



Stephen J. D'Agostino
416-868-3126
sdagostino@thomsonrogers.com

DELIVERED

April 29, 2009

The Honourable Mr. John Gerretsen
Minister of the Environment
12th Floor
135 St. Clair Avenue West
Toronto, Ontario
M4V 1P5

Dear Mr. Gerretsen:

**Request to the Minister of the Environment to review the Decision of the Director –
York Energy Centre, King Township
Our File No. 050852**

1. We are the solicitors for Concerned Citizens of King Township Inc. ("CCKT") in connection with its request that the York Energy Center Limited Partnership ("the Proponent"), be required to prepare an individual Environmental Assessment ("EA") pursuant to Part II of the *Environmental Assessment Act* for the proposed York Energy Centre ("the Project")¹.
2. We are writing to you in accordance with Regulation 116/01², Electricity Projects, made under the *Environmental Assessment Act* and your Ministry's Guide to Environmental Assessment Requirements for Electricity Projects (March 2001)³ to request a review of the decision of the Director ("Director") of the Ministry of the Environment ("MOE") dated April 7, 2009⁴ (the "Decision") as detailed in our conclusions, and that you give the Proponent notice to prepare an EA.

¹ Tab 1

² Ontario Regulation 116/01, Electricity Projects (made under the *Environmental Assessment Act*)

³ Guide to Environmental Assessment Requirements for Electricity Projects, March 21, 2001 (Ministry of the Environment Environmental Assessment and Approvals Branch)

⁴ Tab 2



A. BASIS OF THE REQUEST

3. CCKT is a citizen's organization founded in 1971. It is focused on protecting the natural environment and rural character of King Township. Its family members have an interest in the long term protection of natural features such as wetlands, forests and kettle lakes, the protection of agricultural lands and maintaining the character and quality of life of the Township's small villages and farmlands.
4. CCKT wrote to the Director on December 18, 2008 and requested that the Proponent's Project be elevated to an EA. By letter dated April 7, 2009 the Director refused CCKT's request without imposing any conditions on the Proponent.
5. As will be described herein, CCKT is concerned that the environment, as defined in the *Environmental Assessment Act*, will unnecessarily be impaired by the Project. The Project, as described by the Proponent, would see a 400MW natural gas fired simple cycle electricity generation facility located on a 13.3 hectare parcel of land in King Township. The Project is comprised of turbines and a connection to the Holland Junction Transformer Station. According to the Environmental Review Report ("ERR"), the main elements of the Project include:
 - 2 turbines;
 - a major natural gas connection;
 - 2 18m (60ft) high exhaust stacks;
 - water, waste water and storm water management;
 - an electrical switching yard; and
 - an electrical connection to the Holland Transformer Station.

We are unable to determine from the ERR the height of the Inlet Air System housing and the Generator and Enclosure (as shown on Figure 2.2 of the ERR) in order to assess the potential impact on the rural character of this portion of King Township.

6. The Project is proposed to be located on lands which have the characteristics of prime agricultural land and is located immediately adjacent to the Holland Marsh. As you may know, the Holland Marsh is a key element in the agricultural economy of the Province of Ontario.



Based upon provincial soil analysis, the Holland Marsh area is deemed to contain some of the most fertile soil in the Country.

7. The Project is also located within Ontario's Greenbelt. The introduction of an industrial use of the scale envisaged by the Proponent puts the key qualities and characteristics of the Holland Marsh and the Greenbelt at risk. The qualities and characteristics that comprise the Holland Marsh and Greenbelt are unique and important to Ontario's culture, natural and economic environment.
8. The Project is proposed to be set in a rural portion of King Township characterized by scenic views, rolling topography, and of course the agricultural resource; the Holland Marsh. Immediately adjacent to the Project is the Holland Canal which provides drainage and irrigation to the downstream Holland Marsh. As well, the Holland Canal provides habitat for important species and the adjacent Cawthra Mulock Nature Reserve ("Nature Reserve") owned by Ontario Nature.
9. Ontario Nature owns and manages the 270-acre Nature Reserve in King Township, located between Bathurst Street and Dufferin Street, north of Green Lane. The York-Simcoe Naturalists are the official stewards of the Nature Reserve. The proposed Project is located just north of the Nature Reserve.
10. The introduction of a heavy industrial use such as the Proponent's Project represents a significant risk to the environmental values which are central to the success of the Greenbelt, Holland Marsh, Township of King, and Nature Reserve.
11. The Project is one component of a significant system enhancement being undertaken at the direction of the Minister of Energy and Infrastructure ("Minister of Energy") without the benefit of any environmental review.
12. On January 31, 2008, the Minister of Energy directed the Ontario Power Authority ("OPA"), pursuant to Section 25.32 of the *Electricity Act*, to procure a simple (single) cycle gas-fired electricity generation facility with a rated generation capacity of approximately 350MW and not more than 400MW⁵. This direction was not the subject of environmental review pursuant to the Environmental Bill of Rights nor has it been the subject of

⁵ Tab 3



an environmental assessment despite the fact that the Minister of Energy's direction is for a project much bigger than the requirements identified by the OPA.

