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June 11, 2010

John M. Buhlman
T: 416-947-5070
jbuhlman@weirfoulds.com**VIA FACSIMILE (416) 314-4506**

File 01207.00058

The Secretary
Environmental Review Tribunal
650 Bay Street, 15th Floor
Toronto ON
M5G 1E5

- and -

VIA FACSIMILE (905) 521-7820Mr. Carl Slater
The Director, Section 34
Ministry of the Environment
119 King Street West, 12th Floor
Hamilton ON
L8P 4Y7

Dear Sir/Madam:

Re: St. Marys Cement Inc. - Notice of Refusal Permit to Take Water No. 3708-862GHB

We are the solicitors for St. Marys Cement Inc. ("St. Marys"). Pursuant to subsection 100(4) of the *Ontario Water Resources Act*, St. Marys requires a hearing by the Environmental Review Tribunal with respect to the Director's, section 34, *Ontario Water Resources Act*, refusal to issue a Permit to Take Water.

As required, the following information is provided:

Name and Address of Appellant:St. Marys Cement Inc.
511 Industrial St.
Toronto, Ontario, M4G 3W9
Attention: Melanie Horton

The Exchange Tower, Suite 1600 P.O. Box 480, 130 King Street West Toronto, Ontario, Canada M5X 1J5

T: 416-365-1110 F: 416-365-1876

www.weirfoulds.com

Lawyers & Solicitors

WeirFoulds LLP
150 years

Appellant's Representative and Counsel:

John M. Buhlman
WeirFoulds LLP
The Exchange Tower
Suite 1600, P.O. Box 480
130 King St. West,
Toronto, Ontario
M5X 1J5
T. - 416-947-5070
F. - 416-365-1876
E-mail - jbuhlman@weirfoulds.com

All notices and other official documents are to be delivered to the Appellant's counsel.

Number and Date of Notice of Refusal:

Notice of Refusal Permit to Take Water No. 3708-862GHB
Dated June 3, 2010
(Reference No. 7115-85TLN5)

Name of Director:

Carl Slater, Director, Section 34, *Ontario Water Resources Act*

Location of Site ("Site"):

Lot 3, Concession 11. E. Flamborough
Hamilton, Ontario

Copy of Decision Under Appeal:

A copy of the decision is enclosed.

Portions of Decision being appealed:

The entire decision is being appealed.

Grounds for Appeal:

The Director erred in refusing to issue the Permit to Take Water on the basis that a quarry is not a permitted use of the site under the current zoning and because the application for a pumping test is in respect of a quarry.

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The Director also erred by taking the position that a permit cannot be issued because of a Ministerial Zoning Order issued by the Minister of Municipal Affairs and Housing under the *Planning Act* and section 48 of the *Planning Act*.

The Application for the Permit to Take Water is a temporary, Category 3 permit, which will allow St. Marys to conduct pumping tests. The testing program was developed in consultation with a broad range of stakeholders, including MOE, MNR, Halton Conservation, the City of Hamilton and representatives from the local community group Friends of Rural Communities and the Environment (FORCE). The information which would be collected during the test is intended to address the concerns raised during the agency and public review of St. Marys' application for an *Aggregate Resources Act* ("ARA") quarry licence, which was filed in February 2009. The proposed quarry is also the subject of applications under the planning act (Official Plan and Zoning Bylaw amendments) which were filed with the City of Hamilton in September 2004.

Subsequent to St. Marys filing the applications for the licence and re-zoning, on April 12, 2010, the Minister of Municipal Affairs and Housing made an Order (the "Order") prohibiting the use of the Site and every erection, location or use of any building or structure on the Site, except uses, buildings and structures lawfully in existence on the date of the order and the use of any land, building or structure that was permitted by the applicable zoning by-laws on the date the Order came into force.

St. Marys has filed an application to revoke the Order and expects there will be a hearing by the Ontario Municipal Board to consider this matter. The Application for the temporary Permit to Take Water for the pumping tests is also in support of St. Marys' request that the Order be revoked.

While a quarry is not a permitted use under the current zoning, conducting pumping tests is not a use of land and, therefore, not prohibited under the current zoning, the Order and section 48 of the *Planning Act*. The fact that the pumping tests are in support of the ARA licence application and the re-zoning, is irrelevant to the Director's decision under section 34 of the *Ontario Water Resources Act*. The Director, therefore, took into account an irrelevant consideration in making his decision to refuse to issue the Permit to Take Water.

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In fact, St. Marys and its predecessor in title have conducted pumping tests on the Site in the past, in support of the application for a licence under the ARA, even though the zoning at the time did not permit a quarry. The Director issued 3 separate Permits to Take Water, in April 2004, November 2004 and July 2008, despite the fact that the current zoning of the property did not allow a quarry at the time the Permits were issued.

A pumping test was completed in April 2004 as authorized by the Director under Permit to Take Water 03-P-2402(T). A second test was completed in November 2004 as authorized by the Director under Permit to Take Water 0714-65YNCS. Another pumping test was carried out in August 2008 as authorized by the Director under Permit to Take Water 8462-7GFLC5.

St. Marys' application for a Permit to Take Water for the 2008 testing program was posted for comment on the Environmental Bill of Rights Registry (EBR Registry No. 1A06E1293) in response to a public comment that "*testing shouldn't be completed until the land use planning review process is complete*" the Ministry responded as follows: "The land use planning review is ongoing by the City of Hamilton. The City of Hamilton relies on a Combined Aggregate Review Team (CART) for input into the planning decision. CART members support the need for the testing, as it will provide information that will assist the land use planning decision."

The Director advised St. Marys in his letter of October 30th, 2008 and in subsequent discussions with St. Marys and its consultants, that he was not satisfied with the results of the pumping test conducted on the Site in August 2008, and requested that St. Marys conduct further pumping tests. After extensive consultation with the Director and his staff and other stakeholders, St. Marys agreed on an appropriate testing program to address concerns about the proposed quarry. The testing program is the subject of the application for the Permit to Take Water filed on May 25th, 2010 which was refused by the Director on June 3, 2010. Even without the Order, the pumping tests would have been conducted notwithstanding that the current zoning does not permit the quarry. The fact that the Director issued Permits to Take Water in the past for pumping tests for a quarry even though the zoning did not permit a quarry, demonstrates that the Director took into account irrelevant considerations and was in error when he refused to issue the permit to take water that is the subject of this request.

By taking into account irrelevant considerations and refusing to issue the Permit to Take Water, the Director is preventing St. Marys from conducting the pumping tests he wanted and prevents St. Marys from presenting a full case before the Ontario Municipal Board on a hearing regarding the request to revoke the Order, a hearing on St. Marys' application for a licence for a quarry under the ARA and St. Marys' application to re-zone the Site to permit a quarry.



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Relief Requested:

St. Marys requests that the Director's Refusal to issue the Permit to Take Water be set aside and that the Tribunal order the Director to issue a Permit to Take Water in accordance with the Application that has been filed.

St. Marys will not be seeking a stay of the Director's decision.

Yours truly,

WeirFoulds LLP

A handwritten signature in black ink, appearing to read 'John M. Buhlman', is written over the typed name. The signature is fluid and cursive.

John M. Buhlman

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