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EXECUTIVE SUMMARY

The focus of an environmental assessment under CEAA is to carry out project planning in accordance with the principle of sustainable development and assess the range and extent of adverse environmental effects on surrounding land uses and ecological features.

Based on our review of the Screening Report, together with our review of the City Planning Report (“CPR”) and the Technical Peer Review (“TPR”) provided by the City’s technical consultants, we have concluded that the Project fails to meet the legal requirements of CEAA, and in particular:

1. Fails to apply the CEAA principle of planning for sustainable development; instead, this Project and assessment are pursuing a “develop first, plan later” approach that appears designed to rush through a CEAA approval and fails to: (i) address compliance with binding legal agreements respecting the land use for the area; (ii) assess the adverse environmental effects of the Project on surrounding planned or permitted land uses; or (iii) assess compliance with the siting requirements of the Environmental Assessment Guidelines for Screening Level Assessments of Ethanol Project (the “Federal Ethanol Project Guidelines”).
2. Fails to conduct a quantitative risk assessment to evaluate the environmental effects of accidents and malfunctions as required under s. 16(1) of CEAA. Ethanol plants have triggered over fifty fires and explosions in North America since 1997. Thus, this Project represents a very real danger to the City, its residents and nearby ecological features. This kind of project in this setting demands the most rigorous analysis of the risks and likelihood of significant adverse effects from accidents and malfunctions. Yet the Screening Report has failed to conduct a quantitative analysis of the likelihood of significant adverse environmental effects from this Project.
3. Fails to meet the requirements of the Federal Ethanol Project Guidelines in evaluating the significance of adverse environmental effects. In particular, the present ESR fails to assess the human health impacts of emissions of fine particulate matter (“FPM”) from the facility. FPM is not merely a contaminant: federally, it is a toxic substance listed under the *Canadian Environmental Protection Act*. Recent findings by the Canadian Medical Association are that this substance, along with ozone, was responsible for more than 21,000 premature deaths in Canada in 2008 alone. The ESR also fails to address applicable standards in assessing the adverse environmental effects on surrounding land uses and ecological features from noise, odour, vapour, and surface and groundwater contamination;

4. Fails to meet the requirements of the Federal Ethanol Project Guidelines in evaluating the cumulative effects of the project. In particular, the Screening Report fails to assess the adverse environmental effects of the Project in combination with (i) the adverse environmental effects of other facilities in the area; (ii) the adverse environmental effects from certain and reasonably foreseeable future Project activities; and (iii) the combination of different individual environmental effects of the Project on the same environmental component; and
5. Fails to adhere to legally binding Ontario environmental standards and apply these standards in assessing the likelihood of significant of adverse environmental effects as required by CEAA guidance.

The CEAA also makes it legally important to address public concern. By any measure, this project and its planning are also the subject of major public concern. The local municipality for this Project is the City and it is opposed to this Project and process; the regional municipality affected by this Project is the Regional Municipality of Durham and it is opposed to this Project; and the public is opposed to this Project: to date, this Project has elicited 3,300 written submissions, opposing it. This Project also triggered the largest land use public meeting in the City's history. In 2008, over 700 residents and stakeholders gathered at the General Motors Centre in Oshawa to express their views on the Project, with the vast majority opposing it.

Under the CEAA, where a project has these fundamental legal deficiencies and triggers this level of public concern, the legislation sets out only two courses of action. Pursuant to s. 20(1) of CEAA, the responsible authority for this environmental screening, Agriculture and Agri-Food Canada ("AAFC"), has the option of either (1) refusing to exercise any power or function that would permit the project to proceed in whole or in part; or (2) referring this Project to the federal Minister of the Environment for further referral to a mediator or review panel in accordance with s. 29 of CEAA.

1.0 INTRODUCTION

This report responds to a request from our client, the City of Oshawa ("City") to provide a legal review of the Screening Report ("Screening Report") pursuant to the *Canadian Environmental Assessment Act* ("CEAA") for the ethanol production facility / refinery (the "Project") proposed by FarmTech Energy Corporation ("FarmTech").

The proposed location of this Project is within City boundaries near harbour lands presently managed by the Oshawa Harbour Commission ("OHC"). The importance of these lands to the City's present and future was recognized in a 2008 report for the Minister of Transport, Infrastructure and Communities by The Honourable David Crombie P.C.O.C. (the "Crombie Report").

The vulnerable land uses and ecological features within 1000m of this site include:

- (1) The Provincially Significant Second Marsh, an Area of Natural and Scientific Interest (“ANSI”) that is the largest urban wetland in the Greater Toronto Area, containing a wealth of wildlife, including breeding birds, songbirds and species protected under the federal *Species at Risk Act* and the provincial *Endangered Species Act*;
- (2) The Montgomery Creek Provincially Significant Wetland;
- (3) The aquatic life and fish habitat in Lake Ontario;
- (4) Existing and planned residences, including a residential development conceptually planned to contain approximately 1,730 dwelling units;
- (5) Permitted land uses such as daycares, churches, hotels, nursing homes and a marina where boat owners could live on-board seasonally or year-round.

Based on this setting, the Crombie Report advised that the area west of the Second Marsh, proposed for this Project, should continue to function as a buffer between the Oshawa Second Marsh and the industrial uses further west.

Land use for this area is a major priority of the City. It worked hard to reach legally binding agreements with the OHC and the federal Crown on future development for this area. According to these agreements, concluded in 2010, future development is to be conducted cooperatively between the City and OHC until a land use plan is in place that will determine long term planning.

2.0 LEGAL FAILINGS

2.1 THE SCREENING REPORT FAILS TO PLAN FOR SUSTAINABLE DEVELOPMENT

The preamble to the CEAA states that environmental assessments provide a means to integrate environmental factors into planning to promote sustainable development:

“WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;”

This focus is reinforced by s. 4(1) of the CEAA:

“4. (1) The purposes of this Act are

...

(b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;”

Contrary to these CEAA principles, this Project proposes to take advantage of the lack of a land use plan for the Port of Oshawa to implement a ‘develop first, plan later’ approach that is inconsistent with the CEAA principle of planning for sustainable development. The lack of a land use plan for the Oshawa Harbour area speaks to the prematurity of this application. It is not a legal gap that invites exploitation.