13. Contrary to assertions made in the Decision, the Minister of Energy's direction is not binding on the Minister of the Environment or the Director, nor does it identify the Holland Marsh, and its environs, or the Greenbelt as the only location for the Project. Rather, it identifies a broad area of the Region of York including lands located outside of the Greenbelt and lands which are subject to industrial zoning and urbanized conditions.
14. The Minister of Energy's direction was implemented by a Request for Proposals ("RFP") which identified the constraints on the location of the Project to be located within the Municipalities of Aurora, East Gwillimbury, Georgina, King, Newmarket, Whitchurch-Stouffville, or Bradford West-Gwillimbury subject to electrical connection requirements⁶. To be clear, the RFP did not require that the Project be located within the Greenbelt, the Holland Marsh or its environs, or even, within the Township of King. Notwithstanding the foregoing, and the proposed location of this heavy industrial use in an area protected by Ontario policy for environmental, cultural and agricultural purposes, the Director has unconditionally approved the Project with virtually no site specific study.

B. THE PROVINCIAL POLICY STATEMENT

15. Section 3(5) of the *Planning Act*⁷ requires that any decision by the Director, a Minister of the Crown, including the Minister of the Environment, the Minister of Energy and the Minister of Agriculture, Food and Rural Affairs ("Minister of Agriculture") and an agency of the government, including the OPA, must make its decisions consistent with policy statements issued under Section 3(1) of the *Planning Act*. We note that the Decision relies heavily upon the interpretation of several instruments pursuant to the *Planning Act*, and will potentially result in a new land use and therefore the *Planning Act* and the Provincial Policy Statement ("PPS")⁸ apply to the Decision. The Director's decision is inconsistent with important policy goals and requirements of the PPS.

⁶ Tab 4

⁷ R.S.O., 1990 Chapter P.13

⁸ All relevant excerpts of the PPS are included at Tab 5



Further, the Director erred in concluding that a gas powered electrical plant constitutes an “alternative energy system” as defined by the PPS.

16. The PPS contains requirements for the protection of prime agricultural areas. Policy 2.3.1 directs that prime agricultural areas be protected for long term use for agriculture. According to the PPS, prime agricultural areas are those where prime agricultural lands predominate. Specialty crop areas are to be given the highest priority for protection followed by Class 1-3 soils. The Project is proposed to be located on Class 2 soils and is located immediately adjacent to the Holland Marsh which is one of Canada’s most important specialty crop areas. Any decision that has the affect of reducing or compromising the long-term use for agriculture of a prime agricultural area by the introduction of a heavy industrial use is inconsistent with the PPS and contrary to the *Planning Act*. The PPS does not contemplate the introduction of a heavy industrial use into or adjacent to a prime agricultural area.
17. Policy 2.3.5 of the PPS only permits the exclusion of land from prime agricultural areas for limited purposes. In that case, the PPS requires that the Proponent follow policy 1.1.3.9 of the PPS for the expansion of a settlement area or for other limited non-residential uses and that the Proponent demonstrate that each of the following conditions have been met:
 - 1) The land does not comprise a specialty crop area;
 - 2) There is a demonstrated need within the planning horizon provided for in Policy 1.1.2 of the PPS for additional land to be designated to accommodate the use;
 - 3) There are no reasonable alternative locations which avoid prime agricultural areas; and
 - 4) There are no reasonable alternative locations in prime agricultural areas with lower priority agricultural lands.
18. Neither the Director nor the Proponent has demonstrated that the Project meets any of the preconditions for the removal of land from prime agricultural areas found in Policy 2.3.5 of the PPS.
19. Given the importance of the Holland Marsh, and prime agricultural areas generally, it is surprising that the Proponent’s ERR does not document any input from the Minister of Agriculture. In fact, the Minister of Agriculture seems to be unaware of the Project. Just a few weeks ago, the Minister of



Agriculture wrote that there is “no proposal for a power plant in the Holland Marsh itself” and then observed that the EA process for the proposal had begun with information on how to become involved in that process. Of course, the Minister’s letter is incorrect.⁹ The time for involvement is at an end and the Project is located on prime agricultural land that is intimately connected with the Holland Marsh.

