the ERT's hearing of FORCE's application for Leave to Appeal, the ERT made the following findings:

On July 18, 2008, the Friends of Rural Communities and the Environment ("FORCE") submitted an application for Leave to Appeal (the "Leave Application") to the Environmental Review Tribunal (the "Tribunal") under the *Environmental Bill of Rights, 1993* ("EBR"). The Leave Application concerns Permit to Take Water Number 8461-7CFLG5 issued on July 8, 2008 (the "PTTW") by the Director, Ministry of the Environment ("MOE") pursuant to section 34 of the *Ontario Water Resources Act* ("OWRA") to St Marys Cement Inc. (Canada) ("St Marys") for the purpose of conducting pumping tests to understand the impacts of quarry dewatering on the aquifer and watershed and to test its proposed groundwater re-circulation system ("GRS") for its proposed aggregate extraction operations. The decision was loaded to the EBR Registry on July 8, 2008.

The proposed aggregate extraction operations are to be developed on a property owned by St Marys in Flamborough, a rural community located in the amalgamated City of Hamilton, Ontario (the "Property"). The Property is located within a Natural Heritage System of the Greenbelt, and contains significant provincially, regionally and municipally designated natural features, including Environmentally Sensitive Areas and a provincially significant wetland complex. The proposed

aggregate operations will result in an open pit excavation that will extend below the water table, potentially affecting the drinking water supply and quality for residents who live in the vicinity and draw their water from the Amabel Formation Aquifer (the "Aquifer"), and for the community of Carlisle which draws on a municipal well system that relies on the Aquifer.

To mitigate the expected effects of the aggregate operations on groundwater, St Marys proposes using a GRS to allow for the release of groundwater and surface water collected in the quarry into a trench from which it would infiltrate the Aquifer with a goal of sustaining the groundwater level between the quarry and the adjacent wetland features and nearby residential drinking water supplies. The purpose of the PTTW is to allow St Marys to conduct a series of three pumping tests to improve understanding of the impacts of quarry dewatering and to assess whether the GRS would be feasible as a mitigation measure.

St Marys applied to the MOE on September 28, 2006 for a temporary permit to conduct the series of three pumping tests. According to the Director's materials, the application indicated that the pumping tests would involve the taking of water for up to 20 days in three phases over a five week period within the space of nine months. The MOE notified the public of the application on October 13, 2006 by posting an "Instrument Proposal Notice" on the *EBR* Registry and invited the public to make comments. FORCE's materials indicate that the MOE received 532 comments on the proposed instrument, including comments from FORCE, who objected to the PTTW being granted in the manner proposed and filed expert reports in support of its objections. On May 7, 2008, the MOE posted a draft PTTW as an "Information Notice" on the *EBR* Registry. The notice was intended to enable the public to provide comments on the specific conditions being proposed in the PTTW. FORCE states that it filed further submissions with the support of expert reports.

On July 8, 2008, the Director issued the PTTW, which authorizes three independent pumping tests, each taking place over an expected period of six days, which can be extended for up to 8 days by the Director, on request. The PTTW details the rates and amounts of water taking permitted. Section 3.3 of the PTTW gives approval for the first 6 to 8 day test. Prior to conducting both the second and third tests, St Marys must request and obtain written approval of the Director. A request must be accompanied by a report detailing results of the previous test. The PTTW requires that the Director's approval be based on the results of the previous pumping test being acceptable to the Director. Section 4.22 of the PTTW requires that within 30 days of the completion of each phase of testing, St Marys must submit a hydrogeological and hydrological report. The PTTW was issued for a duration of approximately 11 months and three weeks, or 357 days; it will expire on June 30, 2009

The posting on the *EBR* Registry notifying the public of the PTTW states:

No Leave to Appeal provisions are provided on this decision. The permit that was issued is for less than a year and therefore, is no longer considered a "classified Instrument" under the Environmental Bill of Rights.