This Project represents a regression to the haphazard approach to development and the environment that preceded the coming into effect of CEAA. There are three defining features of the Project’s failure to plan for sustainable development:

First, this Project fails to address compliance with the legal requirements of the terms of the July 15, 2010 Settlement Agreement (“Settlement Agreement”) between the OHC, the Crown and the City and the Land Use, Development and Municipal Services Agreement (“LUDMS Agreement”) between the OHC and City respecting the land use planning for the area;

Second, this Project fails to assess the likelihood of adverse environmental effects of the Project on surrounding planned or permitted land uses. This failure undermines the environmental screening conducted by the Screening Report rendering the likelihood of significant adverse environmental effects for future planned and permitted land uses uncertain.

Third, this Project fails to assess compliance with the siting requirements of the Federal Ethanol Project Guidelines, thereby leading to environmental effects that could be avoided if the Guidelines were followed.

Each of these failures will be addressed in turn in the following sections.

2.2 FAILURE TO ADDRESS THE REQUIREMENTS OF THE SETTLEMENT AGREEMENT AND LUDMS AGREEMENT

Of fundamental importance to any assessment of the Project are (a) the Settlement Agreement between the OHC, the Crown and the City and (b) the LUDMS Agreement between the OHC and the City (Appendices A and B, respectively).

These agreements address how decisions with respect to the long term land use of the lands managed or owned by the OHC are to be determined. The proposed Project is contrary to these agreements.

The history of the Settlement Agreement and the LUDMS Agreement dates back to 1966, when the City transferred 61 acres of land (the “Caveated Lands”) to the Crown

for harbour and economic development purposes. The City believes the lands were underutilized and did not contribute to the growth of the local economy as intended.

In April 2006 the OHC and the Canadian National Railway Company (“CNR”) proposed a rail spur on part of the Caveated Lands, triggering a lawsuit by the City against the OHC, the CNR and the Crown.

Subsequently, in September 2007, the federal Minister of Transport, Infrastructure and Communities (the “Minister”) appointed an independent federal representative, The Honourable David Crombie P.C.O.C., to make recommendations to the Minister. In February 21, 2008, the Crombie Report was released.

The Crombie Report (Appendix C) made a number of key findings, including:

- (1) The Gifford Farm Lands provide a valuable buffer separating the heavy industrial activities of the Port of Oshawa to the west from the environmentally sensitive Second Marsh to the east;
- (2) The Oshawa waterfront “must be shared by all stakeholders in a mixed use environment”;
- (3) Under the *Canada Marine Act* (“CMA”), Canadian ports that meet the Act’s criteria are to be placed under the jurisdiction of local Port Authorities. Those that do not are to be divested; and
- (4) The Port of Oshawa and surrounding lands should be divested by the OHC and Crown and vested in the City of Oshawa subject to specific conditions and obligations.

Following the Crombie Report, in July 2010 the Crown, as represented by the Minister, the OHC and the City settled the litigation in respect of the ownership of the Caveated Lands, the construction of a CNR rail link to the harbour and their differences with respect to land use in the Port area. The purposes of the Settlement Agreement include:

“C. This Settlement Agreement is intended to advance harmonious relations, and to recognize the benefits to be gained by balancing the various interests and needs that are served by the Port of Oshawa.

D. This Settlement Agreement, while providing a statement for the future, is also meant in a spirit of goodwill and understanding, to assist the OHC and the future CPA to carry out their mandates free of litigation.

....

G. Implementation of the terms of this Settlement Agreement is intended by the Parties to:

1. Resolve jurisdictional disputes with respect to land at Oshawa Harbour;
2. Achieve a balanced use of the Oshawa Harbour area;
3. Allow the City to proceed with elements of its vision for certain lands at Oshawa Harbour;
4. Optimize short and long term economic benefits to the City and Durham Region from Oshawa Harbour area lands;
- ...
8. Provide the City and the OHC/CPA with a mechanism aimed at achieving a greater degree of harmony on Oshawa Harbour land related matters;”

These objectives emphasize the importance of a harmonious and cooperative approach to addressing land use related matters in respect of Oshawa Harbour area, the need to optimize benefits to the City and Durham Region (the “Region”) from Oshawa Harbour area, and allowing the City to proceed with elements of its vision for the harbour.

The Settlement Agreement required that the LUDMS Agreement be entered into by the City and the OHC. The LUDMS Agreement, which was also executed on July 15th, 2010, provides under s. 4 that once a Canada Port Authority (“CPA”) is established for the port, a Land Use and Development Committee (the “Committee”) is to be established for the purposes of creating a Land Use Plan for the lands managed, held or occupied by the CPA.

The development of a land use plan, as set out in the LUDMS Agreement, is to be a cooperative process, in which the City will have at least one member on the Committee, may be consulted and will be provided an opportunity to comment. Section 4.3 states that the Land Use Plan “will set out the long-term uses that will transform, renew and revitalize the Port”.

In addition, the LUDMS Agreement provides for consultation and cooperation between the OHC and City with respect to land use planning until the establishment of the CPA:

“13. CONSULTATION AND COOPERATION PROCESS

13.1 The OHC and the City commit to continuing effective communication on matters of interest to both Parties, including but not limited to timely notice to each other and consultation on developments on land for which each is respectively responsible, relevant City policy or by-law changes and decisions which may affect the other.

13.2 The Chief Executive Officer of the OHC and the City Manager of the City will meet at least annually, and additionally when appropriate, to:

....

(d) review the respective plans of each organization regarding developments and activities in the Oshawa Harbour area;

(e) determine where there may be issues requiring resolution and areas where the two organizations may be mutually supportive.”

Section 14 of the LUDMS Agreement provides a formal dispute resolution process where disagreements arise in respect of the LUDMS Agreement.

The OHC has failed to meet the requirement to work cooperatively with respect to Oshawa Harbour and surrounding lands, failed to provide advance notice respecting its plans to lease lands for the Project and failed to consult with the City respecting this proposed development which affects the City, as legally required by the LUDMS Agreement.