20. In addition, the Proponent’s companion Stakeholder Consultation Report states at page 44 that no response has been received from the Ministry of Agriculture, Food and Rural Affairs (“OMAFRA”). We note that this is in direct contradiction with page 185 of the ERR which indicates, without providing any detail, that there were discussions and meetings with OMAFRA representatives. Since the Proponent has not documented those discussions in the ERR, we are unable to determine what OMAFRA’s position was and what advice was given to the Proponent or if the Proponent followed that advice. This is a failure of transparency. We would expect the advice to be consistent with the PPS as is required by law. Should there be written or oral communication from OMAFRA that forms part of the ERR or the basis of the Decision then the ERR fails one of the hallmarks of environmental assessment namely, traceability and CCKT has been irreparably prejudiced in its opportunity to participate in this process.
21. The Project, by the Proponent’s own account, removes prime agricultural land from agriculture permanently by the construction of a heavy industrial facility contrary to the PPS. The Proponent has made no commitment to return unused lands to active agriculture nor has the Director made that a requirement of her approval. In addition, the Project has the potential to affect agriculture in the Holland Marsh as the result of the following:
 - 1) The Project is located immediately adjacent to the Holland Canal which is a source of irrigation water for the downstream portion of the Holland Marsh. Notwithstanding, the Proponent’s stated mitigation, there is significant risk that contaminated surface water run-off will be carried into the canal thereby contaminating the irrigation water used by Holland Marsh farmers. Even if the introduction of contaminants into the canal meets the

⁹ Tab 6



MOE's water quality objectives, the use of the canal for irrigation purposes raises the prospect that crops originating in the Holland Marsh will have a stigma associated with them thereby reducing the value of the crop, and the farmer's ability to sell the crop, which in turn would affect the viability of local farming operations. Modern food standards are trending towards organic produce. As we well know from the recent Listeriosis outbreak, the tainting of food can have a devastating affect on food producers, notwithstanding real health consequences.

- 2) Air-born contaminants as a result of the combustion of natural gas at the Project will, over time, result in the long-term accumulation of many substances which are of concern to human health in the prime agricultural area. Even if these substances fall within the MOE's guidelines, their presence will likely create a stigma on the crops produced in the Holland Marsh and its environs. For the reason set out above, this will have devastating consequences on the viability of farming operations in the Holland Marsh.

22. As a result of the foregoing, and the mandatory requirements of the PPS, the Proponent's failure to study the effect of the Project on the viability of the local agricultural industry and the absence of any position or comments from OMAFRA is a significant failing of the ERR. We would have expected that OMAFRA would have required that the Proponent demonstrate that there was no viable alternative to the use of prime agricultural land, or to a location which has the potential to affect the Holland Marsh and its environs, as a precondition of its approval.

23. On the subject of energy, the PPS does not contain any policies relevant to this project which conflict with the mandatory requirement to protect prime agricultural areas. Policy 1.8.2 directs that increased energy supply should be promoted by providing opportunities for energy generation facilities where feasible. The PPS does not direct that energy generation facilities are or can be located in prime agricultural areas. The Director makes reference to Policy 1.8.3 which does permit alternative energy systems in prime agricultural areas. The Policy requires that when siting an alternative energy system in a rural area or prime agricultural area "these systems should be designed and constructed to minimize impacts



on agricultural operations.” It is clear, that by locating the Project in a prime agricultural area, when alternatives are available in non-prime agricultural areas, that this policy has been violated, if it is indeed applicable. In our view, the Project is not an “alternative energy system”.

24. “Alternative energy systems” are defined to be those that “significantly reduce the amount of harmful emissions to the environment (air, earth and water) when compared to conventional energy systems.” This Project is a conventional energy system. Gas turbine facilities have been used in Ontario for many decades. The Project produces substantial greenhouse gases including 3,727 pounds of nitrous oxide and 14,377 pounds of carbon dioxide daily. “Alternative energy systems” are meant to encompass technologies that are new to Ontario such as wind turbines and solar farms. The Director is incorrect in her conclusion that the Project constitutes an “alternative energy system”¹⁰.