On July 18, 2008, the Tribunal wrote to the Parties, indicating that it appeared that the Tribunal might not have jurisdiction to consider the application for Leave to Appeal and requesting submissions on the issue. All submissions on the question of the Tribunal's jurisdiction were filed by August 1, 2008.

...

The Tribunal finds that the undertaking of the pumping tests will not be for one year or more and that it is not inevitable that the pumping tests will be part of a longer term water-taking undertaking. Therefore, the PTTW does not constitute a decision to implement a proposal for a

Class I instrument. The Tribunal, accordingly, does not have jurisdiction to consider the Leave to Appeal application.

Attached hereto as Exhibit "U" is a copy of the ERT's decision, dated August 28, 2008.

25. Meanwhile, SMC performed the first of the three pumping tests between July 21 and July 30, 2008, in advance of the issuance of the ERT decision. It released the results of this first phase to the MOE and interested stakeholders on August 27, 2008. Raven reviewed the results and reported to FORCE on September 28, 2008. His primary concerns were:

- The Phase 1 pumping tests were performed during a significant period of rainfall, runoff and recharge which biased and compromised the results of both the surface water and groundwater monitoring programs.
- The Phase 1 pumping tests have failed to achieve the intended primary objective of providing a baseline which represents the full anticipated quarry drawdown against which the effects of mitigation by the GRS can be evaluated in the proposed Phase 2 and 3 pumping tests.
- The Phase 1 pumping tests failed to achieve the intended secondary objective of repeating the November 2004 pumping test under conditions of normal rainfall and recharge. In particular:
 - In November 2004, the rainfall during the relevant test was 93mm. MOE correspondence from B. Ryter (January 19, July 27, and August 31, 2005) documented issues relating to the drawdown and water level response being impacted by recharge along with associated interpretational inaccuracies.
 - In July 2008, the rainfall during the relevant test was 155mm, which was almost double the November 2004 rainfall, and which had been preceded by prolonged heavy precipitation in the preceding winter and spring seasons.

Attached hereto as Exhibit "V" is a copy of Raven's September 28, 2008 report.

26. It is my understanding that on September 24, 2008, SMC made a request to the Director to proceed to the second phase of its pumping program.

27. In a September 29, 2008 submission to the MOE, FORCE relied on Raven's September 28, 2008 report to request that the Director deny permission to SMC to proceed to Phase 2 of its pumping program.

Attached hereto as Exhibit "W" is a copy of FORCE's September 29, 2008 correspondence to the MOE.

28. On October 30, 2008, the MOE wrote to SMC denying permission to proceed to Phase 2 of the pumping test. The MOE's reasons were as follows:

Ministry staff have reviewed the reports submitted for Phase 1 of the pumping test. As well, agencies required to be notified of the Phase 1 pumping test have provided comments. Condition 3.3 indicates that the approval of subsequent tests shall be based on the results of the previous pumping test being acceptable to the Director.

The results of Phase 1 of the pumping test are not acceptable for the following reasons:

1. The testing did not resolve the concerns raised by the ministry over previous pumping test results regarding the impact of the water taking on the onsite wetlands by providing an adequate base line against which predictions of the benefit of remedial proposals can be compared.
2. The reliability of the pumping test data as baseline for further aquifer characterization has not been established in the context of a long term water taking.

Accordingly the proposal for Phase 2 as per the September 24, 2008 letter is not accepted. I am prepared to allow Phase 2 to be carried out as a repeat of the Phase 1 test following all appropriate conditions of the permit....

Attached hereto as Exhibit "X" is a copy of the MOE's correspondence, dated October 30, 2008.

29. On January 22, 2009, SMC wrote to the MOE confirming its understanding of discussions that were held on November 27, 2008 pertaining to the Director's decision not to allow the second phase of the pumping test program to proceed. SMC took the position that the repetition of the Phase 1 test was unnecessary. SMC wrote as follows:

It was apparent to us in the meeting that the major concern for the Ministry...was the major precipitation events that occurred prior to, and during the course of the Phase 1 testing. As a result of the precipitation, the Ministry felt that a) baseline data for the impact assessment would be "confounded," and b) surface water/groundwater interaction could not be adequately demonstrated in the field. In addition, the Ministry expressed concerns that one of the purposes of the Phase 1

test, at least in their opinion, was to repeat the test that was carried out in 2004, which had been called into question due to excessive precipitation events that also had occurred during the course of the test at that time.