In addition, the long term planning for these lands has been expressly reserved under s. 4.3 of the LUDMS Agreement for the land use plan to be cooperatively developed once the CPA has been established. In proposing to lease approximately two-thirds of the remaining developable lands of the Port of Oshawa and surrounding area to a heavy industrial use for the next seventy-five years, the OHC has rendered any such plan moot and frustrated the ability of the CPA and the City to cooperatively develop a land use plan for this area.

Further, the use of the Project site for a heavy industrial use is contrary to what the parties to these agreements had previously contemplated for this site. At the federal level, the Crombie Report found that the Gifford Farm Lands should remain a buffer, shielding the Second Marsh from the heavy industrial uses to the west:

“The so-called Gifford Farm Lands provide a valuable physical barrier separating and, in effect, containing the industrial activities of the Port of Oshawa to the west from the environmentally sensitive marshlands to the east, known as Second Marsh.

The City should be mindful of the importance of that buffer-zone role in preserving a balanced waterfront, when considering the possible benefit of future development of these lands.”

With respect to the OHC and the City, both had proposed urban design guidelines for the Gifford Farm area. At an Ontario Municipal Board (the “Board”) hearing involving the OHC and the City that addressed these proposals, the Board approved guidelines

based on the two proposals that resulted in the current Gifford Farm Urban Design Plan and Design Guidelines.

As set out in the City Planning Report, City Planning Staff have conducted a detailed review Gifford Farm Urban Plan and Design Guidelines. And found that a heavy industrial uses is inconsistent with these guidelines.(CPR, s. 3.2 and 3.3.). The inconsistency of the Project with these recommendations and policies reinforces the dangers of the “develop first, plan later” approach.

At law, this Project is premature until such time as a land use plan is developed cooperatively in accordance with the terms of these agreements. Both the City and the Crown have an important interest in seeing the Settlement Agreement and LUDMS Agreement fulfilled according to their terms, which provide benefits both to the City and to the Crown in terms of the settlement of litigation and allowing the proposed rail spur to proceed. The OHC’s failure to meet the terms of these agreements and any acquiescence or participation in this failure by the Crown would jeopardize this.

2.3 FAILURE TO ASSESS ENVIRONMENTAL EFFECTS ON SURROUNDING LAND USES

The Federal Ethanol Project Guidelines state at s. 2.4:

“Note that good site selection can minimize many potential environmental effects of ethanol plants.”

Section 4.5.2 of these Guidelines requires that the environmental assessment for this Project must be conducted based on an assessment of current and future land uses in this area:

“Current and future land use in the project area should be identified; including current community plans and zoning, existing industrial operations, existing resource extraction operations (e.g. traplines, oil and gas leases, etc.), as well as potential uses in adjacent lands and any conflicts that may arise from competing land uses. The transportation routes (road and rail) that would serve the project should be identified.”

Relevant guidance as to the spatial extent of the environmental effects of industrial facilities similar to the Project is found in the Ontario Ministry of the Environment (“MOE”) in its D-Series Land Use Compatibility Guidelines. Guideline D-6: Compatibility Between Industrial Facilities and Sensitive Land Uses (“D-6”) states:

“The objective of this guideline is to prevent or minimize the encroachment of sensitive land uses upon industrial land use and vice versa, as these two types of land uses are normally incompatible, due to possible adverse effects on sensitive land uses.”

To this end, D-6 provides minimum separation distances and influence areas for certain classes of facilities based on “case studies and past experience”. The Screening Report in its assessment states that Project is a Class II facility. (CPR, s. 2.0; TPR, s. 3.1). However, both the City Planning Report and the Technical Peer Review agree that the Project is a Class III facility with a minimum separation distance of 300m and an area of influence of 1000m.

Section 4(1) of CEAA states:

“4. (1) The purposes of this Act are

(a) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;”

The use of a Class III zone of influence of 1000m is in keeping with the careful and precautionary manner for considering projects required by CEAA. However, the City Planning Report has found that:

“As noted above, the supporting documentation does not recognize existing and permitted sensitive land uses within 300–1000 metres of the proposed site, nor even sensitive land uses within 300 metres of the subject lands, such as daycares and churches. Consequently, no analysis is presented with respect to conflicts that may arise from competing land uses such as these.” (CPR, Executive Summary).

The failure to assess the adverse environmental effects of the Project on these neighbouring uses and features, including a residential development that has been conceptually planned to contain approximately 1,730 dwelling units identified in the City Planning Report means that the significance of the adverse environmental effects caused by this Project must be determined to be uncertain.

2.4 FAILURE TO ASSESS COMPLIANCE WITH THE SITING REQUIREMENTS OF THE FEDERAL ETHANOL PROJECT GUIDELINES

Section 2.4 of the Federal Ethanol Project Guidelines requires that:

“Factors that should be considered in siting might include:

...

- the proximity of plants to large livestock feeding operations such that the “distillers dried grain with solubles” can be pumped to livestock operations;

...

- proximity to input resources and biofuel markets (to reduce emissions resulting from transportation)”

The Screening Report conducts no assessment of compliance with this requirement of these Guidelines. As a result, unlike other ethanol refineries, the Project has not followed this requirement to site this Project near sources of feedstock, input resources and biofuel markets to reduce emissions from transportation.

Instead of siting the Project in a rural area where the potential significant adverse environmental effects may be minimized and haul routes shortened, the Project has been sited at a distance that requires significant transportation of feedstock by truck to the facility, on the basis that it plans on receiving 3–4 shipments a year of feedstock by way of Oshawa Harbour, comprising at most 30% of its feedstock.

Given the shipping volumes involved, appropriate site selection would have involved siting the Project in a rural area near input sources. The shipment of feedstock could then be then transported by truck or rail to the rural location with reduced overall emissions from transportation.

3.0 THE SCREENING REPORT FAILS TO ASSESS ENVIRONMENTAL EFFECTS OF ACCIDENTS AND MALFUNCTIONS

The Screening Report fails to meet the CEAA requirement to assess the environmental effects of accidents and malfunctions that may occur. This failure puts the City's residents and the sensitive environmental features in the vicinity of the Project at risk, given the frequency and severity of these incidents with respect to ethanol facilities, as found by the Technical Peer Review:

“Fires at ethanol facilities are frequent events. A review of accident reports for North American ethanol plants shows more than 50 fires or explosions since 1997 (s. 8.4).”