C. GREENBELT ACT AND PLAN

25. The Project is located within land regulated by the *Greenbelt Act, 2005*¹¹ and *Plan*¹². The Act’s objectives are, among other things, to:

- 1.) to sustain the countryside, rural and small towns and contribute to the economic viability of farming communities;
- 2.) to preserve agricultural lands as a continuing commercial source of food and employment;
- 3.) to recognize the critical importance of the agriculture sector to the Regional economy;
- 4.) to provide protection to the land base needed to maintain, restore and improve the ecological and hydrological functions of the Greenbelt area;
- 5.) to control urbanization of lands to which the *Greenbelt Plan* applies; and

¹⁰ The Proponent proposes to use two Siemens SGT6-5000F gas fired turbines for the Project. This is not a new or alternative technology. As indicated on the Siemen’s website, “with more than 3,200,000 hours of fleet operating the SGT6-5000F is ideally suited for either simple-cycle or heat recovery applications ...”

¹¹ S.O. 2005, Chapter 1

¹² *Greenbelt Plan*, established under Section 3 of the *Greenbelt Act, 2005*, map at Tab 7



6.) to ensure that the development of transportation and infrastructure proceeds in an environmentally sensitive manner¹³.

26. The *Greenbelt Plan* and *Act* are binding upon the Director, a Minister of the Crown including the Ministers of the Environment, Energy, and Agriculture, in relation to decisions made under the *Planning Act*. In addition, the *Greenbelt Act*, 2005 provides that the comments, submissions or advice provided by a Minister of the Crown, an agency of the government of Ontario (which would include OPA) that affect a planning matter related to lands within the Greenbelt must conform with the *Greenbelt Plan*¹⁴.

27. The *Greenbelt Plan* prevails in the case of conflict with any official plan or zoning by-law or policy statement issued pursuant to Section 3 of the *Planning Act*¹⁵.

28. According to the Premier of Ontario, the *Greenbelt Plan*, which was approved in February of 2005 "will permanently protect more than one million acres in the Golden Horseshoe from urban sprawl."¹⁶ The Decision to approve the introduction of a heavy industrial use into the quiet countryside of King Township, within the Greenbelt and located within the environs of the Holland Marsh is contrary to the *Greenbelt Plan* as it is evidence of the introduction of new unjustified urbanization into the Protected Countryside.

29. Section 4.2.1 of the *Greenbelt Plan* deals with infrastructure policies. Infrastructure is defined by the plan to include electric power generation and transmission facilities. According to the Proponent, the Project is located within the Protected Countryside¹⁷. Accordingly, the Protected Countryside policies within Section 4.2.1 apply. In order to be permitted, 4.2.1 subsection (1) requires that new infrastructure be approved by the *Environmental Assessment Act*. The policy purpose of this requirement is to ensure alternatives are considered in order to minimize the risk of unjustified intrusions into the protected area. In this instance, the

¹³ Section 5 of *Greenbelt Act* 2005 S.O. 2005 Chapter 1 (relevant excerpts of the *Greenbelt Act*, 2005 are at Tab 8)

¹⁴ Section 7 of *Greenbelt Act*, 2005

¹⁵ Section 8 of the *Greenbelt Act*, 2005

¹⁶ Tab 9

¹⁷ Relevant excerpts of the *Greenbelt Plan* are at Tab 10



Proponent has elected to proceed under Regulation 116/01 which does not result in an approval under the *Environmental Assessment Act* but rather, an exemption. As a result, the Project does not meet with this fundamental requirement of the *Greenbelt Plan*.

30. In addition, subsection (1) requires that the infrastructure meet one of the following objectives:

- a) That it supports rural economic activity that exists and is permitted within the Greenbelt; or
- b) It serves the significant growth and economic development expected in Southern Ontario by providing for appropriate "infrastructure connections."

31. The Project is a generating facility, not an infrastructure connection and therefore it does not comply with policy 4.2.1.1(b). Accordingly, the Proponent must demonstrate that it provides support for agriculture, recreation and tourism, or rural settlement areas as described in subsection 4.2.1.1(a). Clearly, given the risk to agriculture and the character of the area as a result of the introduction of this heavy industrial use, it does not comply with 4.2.1.1(a).

32. Section 4.2.1.2 of the *Greenbelt Plan* requires that the location of infrastructure in the Protected Countryside be located to minimize the amount of Greenbelt occupied by such infrastructure. As well, the planning and design are required to minimize the negative impacts and disturbances to the existing landscape including impacts caused by light and noise. Since the Proponent has not considered alternatives, and since the OPA RFP¹⁸ siting requirements permit the location of the Project outside of the Greenbelt, it cannot be said that the policies requiring that the amount of Greenbelt lost to the Project be minimized have been met.