...

St Marys does not believe that any further data will be gained by repeating Phase 1 of the pumping test and therefore will not be repeating that Phase. Three separate pumping tests have been carried out on the site and doing another one will not garner any further useful information.

St Marys plans to submit the ARA shortly as further data on the hydrogeology of the site is not required for this Application. This will allow all the agencies involved and the community to evaluate the merits of the project as a whole.

Attached hereto as Exhibit "Y" is a copy of SMC's January 22, 2009 correspondence.

30. On March 5, 2009, the MOE responded to SMC, stating the MOE's position that the hydrogeological studies completed to date were insufficient. The Director proposed to revoke the PTTW. The Director wrote:

It is the ministry position that hydrogeological studies completed to date have not provided information to conclude that the proposed Groundwater Recirculation System is an acceptable mitigation strategy for this site. Further pumping tests are necessary to demonstrate that the proposed Groundwater Recirculation System is an acceptable mitigation strategy for this site. Further pumping tests are necessary to demonstrate that the proposed Groundwater Recirculation System for this site will protect the quality and quantity of both groundwater and surface water.

Your letter indicates that you will not be carrying out any further testing under the mandate of the above referenced permit. Accordingly, unless you advise otherwise by March 20, 2009, the above referenced permit will be revoked.

Attached hereto as Exhibit "Z" is a copy of the MOE's March 5, 2009 correspondence.

31. On March 13, 2009, SMC responded to the Director that it did not wish to have the PTTW revoked. SMC wrote:

Briefly, this is to advise that we do not wish this Permit to be revoked. St Marys is prepared to carry out further testing at the site under the mandate of this Permit, in the event that we can agree on the purpose and nature of the testing.

Attached hereto as Exhibit "AA" is a copy of SMC's correspondence dated March 13, 2009.

32. To my knowledge, the PTTW expired on June 30, 2009 without any further testing having been conducted.

33. Meanwhile, on January 22, 2009, SMC had submitted its *Aggregate Resources Act* license application (the “ARA Application”) to the Ministry of Natural Resources (the “MNR”). The MNR corresponded with SMC on March 3, 2009 to advise that it deemed the ARA Application complete. In a press release dated March 3, 2009, SMC indicated its intent to begin the 45-day comment period in late March or early April of 2009.

Attached respectively hereto as Exhibits “BB” and “CC” are copies of the MNR’s correspondence to SMC dated March 3, 2009, and SMC’s press release of the same date.

34. In response to the filing of the ARA Application, PHS and the Medical Officer of Health for Halton Region wrote to the MNR to express public health concerns with the ARA Application. Their concerns related to potential adverse impacts on groundwater quality and quantity should the ARA Application proceed.

Attached hereto as Exhibit “DD” are copies of PHS’s correspondence dated February 10, 2009 and the correspondence of the Medical Officer of Health of Halton Region, dated February 20, 2009.

35. On March 30, 2009, Staff reported to City Council on the status of its and the Combined Agency Review Team’s (“CART”) review of the Planning Act Applications, additional *Planning Act* applications by SMC related to lands adjacent to the Subject Property, and the process that would unfold in relation to the ARA Application. Staff made the following comments:

Technical review by CART and the Peer Review Team of the studies and reports submitted by the proponent in support of the Flamborough Quarry planning applications has been ongoing. This work includes review of a Level 2 Hydrogeological Report; Level 2 Natural Environment Report

and EIS and a Transportation Study. In addition, St Marys has held four Public Information Centres (PICs) toward the preparation of their Haul Route Study.