Section 16(1) of the CEAA requires an assessment of the environmental effects of malfunctions and accidents that may occur, including their environmental effects:

“16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, **including the environmental effects of malfunctions or accidents that may occur in connection with the project** and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;” [emphasis added]

(b) the significance of the effects referred to in paragraph (a);”

The Guidelines elaborate on this requirement as follows:

“5.2. EFFECTS OF MALFUNCTIONS AND ACCIDENTS

This section should describe possible accidents or malfunctions, their probable and potential effects on the environment, and the implementation of any mitigation measures or contingency plans.”

The CEAA assessment of malfunctions and accidents therefore contains three requirements:

- (1) an assessment of possible accidents and malfunctions;
- (2) an assessment of the probable and potential effects on the environment; and
- (3) a description of mitigation measures and contingency plans.

The Technical Peer Review found that rather than conduct a quantitative risk analysis to assess environmental effects, the Screening Report (referenced in the Technical Peer Review as the “ESR”) draws subjective conclusions without supporting evidence:

“The ESR states that accidents and malfunction were considered as part of the assessment but, apart from general qualitative statements, there is no information or insufficient detail to evaluate the potential adverse effects associated with accidents or malfunctions. ...In many instances the evaluation of significant effects appears to be entirely subjective, with little or no reliance on quantitative or semi-quantitative data.” (TPR, s. 8.0).

In addition, the Technical Peer Review found:

- (1) Air quality effects due to malfunctions and accidents were not considered (s. 3.4).
- (2) The Screening Report did not provide an adequate assessment of the effects of changes to water quality on aquatic species in Lake Ontario due to malfunctions or accidents, noting that “[d]uring fires or explosions, large volumes of chemically-treated water may be used as part of the fire fighting operations. These chemical agents can be highly toxic to aquatic species.” Its conclusions that the effects will be “minimal” is “unsubstantiated (s. 5.5 & 7.4).
- (3) The Screening Report did not provide adequate information to assess the adverse environmental effects on groundwater from accidents and spills (s. 6.4).
- (4) Failure to consider the adverse environmental effects of “knock-on” impacts at adjacent facilities (s.8.2).

Thus, the first two CEAA Guidelines requirements for assessments of malfunctions and accidents have not been met. With respect to the third requirement for mitigation measures and contingency plans, s. 7 of the LUDMS Agreement, which was executed on July 15th, 2010, states

“Within one hundred and twenty (120) days of the Effective Date of this Agreement, the CPA will prepare, a Fire Protection and Emergency Services Plan and Protocol which document(s) shall, at a minimum, relate to each building managed by the CPA and will specify site conditions, response procedure, fire routes, maintenance of roads, first responder and secondary responder.”

Despite the lapse of more than a year from the effective date of the LUDMS Agreement, no Fire Protection and Emergency Services Plan has been prepared for Oshawa Harbour and associated lands.

As previously noted, the Project is to be located in an urban waterfront setting in proximity to a variety of sensitive land uses and ecological features:

- i. a number of sensitive environmental features, such as the Second Marsh which contains species protected under the federal *Species at Risk Act* and *Provincial Endangered Species Act*, Montgomery Creek Provincially Significant Wetland, Harmony Creek, Lake Ontario;
- ii. important recreation areas such as the Waterfront Trail and Lakeview Park; and
- iii. existing and permitted sensitive land uses within 300–1000m of the Project, including a conceptually planned higher density residential area with approximately 1,730 dwelling units, and permitted uses such as a nursing home, retirement home, hotels, cultural centres, churches, assembly halls and day care centers (CPR s. 3.1.1).

The failure to assess the adverse environmental effects of accidents and malfunctions, as required by CEAA and the Guidelines means that the likelihood of significant adverse environmental effects to these sensitive land uses and ecological features is uncertain. Based on the proximity of these sensitive land uses and ecological features, the Technical Peer Review found that to meet CEAA requirements a quantitative hazard and risk assessment for the Project should have been conducted to:

- (1) evaluate the appropriateness of locating such an ethanol facility on the proposed site, near sensitive environmental features and bordering public recreation areas and other industrial facilities;
- (2) examine the potential for significant off-site impacts posed by the proposed facility in the event of an accident; and

- (3) ensure that appropriate resources and emergency response plans are in place to manage the response in the event of an accident or upset at the proposed facility and to mitigate the potential for significant damage to persons, property and the environment (s. 8.1).

4.0 THE SCREENING REPORT FAILS TO ASSESS ADVERSE ENVIRONMENTAL EFFECTS FROM CONSTRUCTION AND OPERATIONAL PHASES OF THE PROJECT

The Federal Ethanol Project Guidelines provide that the Screening Report should assess the environmental effects on each environmental component (Guidelines, s.1.5). Project components are defined as follows:

“Environmental Components: Fundamental elements of the natural environment. Components usually include air, water (surface and groundwater), soils, terrain, vegetation, wildlife, aquatics and resource use.”

The Technical Peer Review determined that:

“In conclusion, the ESR does not provide the data and analysis necessary to evaluate the likelihood of significant environmental effects. It is our opinion that the significance of environmental effects associated with this project is uncertain.” (TPR, S. 1.5)

With respect to assessing significant adverse environmental effects, the CEAA Reference Guide: *Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects* (“SAEE Reference Guide”) states that the principle method for determining whether a significant adverse environmental effect is likely to occur is to assess a project’s compliance with environmental standards, guidelines or objectives including provincial standards guidelines and objectives:

“The most common method of determining whether the adverse environmental effects of a project are significant is to use environmental standards, guidelines, or objectives. If the level of an adverse environmental effect is less than the standard, guideline, or objective, it may be insignificant. If, on the other hand, it exceeds the standard, guideline, or objective, it may be significant.