33. As a result of the foregoing it is clear that the Project is designed to serve the growth requirements of Southern Ontario, but is not an infrastructure connection. It cannot be said to be necessary for the support of agriculture, recreation, tourism or rural settlement areas. As a result, it is not permitted by the *Greenbelt Plan or Act*. As noted earlier, the Director erred in her conclusion that the Project was located on the Greenbelt as a result of constraints placed on it by the OPA's RFP and the Minister's

¹⁸ Tab 4



direction¹⁹. These documents contemplate alternatives located off of the Greenbelt and do not constrain the Minister of the Environment's consideration in any event.

34. We note that the Proponent has identified a portion of the land subject to the Project is designated Natural Heritage System. None of the reports required to demonstrate compliance with the Natural Heritage System policies have yet to be produced. Policy 3.2.2 of the *Greenbelt Plan* specifically permits existing and new agriculture subject to policy 3.2.2.2. There is no similar permission for infrastructure. Section 3.2.2.3 requires a demonstration that:

- 1.) there are no negative affects on key natural heritage features or key hydrologic features; and
- 2.) connectivity between key natural heritage features and key hydrological features are maintained.

35. Without the receipt and approval of the reports it cannot be said that the Natural Heritage System policies of the *Greenbelt Plan* have been maintained. Given the absence of any discussions concerning these issues in the ERR, other than the Proponent reciting provisions of the *Greenbelt Plan*, it is difficult to understand the basis for the Decision. As a result, it is not traceable.

D. REGIONAL OFFICIAL PLAN

36. According to the ERR, the Project is located on lands designated Rural Policy Area and Agricultural Policy Area in the Regional Official Plan ("ROP"). This conclusion is surprising given that the maps attached to the ROP are not meant to be scaled but rather, are subject to interpretation policies. Section 7.6 of the ROP²⁰ states that the boundaries of the policy areas identified on its maps are intended to be considered as general locations. The exact boundaries are defined in the local official plans and zoning by-laws. In this instance, the King Township Zoning By-law zones all of the land RU2 which only provides for agricultural uses. As a result, one must conclude that the Project is designated in the ROP as an Agricultural Policy Area. As a result, policy 5.8²¹ of the ROP requires that development not be permitted without an amendment to the ROP

¹⁹ Tab 3 and Tab 4

²⁰ Tab 11

²¹ Tab 12



which would include an evaluation in accordance with the Foodland Guidelines including demonstration of the necessity for the proposed land-use at that location and whether any suitable alternative locations on lower capability lands have been considered.

37. The Project's infrastructure use is not permitted within the Agricultural Policy Area. Given that this is a generating facility rather than a transmission facility, the Proponent's discussion of transmission facilities at page 83 of the ERR in its justification of the ROP is irrelevant. The policies quoted by the Proponent do not permit a generating facility. Rather, the Proponent speculates that some future amendment to the ROP may permit it.²²
38. Should you disagree with our analysis of the interpretation provisions of the ROP it is important to note that in the Rural Policy Area²³ there are no policies which explicitly permit power generation. Rather, policies related to non-agricultural uses require an amendment to the local official plan including a consideration of the need and demand for the proposed use, why the location is appropriate and the impact of the proposed use on the agricultural land base and farming activities nearby. As well, the Proponent must demonstrate compatibility with surrounding uses, its sensitivity to the natural environment and the rural character of the area. Given the Proponent's failure to consider alternative sites, it does not comply with the Rural Policy provisions of the ROP. As well, given the scale and nature of the Project it is clear that it could not bring itself within the provisions of the Rural Policy dealing with compatibility and character at this location.
39. Finally, it is disturbing that the Director made the Decision relying upon a legal opinion supplied by the Proponent. That opinion has not been disclosed and, as a result, we are unable to comment on its contents. This non-disclosure violates the principle of transparency which is fundamental to the environmental assessment process and prejudices CCKT's ability to participate in it. We believe it is inappropriate for the Director to fetter her discretion by unlawfully delegating the interpretation of the ROP by relying upon a legal opinion from a third party in coming to a conclusion on an important matter such as official plan conformity. This is particularly so when the legal opinion contradicts the opinion of the

²² It is also contemplated in a Region of York staff report dated November 5, 2008 that a ROP amendment may be required for the Project.