St Marys submitted applications for an Official Plan Amendment (OPA-08-014) and Zoning By-law Amendment (ZAC-08-067) on October 22, 2008, related to a 4.2 hectare (10.6 acre) parcel of land located at 1869 Millborough Line, located immediately adjacent to the lands subject to the Flamborough Quarry applications (see Appendix "A"). The intent is to permit these lands to be used for an internal driveway and acoustical barriers associated with the proposed quarry. The planning applications were deemed complete on November 20, 2008. Staff is processing these applications concurrently with the Flamborough Quarry planning applications submitted in 2004.

...

The MNR deemed the St Marys ARA license application complete on March 3, 2009. The ARA outlines the notification and consultation procedure for an application for an ARA license, as shown on Appendix "C". Following the MNR deeming the application complete, St Marys must provide public notice of the application by way of written notice to all property owners within 120 metres of the proposed licensed boundary, posting a sign on the property, and placing an ad in a local newspaper. Placement of the ad in the local newspaper will mark the beginning of a 45-days notification period. All objections to the application must be provided to the applicant and the MNR within this 45-day period. Also within this 45-day period, St Marys is required to hold one Public Information Session.

...

St Marys has two years from the beginning of the consultation period to attempt to resolve all objections. It is during this two year period that the CART process will continue to unfold.

...

Once the applicant has attempted to address all of the objections submitted during the 45-day comment period. St Marys will submit a list of all unresolved objections to the MNR and any objectors. At this point, remaining objectors will have 20 days to respond to confirm that they have outstanding objections. Following a 30-day review period, the MNR will either recommend approval of the license or refer the matter to the Ontario Municipal Board.

Attached hereto as Exhibit "EE" is a copy of Report PD04244(c).

36. After reviewing the ARA Application and supporting studies, FORCE objected to the ARA Application. Its objection focussed on a number of matters, with supporting expert technical documentation, including but not limited to:

- the threat posed by the proposed quarry to safety of the community's drinking water;
- the unavailability of an appropriate haul route;
- the unproven basis and effectiveness of the proposed quarry dewatering mitigation measures;

- potential impacts on the natural environment;
- lack of conformity with Provincial, Regional and local policy. In particular, the proposed quarry is located entirely within the Natural Heritage System, the designation afforded the highest protection by the Greenbelt Plan, for its linkages to important and sensitive natural heritage features;
- loss of agricultural land;
- potential social impacts;
- potential noise impacts;
- potential air quality impacts; and
- lack of compatibility with surrounding uses.

Attached hereto as Exhibit "FF" is a copy of FORCE's May 21, 2009 objection letter.

37. SMC and the MNR received approximately 1200 objections to the issuance of the ARA License, among them letters from the City's Planning and Economic Development Department, the City's Public Health Services Department, the Regional Municipality of Halton, the City of Burlington, the Town of Milton, Conservation Halton, the Hamilton-Wentworth District School Board, the Hamilton-Wentworth Federation of Agriculture, the Halton Region Federation of Agriculture, and the MOE. Collectively, the objections identified a variety of policy-based and technical concerns with the issuance of the license. The MNR issued a letter to SMC during the 45-day comment period as well, setting out seven pages of items to be addressed from its perspective before a license could be issued.

Attached hereto as Exhibit "GG" is a copy of the objection letters of the above-noted stakeholders.

38. As the ARA Application process was unfolding, SMC continued to work on the hydrogeological and hydrological aspects of the Proposed Quarry.
39. I attended a series of stakeholders' meetings at which Golder Associates ("Golder") presented a proposed groundwater pumping program, intended to prove the concept of the Groundwater Recirculation System. At the first meeting held on December 21, 2009, Golder advised that on October 7, 2009, it had performed a recharge test on the Subject Property, using existing wells and a trucked-in potable water source, and that on the basis of the results achieved, it intended to carry out broader-scale testing. It presented the results of its October 2009 testing in a Powerpoint presentation and a document titled "Technical Support Document GRS Proof of Concepts Testing Program, December 2009".