Environmental standards, guidelines and objectives have been established by federal, provincial, and in some cases municipal departments, ministries, and agencies. They often define either maximum levels of emissions or discharges of specific hazardous agents into the environment or maximum acceptable levels of specific hazardous agents in the environment. They are usually based on the results of studies in the field and with laboratory animals, available technology, and/or prevailing attitudes and values. (s. 4.2)”

The Screening Report fails to apply a number of relevant provincial or federal standards, and misapplies others. The failure to apply relevant standards means that the significance of adverse environmental effects has not been appropriately assessed and must be found to be uncertain with respect to this Project.

The deficiencies in assessing the significance of adverse environmental effects for each environmental component are briefly described below. The deficiencies with respect to the assessment of adverse environmental effects from accidents and malfunctions and the assessment of cumulative environmental effects which are set out elsewhere in this report.

4.1 AIR QUALITY

The Technical Peer Review (ss.3.1–3.2) has identified serious deficiencies with respect to air quality modeling that leads to an underestimate of environmental effects, including:

- (1) No quantitative analysis of impacts from the construction phase;
- (2) Inaccurate emissions data;
- (3) Failure to evaluate fugitive emissions;
- (4) Use of non-representative meteorological data;
- (5) Use of a dispersion model that does not take into account the effects of lake-breezes from Lake Ontario; and
- (6) Failure to evaluate emissions from haul route traffic

Even with these deficiencies, the Ministry of the Environment standards for Total Suspended Particulate (“TSP”) under O. Reg. 419/05 pursuant to the EPA will be exceeded.

4.2 IMPACTS ON HUMAN HEALTH FROM CHANGES TO AIR QUALITY

The Technical Peer Review found that the impacts of FPM (or PM_{2.5}) were not evaluated despite the potential “serious harm to human health” presented by the Project (TPR s. 3.2.3). FPM is listed as toxic substance under Schedule 1 to the *Canadian Environmental Protection Act* (“CEPA”). With respect to toxic substances, s. 64 of CEPA provides:

“64. For the purposes of this Part and Part 6, except where the expression “inherently toxic” appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

1. (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;

2. (b) constitute or may constitute a danger to the environment on which life depends; or
3. (c) constitute or may constitute a danger in Canada to human life or health.”

Presently, there are no legally binding standards for FPM. However, two guideline values have been provided.

The first guideline value was provided in the late 1990s, by the Canadian Federal-Provincial Air Quality Working Group in the National Ambient Air Quality Objectives For Particulate Matter: Addendum to the Science Assessment Document (“NAAQO”). The NAAQO identified a “reference level” for 24 hour (acute) exposure to FPM. According to the NAAQO, “[a] reference level is a level above which human health and environmental effects can be demonstrated”.

The NAAQO reference level for FPM is 15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) over a 24 hour averaging period for ambient levels of FPM; although the NAAQO notes that there is no safe level of exposure to FPM (NAAQO p.21-22).

Following the establishment of the Reference Level, the Canadian Council of Ministers of the Environment established the Canada Wide Standard (“CWS”) for FPM and ozone as a target for reduction of ambient levels of FPM. The CWS for FPM is 30 per cubic meter ($\mu\text{g}/\text{m}^3$) over a 24 hour averaging period for ambient levels of FPM; however, the CWS notes that this level “may not be fully protective” of human health and “that recent scientific evidence indicates that there is no apparent lower threshold for the effects of these two pollutants on human health.” (CWS p.2)

There is presently no guideline value for chronic (i.e. annual) exposure to FPM. However, the Canadian Medical Association found that in 2008 alone over 21,000 Canadians died prematurely due to chronic exposure to existing levels of FPM and ozone (see TPR, s.4.2.3).

The Technical Peer Review found that based on data in the Screening Report the maximum predicted level of FPM due to emissions from the Project (i.e. excluding FPM levels already present in the air) will be 98 of FPM $\mu\text{g}/\text{m}^3$ over a 24 hour averaging period. This is more than six times the Reference Level and 3 times the CWS. Both of these values represent guidelines for ambient levels of FPM, meaning that exceedances would be even higher if the cumulative effects of FPM from other facilities were included.

Consequently, as the Technical Peer Review found, there is potential for serious harm to human health. Based on this potential, both the Technical Peer Review and Health Canada recommended that the proponent conduct a health risk assessment to evaluate the health effects of FPM (TPR s. 4.2.3). This is consistent with guidance from the SAAE Reference Guide:

“Another method of determining significance is quantitative risk assessment, which is often used to determine the significance of the risks to human health from ionizing radiation and carcinogenic chemicals. Its use is restricted to agents that have predictable dose-response (or exposure-effect) relationships (SAEE Reference Guide, s. 4.2).”

To date, there has been no health risk assessment of this Project.

4.3 ODOUR

The Technical Peer Review found that odour impacts were underestimated due to similar modeling deficiencies as were found in the air quality assessment (TPR, s. 3.2.2) and that “the data is insufficient to conclude that odour emissions from the facility will not cause an environmental effect”.

4.4 FOGGING AND ICING

The Technical Peer Review found that the assessment of the potential for icing and fogging was not properly conducted as it used outdated calculation methods (TPR, s. 3.2.4). Icing and fogging has the potential to cause accidents on nearby roads and interfere with the use of the Waterfront Trail.

4.5 NOISE

The Technical Peer Review found serious deficiencies in the analysis of noise impacts leading to uncertainty or underestimation of the adverse environmental effects of noise. These deficiencies are of three types, as follows.

First, the failure to assess impacts from noise sources or on noise sensitive receptors, including:

- (1) No quantitative assessment of noise from construction;
- (2) No assessment of impacts from blasting which may be used during the construction phase;
- (3) Insufficient monitoring of the baseline noise environment; and
- (4) Failure to assess impacts on a number of sensitive receptors including new residential developments and hotels, the use of the Oshawa marina for houseboats, recreational areas such as the Waterfront Trail and Lakeview Park.

Second, the failure to identify and apply applicable standards to assess impacts, including:

- (1) No assessment of compliance with the City Noise By-law, despite the statement in s. 4.2 of the SAE Reference Guide of the relevance of municipal environmental standards; and
- (2) Failure to apply Health Canada's environmental assessment guidelines;

Third, noise modeling errors that have lead to underestimating impacts on those noise sensitive receptors were identified, including:

- (1) Underestimates of noise from equipment by as much as 10 decibels;
- (2) Incorrect trucks volumes used in the assessment leading to on site leading to underestimates of 2 decibels (TPR s.4.5.2); and
- (3) Failure to assess haul route noise.