²³ Tab 12



Region of York's Planning Department in its report dated November 5, 2008, wherein Regional Planning staff concluded that a ROP amendment is required regardless of the designation²⁴. Given the resources available to the Director, including the Ministry of Municipal Affairs and Housing ("MMAH") which ought to have been consulted on this proposal, this reliance is unjustified.

40. Finally, we note that the utility provisions quoted by the Proponent in the ERR require that utilities be located so as to avoid the Regional Greenlands System and to minimize the use of agricultural lands. Clearly, without the consideration of alternatives, the Proponent is unable to meet this requirement. In fact, given that the OPA considered other proposals outside of the Greenbelt, it is clear the Proponent would fail this test.
41. Puzzling in the analysis in the ERR is the fact that the Proponent has used two different consolidations of the ROP to come to its conclusions. Without an understanding why the Proponent would wish to use historic documents in coming to a conclusion on an official plan matter, we submit that the analysis is suspect.²⁵

E. TOWNSHIP OF KING OFFICIAL PLAN

42. The Director concluded that the Project is permitted pursuant to the Township's Official Plan ("OP") without conducting any independent review. Rather, she relied upon legal advice from the Township which has not been disclosed. We are unaware of any such legal opinion provided to the Director to support the Project. For the reasons set out above, the Director is required to give independent consideration to conformity with the OP. Reliance on confidential opinions prejudices CCKT's ability to participate in this process for the same reason as the non-disclosure of the Proponent's legal opinion. In any event, the conclusion is wrong.
43. The Township of King OP, in Section 3(11)²⁶, permits Public Utilities and Public Uses in all areas of the Plan "provided that such use is necessary in the area, and can be made compatible with its surroundings and that

²⁴ Regional Municipality of York, report of the Commissioner of Planning and Development Services, November 5, 2008

²⁵ Note that the ERR at Page 83 deals with the Regional Official Plan consolidation dated September 2007 while on Page 84 they refer to the consolidation dated November 30, 2005.

²⁶ Tab 13



adequate measures are taken to ensure this compatibility.” In the absence of the consideration of alternatives, the Director is unable to conclude that the Project is necessary in this area. In fact, given that the OPA considered other projects located in less sensitive areas, the Proponent would fail that analysis.

44. Public Utility and Public Use is not defined in the OP. However, we note that the Project does not supply electricity to the public, rather it is a private manufacturer of electricity and is therefore not a public utility or public use as those phrases are regularly used. As a result, an amendment to the OP is required to permit this industrial use.
45. We note that the Township adopted an amendment to its OP in order to conform with the *Oak Ridges Moraine Conservation Plan*. That amendment, as it applies to infrastructure and utilities, only permits power transmission lines not generation²⁷. In fact, all of the utilities identified in that amendment are linear in nature and do not include a “plant” associated with the manufacture or processing of the utility. As a result, it is clear that when considering important environmental features, the Township’s planning documents do not contemplate the introduction of a major industrial use under the guise of a utility exemption.
46. The Rural Area designation of the OP²⁸ is focused on agricultural and conservation uses. The designation permits limited non-farm residential uses. There is no provision explicitly permitting the generation of power or in fact any manufacturing use. As a result, it cannot be said that the Project conforms with the OP. It is clear that the Director misunderstood the Township’s position with respect to OP conformity (which we disagree with to the extent it says the use is permitted) set out in the staff report dated January 19, 2009²⁹, in that she did not require the Proponent to demonstrate compliance with the locational requirement of the OP, including that the use is necessary in the area, as was required by the Township as part of its analysis.

F. KING TOWNSHIP ZONING BY-LAW

47. Rather than exercise independent judgment with respect to compliance with the Township’s zoning by-law, the Director relied upon an opinion

²⁷ Tab 14

²⁸ Tab 15

²⁹ Tab 16, page 6



from the Township with respect to zoning conformity. As noted earlier, we are unaware of any legal opinion supplied to the Director. That opinion has not been disclosed and, as a result, CCKT is prejudiced for the same reason as the non-disclosure of the Proponent's legal opinion and we are unable to comment on it. For the reasons set out above, the Director is required to exercise independent judgement in coming to her conclusions. In addition, the ERR, which deals with zoning at page 86, simply recites zoning provisions and makes no analysis. Based upon our review, the Director clearly misunderstood the Township's position on the zoning by-law set out in the staff report dated January 19, 2009³⁰. The Township's staff report, makes it clear that compliance with the by-law and OP requires a demonstration that the "use is necessary in the area and compatible with its surroundings and that the buildings meet the setbacks and other provisions of the by-law".