Attached hereto as Exhibit "HH" is a copy of Golder's Powerpoint presentation and the "Technical Support Document GRS Proof of Concepts Testing Program, December 2009".

40. I attended a further meeting on January 19, 2010. At that meeting, Golder made a further Powerpoint presentation in an effort to respond to the comments it had received from the various stakeholders since the December 21, 2009 meeting. Pages 4 and 6 of the Powerpoint presentation made clear to me that SMC would be incapable of proving the effectiveness of the GRS until it had developed a full depth quarry face.

Attached hereto as Exhibit "II" is a copy of Golder's January 19, 2010 Powerpoint presentation.

41. I attended further stakeholder meetings on February 4, 2010, March 2, 2010 and March 30, 2010. Raven attended the March 2, 2010 meeting with me. At the conclusion of this

consultation process, with the benefit of Raven's technical advice, and on the face of SMC's documents, it was my belief, that even if SMC were permitted to conduct the testing it proposed, the GRS would remain unproven.

42. On April 12, 2010, a Ministerial Zoning Order (the "MZO") was issued in respect of the Subject Property, pursuant to section 47 of the *Planning Act*.

Attached hereto as Exhibits "JJ" is a copy the MZO.

43. The MZO provides as follows:

2. **Use of Land** - Every use of the land described in section 1 [the Subject Property], and every erection, location or use of any building or structure on the land described in section 1, is prohibited, except,

(a) uses, buildings and structures lawfully in existence on the date this Order comes into force; and

(b) the use of any land, building or structure that was permitted by the applicable zoning by-laws on the date this Order comes into force.

44. On April 13, 2010, the Province issued a press release regarding the MZO, which stated:

Ontario is not allowing the development of a proposed quarry in the City of Hamilton.

A minister's zoning order permanently restricts the proposed quarry site in the former Town of Flamborough, now part of Hamilton, located near Milborough Town Line and 11th Concession Road East, to its current uses or ones that comply with the current zoning.

Hamilton City Council and Halton Regional Council have both passed resolutions asking the province not to allow the proposal to proceed. The medical officers of health for Hamilton and Halton Region have also expressed health concerns related to the quarry project.

Attached hereto as Exhibit "KK" is a copy of the Provincial Press Release.

45. On May 10, 2010, SMC issued a press release indicating that it had requested the revocation of the MZO. SMC's press release stated the following:

St Marys Cement Inc. is challenging the issuance of a Minister's Zoning Order for the proposed Flamborough Quarry.

The Request to Revoke Minister's Zoning Order (Ontario Regulation 546/06) [sic] was submitted to the Minister of Municipal Affairs on May 10th, 2010. The submission asks for the Minister to refer the matter to the Ontario Municipal Board for a hearing and decision under the existing framework.

Attached hereto as Exhibit "LL" is a copy of SMC's press release, dated May 10, 2010.

46. As of the date of the swearing of this Affidavit, to the best of my knowledge, the Minister has not referred the request to revoke the MZO to the Ontario Municipal Board.
47. On May 14, 2010 I received a copy of an updated Draft Technical Support Document GRS Proof of Concept Testing Program from SMC by way of e-mail. The e-mail indicated that SMC intended to proceed with its pumping test program, and to submit a PTTW application to the MOE by the end of the month.

Attached respectively hereto as Exhibits "MM" and "NN" are copies of the e-mail I received and the Draft Technical Support Document GRS Proof of Concept Testing Program.

48. The Draft Technical Support Document GRS Proof of Concept Testing Program made clear that SMC believed that the success of the ARA Application was dependent on the issuance of another PTTW, to allow SMC to carry out further hydrogeological testing. The Introduction to the Document gave an overview of the proposed testing program, as follows:

St Marys Cement (Canada) has made applications to develop a quarry on its 158 ha property located in the Township of Flamborough in the City of Hamilton.... In support of the Category 2, Class "A" Quarry Below Water licence application under the... ARA, a Hydrogeological Level 2 Report prepared by AECOM Canada Ltd.... formerly Gartner Lee Limited... was submitted.... In that report AECOM proposed that a groundwater recharge system (GRS) be implemented along the perimeter of the majority of the extraction area to mitigate the effects of locally lowering the water table in the vicinity of nearby water receptors such as adjacent wetlands, streams and water wells.