With respect to this last category, the Technical Peer Review concludes that “[i]f proper noise emission rates were used, sound levels at sensitive receptor locations could be higher by as much as 10 dB.” (TPR s.4.5.2)

4.6 SURFACE WATER AND AQUATIC RECEPTORS:

The Technical Peer Review determined that “the design of the stormwater and non-contact process water treatment system is inadequate”. (TPR, s. 6.1)

It also found that effluent from the facility that will be discharged into Lake Ontario will exceed Provincial Water Quality Objectives (PWQOs). PWQO's are set at levels designed to protect aquatic life. For some parameters, the PWQOs will be exceeded by as much as 100 times, yet no mixing zone analysis was conducted as required by MOE standards to evaluate impacts on aquatic life and water quality. (TPR, ss. 6.3 and 8.2.1.2)

We note that the failure to properly conduct the analysis of the impacts of discharging contaminated process and stormwater into Lake Ontario is also relevant to the prohibition under s. 36(3) of the federal *Fisheries Act*, of discharging deleterious substances into water frequented by fish. The Screening Report lacks an analysis of whether the Project will comply with the *Fisheries Act*. As such, there is insufficient evidence of compliance by the Project with this federal requirement.

4.7 GROUNDWATER

The Technical Peer Review found that the Screening Report did not properly evaluate soil characteristics, the groundwater flow regime and baseline aquifer properties. It concluded that:

“The data provided in the ESR is not sufficient to conclude that the site is not a source of contaminants to the aquatic environment. It is also not possible to

ascertain the extent and magnitude of off site contamination that is possible if there is a spill or other accident at the facility. Therefore, it is uncertain if the site will cause a significant environmental effect due to off-site migration of contaminants in groundwater.” (TPR s. 7.0)

4.8 TERRESTRIAL ECOLOGY AND WETLANDS

The Second Marsh is a 123 ha coastal wetland located adjacent to the Project. It is a Provincially Significant Wetland, and an ANSI. It has also been listed by the City under the *Heritage Act*. It contains breeding birds, songbirds and species protected under the federal *Species at Risk Act* and the provincial *Endangered Species Act*.

Despite the ecological significance of the Second Marsh, the Technical Peer Review found that the air quality assessment lacked an assessment of air derived loading rates on the Second Marsh (TPR s. 2.1).

The City had previously retained Mr. James Kamstra of AECOM to peer review Project reports on terrestrial and wetland ecology. He identified noise as an issue of concern for breeding birds and songbirds in the Second Marsh (TPR, Appendix “M” s. 3.1).

With respect to noise impacts on the second Marsh, the Technical Peer Review found that the Screening Report threshold for significant adverse environmental effects from noise of +20 dB is inconsistent with the recent decision of the Joint Review Panel (“JRP”) for the Kendall Island Bird Sanctuary (“KIBS Decision”) which set a noise level limit of 50 dBA to protect the Bird population.

Further, at the hearing, Environment Canada adopted a standard that a maximum of 1% of the KIBS sanctuary could be disturbed by industrial activity, including sensory disturbance through noise. The National Energy Board supported the Environment Canada position.

The Screening Report did not apply these standards; although, there is evidence that the standards will be exceeded with respect to the Second Marsh. Under worst case conditions, the 50 dBA noise contour extends over a large portion of the second Marsh and will exceed ambient sound levels by 5 dBA to 15 dBA or three times the existing ambient sound levels at the Second Marsh. This is based on the calculations in the Screening Report, which the Technical Peer Review found underestimated sound levels from the Project.

The Technical Peer Review notes that the noise levels from the Project also exceed MOE standards, if the Second Marsh is treated as a sensitive receptor as per the City’s land use policies.

The Technical Peer Review concludes:

“Given that significant portions of Second Marsh, a Provincially Significant Wetland, will receive noise impacts exceeding Environment Canada’s 50 dBA threshold for impacts on bird species, the facility should be redesigned to reduce noise impacts within the Marsh to meet this limit.

In keeping with the Mackenzie Gas Pipeline decisions, the facility should incorporate best management practices and best available control technologies. The revised study should be subject to independent review. The required mitigation measures and best practices should be written into the Environmental Protection Plan for the facility, which should be included in a revised ESR.” (TPR, s. 5.2.3.3)

5.0 FAILURE TO EVALUATE CUMULATIVE ENVIRONMENTAL EFFECTS

The ESR fails to follow the legal requirements of CEAA and the Federal Ethanol Project Guidelines in assessing cumulative environmental effects. Section 16(1) of the CEAA provides the requirement for an assessment of the cumulative environmental effects of the Project as follows:

“16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, **including...any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;** [emphasis added]

(b) the significance of the effects referred to in paragraph (a);”

The Guidelines elaborate on this requirement as follows:

“5.4. CUMULATIVE EFFECTS

Cumulative effects are the combination of the residual effects of the project in conjunction with the environmental effects of past, present and future projects or activities. Cumulative effects can also result from the combination of different individual environmental effects of the project acting on the same environmental component. Cumulative effects should be presented in this section of the EA Report.”

The required assessment of cumulative effects therefore comprises:

- (1) the combination of the residual effects of the project in conjunction with the environmental effects of past, present and future projects or activities; and
- (2) the combination of different individual environmental effects of the project acting on the same environmental component.