48. We note that the Proponent discusses a draft zoning by-law at length. This discussion is irrelevant since the draft zoning by-law has no legal status and may be subject to change by Council, or the Ontario Municipal Board.
49. The Proponent identifies section 6.39³¹ of the zoning by-law under the heading "Public Uses Permitted" and then, without analysis, concludes in the ERR that it complies with the by-law. Section 6.39 permits in all zones, the use of land "for the purpose of public services" by a list of public sector entities. These entities do not include non-governmental agencies, or corporations with the exception of telephone, telegraph, or gas companies. Presumably, the Proponent relies upon the definition of Public Authority in this list which is defined in the by-law. From our review of Section 3.113 (the definition of Public Authority) it is our view that it does not³². Public Authority is defined in such a way that it only includes governmental boards, commissions and governments. Further, the entity must be exercising a power or authority under a statute of Ontario. As a result, the Proponent cannot be said to be a Public Authority. As well, the Proponent is not a successor to the Hydro Electric Power Commission of Ontario which is the only named corporation set out under Section 6.39.
50. As a result of the foregoing, it is clear that the Project does not comply with the Township of King zoning by-law.

³⁰ Tab 16, page 6

³¹ Tab 17

³² Tab 17



G. ENERGY ACT CONSIDERATIONS

51. Earlier in our submission, we indicated that the Project arises as a result of the Minister of Energy's direction to the OPA. Neither the Minister of Energy's direction to the OPA, the integrated power system plan or the OPA's RFP have been the subject of environmental assessment pursuant to the *Environmental Assessment Act* or review under the Environmental Bill of Rights.
52. Regulation 276/06³³ designates every integrated power system plan for the purposes of the *Environmental Assessment Act*, but exempts them from the requirement of a full environmental assessment. However, Section 3(3) of that Regulation scopes that exemption such that where a proposal or plan in respect of an enterprise or activity that is included in an integrated power system plan is exempt from Part II of the *Environmental Assessment Act*, pursuant to another regulation or order made under the *Environmental Assessment Act*, then the other regulation or order applies to it. We note that Regulation 424/04³⁴ made under the *Electricity Act*, 1998 (amended by Regulation 277/06 immediately following Regulation 276/06) provides direction to the OPA including the requirement that it follow directives from the Minister concerning the implementation of integrated power system plans. Section 2 of the Regulation requires in Part 8 that each electricity project include an analysis of the impact on the environment using Part II of the *Environmental Assessment Act* as the criteria. As a result, the regulation requires that the OPA, as part of its process, consider alternatives as if an EA had been conducted. We can find no evidence that this requirement has been met by the OPA outside of this process. If it has, and this fact was relied upon by the Director, it must be disclosed for comment as part of this process. Otherwise, the process has not been transparent and CCKT has been prejudiced in its ability to participate in the process. If OPA relies on this process, then it has failed to meet its regulatory obligation since the ERR does not comply with Part II of the *Environmental Assessment Act*.
53. As a result of the foregoing, it is clear that the OPA is required to consider this Project as if an EA had occurred. As a result, there is no prejudice on the Proponent or the OPA of ensuring a full EA pursuant to the *Environmental Assessment Act*.

³³ Tab 18

³⁴ Tab 19



54. It is important to note that the Ontario Energy Board, in its decision EB-2005-0315³⁵, cited by the Minister of Energy in his direction to the OPA dated January 31, 2008, specifically stated that it did not review any of the environmental issues associated with the implementation of its decision. The position of the Ontario Energy Board is clear that it does not look at environmental matters, but rather defers to the Minister of the Environment. At page 13 of its decision, the Board notes: "As is clear from the Board's legislative mandate, and as has been confirmed by the Board on a number of occasions, the Board does not have the legal authority to review environmental issues in considering the approval of electricity projects. The environmental issues are entirely within the authority of the Ministry of the Environment under the *Environmental Assessment Act*."

H. THE CONNECTION TO THE HOLLAND JUNCTION TRANSFORMER STATION

55. Contrary to the Director's comments to the Township in her denial of their bump-up request dated April 7, 2009, the Proponent is required to consider transmission associated with the generation of electricity. At page 14 of the Guide to Environmental Assessment Requirements for Electricity Projects, proponents are directed to examine and evaluate different routes as part of their review. In this instance, there is no evidence that the Proponent has done so notwithstanding their statement that they looked at alternatives at Section 2.12 of the ERR. According to the ERR the only route considered is through the adjacent Nature Reserve. Based upon our review, we understand the Proponent has no legal authority to use Hydro One's right of way through the Nature Reserve and there is no evidence that the owners of the Nature Reserve are prepared to grant legal authority to the Proponent to use the Nature Reserve for transmission purposes. As a result, the only analysis in the ERR available to the Director is in fact irrelevant since the route may not be used. Given the environmental impact associated with the construction of a transmission line, and health and safety issues related to electromagnetic fields generated by such lines, it is inappropriate to proceed with this approval without a comprehensive review of alternatives.