In response to a request from the MOE and others to conduct 'proof of concept' testing for the proposed GRS, SMC has retained Golder Associates Ltd. (Golder) to develop and implement a testing program to demonstrate the 'proof of concept'. This testing program will involve the

pumping and subsequent recharge of groundwater and, as such, is subject to the Permit to Take Water (PTTW) requirements set forth by the MOE for water taking over 50,000 L/day.

...

The objective of the currently proposed testing program is to demonstrate that groundwater levels can be raised by recharging at wells to/above static levels after initial lowering by pumping, and thereafter controlled by varying the rate of recharge. The term 'Proof of Concept,' with respect to this testing program, relates to a 'proof of hydrogeological concept' as the proposed testing is directed to assessing aquifer conditions and well separation and is not directly intended to prove the long term operational performance of a future GRS, which would be addressed in later stages of the overall proposal for the property.

In summary, the proposed testing program comprises pumping to lower the water table locally at a test well that is to be located in the vicinity of the perimeter of the planned excavation. To avoid stressing the nearby wetlands, test pumping will be conducted at an intermediate and then higher pumping rate for a period of time sufficient to induce local lowering of groundwater levels within the aquifer without causing a measurable impact on the wetland. After each pumping step, the pumped water will be directed to nearby recharge wells with associated monitoring of water levels in nearby bedrock and overburden monitoring wells being carried out continuously. This testing program will be conducted sequentially at three locations around the perimeter of the planned excavation with the complete program repeated in a different season within a 10 month period. Additionally short-term recharge tests will be conducted at four other locations generally around the perimeter of the proposed extraction limit.

The proposed testing program is not required to be phased. The testing program at three locations repeated over two seasons constitutes one test held under this permit. Approval of this permit would constitute approval for the complete testing program, subject to conditions of the permit.

The results of this testing program will be used to support a full assessment of the 'proof of concept' for a future site-wide GRS system that would be used to control groundwater levels in the vicinity of the proposed extraction area.

49. On May 25, 2010, SMC applied for a Permit to Take Water which would permit a maximum of 70 days of round-the-clock pumping from three on-site wells at a maximum rate of 5,184,000 litres of water per day. The application proposed an estimated start date of the pump testing as August 2 of this year. The basis of the application was stated to be set out in Draft Technical Support Document GRS Proof of Concept Testing Program, which I have described above.

Attached hereto as Exhibit "OO" is a copy of the application for a PTTW, dated June 3, 2010.

50. On June 3, 2010, the MOE refused to issue the PTTW to SMC, on the basis of the MZO and section 48 of the *Planning Act*.

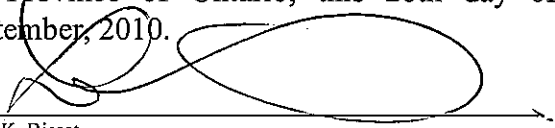
Attached hereto as Exhibit "PP" is a copy of the MOE's correspondence to SMC, dated June 3, 2010.

51. On June 11, 2010, SMC appealed the MOE's decision to refuse to issue the PTTW to the Environmental Review Tribunal.

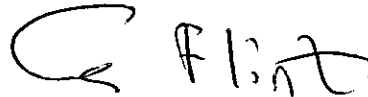
Attached hereto as Exhibit "QQ" is a copy of WeirFoulds appeal letter, dated June 11, 2010.

52. I swear this Affidavit in support of FORCE's Motion to adjourn the appeal of St Marys Cement *sine die* and for no other or improper purpose.

SWORN before me at the City of Toronto, in the Province of Ontario, this 28th day of September, 2010.



Laura K. Bisset
A Commissioner for Taking Oaths, etc.



GRAHAM FLINT