5.1 THE COMBINATION OF PAST, PRESENT AND FUTURE PROJECTS OR ACTIVITIES

The Federal Ethanol Project Guidelines instruct proponents that the CEAA *Cumulative Effects Assessment Practitioners Guide* (“Cumulative Effects Guide”) provides guidance on “how to consider the cumulative environmental effect in an EA” (s. 5.4). The Cumulative Effects Guide states that cumulative effects should be assessed with respect to each Valued Ecosystem Component (“VEC”). A VEC is a component of the environment that is considered important by the proponent, public, scientists and government involved in the assessment process. Importance may be determined on the basis of cultural values or scientific concern. (p. 4 & 28)

The Federal Ethanol Project Guidelines further advise:

“When looking at past, present and future projects or activities, the proponent must include all projects and activities in the area, not just other biofuel projects. (s. 5.4)”

5.1.1 Cumulative Effects from Past and Present Projects or Activities

The Technical Peer Review states that in the Screening Report there is a “[f]ailure to conduct a cumulative effects assessment for many VECs or inadequate evaluation of such effects on other VEC’s (s.1.5). It found that the Screening Report failed to assess the following cumulative effects of the Project on VECs in combination with impacts from other facilities in the area:

Air Quality: the Technical Peer Review states that the ESR “did not consider existing (background) air quality for many of the air contaminants that will be released by the facility known to cause cancer or other toxic effects in humans. There is also no discussion of the type of contaminants likely to be released from nearby facilities and the significance of emissions on local air quality and cumulative effects”. One such nearby facility, the adjacent McAsphalt plant has recently applied for a CofA. (TPR, s. 4.5)

Noise & Vibration: the Technical Peer Review states that “Cumulative effects from the existing sources plus the proposed facility, including an assessment of the increase in noise levels over existing conditions were not evaluated.” (TPR, s.5.3)

Lake Ontario Water Quality and Impacts on Aquatic Receptors and Habitat: the Technical Peer Review states that “[t]he ESR does not discuss cumulative effects within the context of other known sources of effluent discharges in the area and the aquatic habitat/receptors in the effluent mixing zone in Lake Ontario. This is not only a requirement under CEAA and AAFC (2007) but is also identified as a requirement under the MOE (1994) guidance on mixing zone analysis.” (TPR ss. 6.4 & 8.5)

Background Groundwater Quality and Hydrogeology: the Technical Peer Review states that “Potential cumulative effects on soil and groundwater quality due to existing conditions, normal operations, or spills and other accidents were not considered. Information on background groundwater quality is required.” (TPR, s. 7.5)

Terrestrial and Wetland Ecology: The City previously retained Mr. James Kamstra of AECOM to peer review Project reports on terrestrial and wetland ecology. He identified noise as an issue of concern for breeding birds and songbirds in the Second Marsh. He also concluded that the combination of background noise and noise from the Project was not evaluated for the Project (TPR, Appendix “M” s. 3.1). As noted above, the Technical Peer Review has found that the Screening Report lacks an assessment of the cumulative effects of noise.

5.1.2 Cumulative Effects from Future Projects and Activities

In 2007, an update to the Cumulative Effects Guide was published, *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act* (the “Operational Policy Statement”)

This update states that in assessing the cumulative effects of future projects and activities, CEAA policy is now as follows:

“The Agency’s 1994 Reference Guide advised that the assessment of cumulative environmental effects in relation to future projects should focus exclusively on imminent projects, that is, projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval.

...

To better reflect the broad objectives of the Act, the Agency position has evolved to include “certain” and “reasonably foreseeable” projects and, where appropriate those projects that are “hypothetical” (pp.2–3).”

The City Planning Report found that the Screening Report failed to assess many certain and reasonably foreseeable future Project activities, including:

Cumulative environmental effects of changes in Project feedstock: Ethanol may be derived from a wide variety of feedstock. While FarmTech indicates that the Project will only use corn as a feedstock it has acknowledged that market conditions for corn fluctuate. The use of alternate feedstock in the future due to market conditions is therefore reasonably foreseeable, but the cumulative environmental effects of alternate feedstock were not assessed (CPR, s. 3.2.6.1).

Cumulative environmental effects of changes in production: Similarly, while FarmTech has indicated it does not intend to produce wetcake, it has acknowledged that market conditions for ethanol and distillers grains (i.e. wet cake) will fluctuate. It is therefore reasonably foreseeable that changes in market conditions could lead to the Project producing wet cake. Indeed, the Project Traffic Impact Study verifies this future possibility. The cumulative environmental effects of changes in production were not assessed (CPR, s. 3.2.6.2).

Cumulative environmental effects of the planned addition of a CO₂ recovery plant: The ESR states that a CO₂ recovery plant may be constructed within three years of Project start-up. Consequently, the potential for a future CO₂ recovery plant is both reasonably foreseeable and imminent. The cumulative environmental effects of the future CO₂ recovery plant were not assessed (CPR, s. 3.2.6.3).

Cumulative environmental effects of potential expansions of the Project: The Project has a planned capacity of 210 million litres; however, the *Economic Impact Study for a Renewable Fuels Facility*, commissioned by FarmTech, foresees a plant expansion to 420 million. This is similar to an expansion conducted by a similar facility (CPR, s. 3.2.6.4). Such an expansion would significantly increase a broad range of environmental effects. The cumulative environmental effects of any future plant expansions were not assessed (CPR, s. 3.2.6.4).

5.2 COMBINATION OF DIFFERENT INDIVIDUAL ENVIRONMENTAL EFFECTS

The Cumulative Effects Guide elaborates on the Guidance requirement to evaluate the combination of different individual environmental effects of the Project on the same environmental component. It requires that proponents evaluate the “effects on Valued Ecosystem Components (VECs) due to interactions with other actions, and not just the effects of the single action under review”. (p. 3)

The CEAA requires that the significance of the effects of environmental changes on health, socio-economic conditions, physical and cultural heritage, etc. be assessed:

“environmental effect” means, in respect of a project,

- (a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the Species at Risk Act
- (b) any effect of any change referred to in paragraph (a) on
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes by aboriginal persons, or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance or
- (c) any change to the project that may be caused by the environment,
- (d) whether any such change or effect occurs within or outside Canada;”

The core of this assessment is the assessment of cumulative effects from the multiple environmental changes brought on by the Project. This aspect of the cumulative effects assessment is absent. For instance, the Screening Report does not assess the combined effects of noise, air, odour and vapor emissions on outdoor recreation areas including the Waterfront Trail and Lakeview Park, the heritage value of Gifford Hill or present and permitted planned land uses such as residential developments, hotels or commercial uses..

6.0 FAILURE TO COMPLY WITH PROVINCIAL ENVIRONMENTAL STANDARDS

The Screening Report fails to comply with provincial environmental standards. This is relevant in two respects. First, as cited above, the SAEE Reference Guide states that assessing compliance is important to assessing the likelihood of significant adverse environmental effects. Second, the Project is legally required to comply with these standards.

Yet the Screening Report claims that Provincial environmental standards do not apply:

“At the outset of the environmental assessment process, FarmTech had submitted applications to the Province of Ontario, Ministry of the Environment (MOE), for Certificates of Approval pursuant to the provincial *Environmental Protection Act* (EPA) and the *Ontario Water Resources Act*. At that time, PWGSC [*Public Works and Government Services Canada*] and the AAFC were also of the opinion that these laws applied to the Project, given that FarmTech had applied

for the respective provincial authorizations. However, FarmTech withdrew its applications to the Province on the basis that provincial legislation does not apply to the proposed parcel of federal land and, therefore, FarmTech had no application to apply for Certificates of Approval. The OHC, which is an agent of the Federal Crown that owns the land, is also of the opinion. The AAFC has no responsibility for permitting, except to determine whether required permits have been or will be obtained by the proponent. (ESR, s. 1.8)”

This analysis is incorrect. The MOE determined that provincial environmental laws do apply:

These proposed undertakings will be subject to applicable legislation under the *Ontario Environmental Protection Act* and the *Ontario Water Resources Act*. Applicable approvals under these Acts include Certificates of Approvals (CofA) for air emissions, noise emissions, stormwater management works, sewage works, and effluent water discharge. A Permit to Take Water (PTTW) will also be required if construction dewatering is greater than 50,000 litres per day. (TPR, Appendix L, MOE Letter to AAFC, July 28, 2011)

Having reviewed relevant constitutional law decisions, we agree that private undertakings on federal lands are not immune from provincial environmental laws unless it can be demonstrated that there is an operational conflict with applicable *intra vires* federal legislation.

Despite its claims that provincial environmental laws need not be complied with, the Screening Report also claims that the MOE has determined that the Project will comply with provincial environmental laws:

“Although FarmTech will not be applying for provincial Certificates of Approval, FarmTech reported that the provincial MOE had reviewed all of its previously submitted documents and it understood that MOE was generally satisfied with the documentation submitted.”

Based on our review of the MOE letter to AAFC, dated July 28, 2011, the preceding statement is false, as set out in the letter:

“The ministry has completed a cursory review of the Screening Report and has identified a number of concerns related to air quality and odour impacts which have not been sufficiently addressed including:

- Undertaking additional studies on the cumulative effects for contaminants of concern;
- Creating a complaints protocol for potential public complaints regarding off site odour impacts;

- Developing an odour mitigation management plan;
- Providing clarification and supporting documentation for the fugitive emission sources and air emission estimates;
- Creating an air quality and emissions monitoring plan for contaminants of concern including VOCs, PM_{2.5}, PM₁₀, NO_x, SO₂, and CO;
- Providing further justification for the D-Series classification rationale

...

The ministry will undertake a detailed evaluation of the technical information provided when approval applications are received under the provincial legislation listed above.”

In addition, the City’s Technical Peer Review determined that MOE requirements have not been met:

MOE D-Series Guidelines: The D-Series Classification is incorrect; “[b]ased on the nature of operations and size of the facility, we do not agree with this classification.” (TPR, s. 3.1);

CofA for Air requirements pursuant to s. 9 of the Ontario *Environmental Protection Act* (“EPA”): “Table 5-7 (Appendix E) of the Screening Report shows that the predicted combined (ambient + facility) concentration of TSP is 126 µg/m³. Since this concentration is greater than the MOE standard of 120 µg/m³, the MOE would not issue a Certificate of Approval until additional [more detailed] analysis is provided which shows that TSP concentrations would be less than the standard.” (TPR, s.4.2.3);

CofA for Noise pursuant to s. 9 of the EPA: Through inappropriately interpreting the [MOE] guidelines, the Screening Report underestimates the potential impact on these noise sensitive receptors. (TPR, S. 5.2.1)

CofA for Sewage Works pursuant to s.53 of the Ontario *Water Resources Act* (“OWRA”): Under the OWRA, sewage works include stormwater works and the drainage of industrial effluents. The Technical Peer Review notes “[f]urther consideration is needed to enhance the stormwater (which includes non-contact process water) management design plan to ensure that the quality of effluent released by the facility will be suitable as per accepted federal, provincial and municipal requirements (e.g., MOE—MISA effluent control and SWM Planning and Design Guidelines, DFO/MNR—aquatic and terrestrial habitat protection) (TPR, s.6.1).

Prohibition of effluent discharges that impair water quality pursuant to s. 30 of the (“OWRA”): With respect to MOE mixing zone requirements for effluent discharges, which is central to the assessment of s. 30 compliance, the Technical Peer Review states: “[t]he ESR has not considered any aspect of the above noted MOE requirements.”

Permit to Take Water pursuant to ss. 34 and 34.1 of the OWRA: The Technical Peer Review notes the lack of details as to the amount of water to be taken in the construction phase of the Project. This information is necessary to determine whether a permit is necessary: “dewatering will be required during construction, but no details regarding the collection and treatment of this water is provided” (TPR, s. 6.2).

This failure to demonstrate compliance with MOE environmental standards further supports the Technical Peer Review’s finding that the likelihood of significant of adverse environmental effects caused by the Project is uncertain.

7.0 CONCLUSION

Section 20(1) of CEAA sets out the basis for decision making by a responsible authority with respect to an environmental screening:

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

- (a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;
- (b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or
- (c) where
 - (i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible

authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

Given: (i) the fundamental legal deficiencies in meeting CEAA requirements, (ii) the uncertainty as to whether the Project is likely to cause significant adverse environmental effects as determined by the City Planning Report and technical Peer Review, and (iii) the high level of public concern, the AAFC has only two legally permissible courses of action: (1) to not exercise any power or perform any duty or function that would permit the project to proceed in whole or in part; or (2) to refer this matter to the federal Minister of the Environment for further referral to a mediator or review panel in accordance with s. 29 of CEAA.

Dated August 10, 2011



Rodney V. Northey, Partner



Konstantine Stavrakos