³⁵ Tab 20



I. ENVIRONMENTAL IMPACTS

56. A fundamental flaw of the ERR is the fact that with respect to anticipated environmental impacts, the Proponent has merely indicated that it is able to meet generic provincial standards. No attempt has been made to identify whether or not the impact is appropriate in the circumstances or to provide mitigation that is commensurate with the impact in the context of this site on the Greenbelt, immediately adjacent to the Holland Marsh or to determine if the impacts would be less significant at another location.
57. Noise is an example of such an impact. For example, nowhere in the ERR does the Proponent disclose the existing acoustic environment. Rather, the Proponent simply recites MOE day time and night time requirements and then indicates that at near-by residential receptors it is anticipated that the Project will generate noise levels from 39.0 to 36.8 DB. We note that the night time limit for noise is 40 DB and that acoustic experts regularly indicate that in modelling of this kind there is a margin of error of 4 DB. Accordingly, the Proponent could well exceed MOE standards at near-by residential receptors. However, given the requirement on the Proponent under the *Greenbelt Plan*, and municipal regulations to demonstrate compatibility, one would have expected the Proponent to demonstrate compatibility with the acoustic environment, not compliance with generic standards.
58. More importantly, the Project is located immediately adjacent to the Nature Reserve and species of Special Concern have been identified by the Proponent. Notwithstanding, no attempt is made by the Proponent to determine whether or not the noise limits identified in Table 4.1. of the ERR are appropriate given the natural environment and its sensitivities. The Proponent's approach would have been appropriate in an urban area or an area removed from areas of natural heritage significance such as locations promoted by other bidders in the RFP process. It is not appropriate at this location. This is yet another indicator of the failing which results from the Proponent's failure to consider alternatives.

J. WILDLIFE

59. In addition to the acoustic concerns set out above, it is of special relevance that Table 3.6 of the ERR notes two species of Special Concern which have a range of distribution that overlaps the Project study area. These species are the Milksnake and Northern Map turtle. The ERR also



documents at Table 3.5 that the Monarch butterfly, also a species of Special Concern, has been observed on the Project site. These species are considered of Special Concern under both the Federal *Species at Risk Act* and the provincial *Endangered Species Act*. We note that since these species are classified as being of Special Concern, the Minister of Natural Resources is required to prepare a management or a recovery plan prior to permitting this disruption of their habitat. We understand from representatives of the Canadian Wildlife Service that such plans are being prepared by the Province in relation to the Milksnake and the Northern Map Turtle as part of a multi-species report but that to date, no report has been released. It is noted on the Species at Risk Public Registry that a Monarch Management Plan has yet to be prepared. Under the circumstances, it is inappropriate to permit the Project to proceed in advance of the preparation of the management or recovery plans and a site specific study to determine if the Milksnake and Northern Map Turtle are present. This is particularly so when the Project could be located at another location such that there would be no impact on any species identified to be of Special Concern.

60. We note that Section 4.4.6 of the ERR dealing with wildlife is disconnected from the acoustic discussion and that the recommendations with respect to noise mitigation are not carried forward into the noise mitigation recommendations at the conclusion of the ERR.
61. It also appears to us, that notwithstanding the identification of the habitat of species of Special Concern, only two on-site field visits in relation to wildlife have occurred. As documented in Table 3.5 of the ERR, field visits were undertaken on August 22 and September 5, 2008. Having conducted only two visits two weeks apart in the late summer is not sufficient given that significant species are often only identifiable in the spring and fall. One would have expected many surveys over all seasons in order to adequately inventory the environment. As a result, the Director would be unable to conclude that the impact on the natural environment as a result of the Project is acceptable.

K. HYDROGEOLOGY AND SURFACE WATER

62. Hydrogeology and surface water are also areas which underscore the Proponent's failure to consider the environmental impacts of the Project beyond those anticipated to be dealt with under *Environmental Protection Act* approvals. For example, there has been a systematic failure in the



ERR to consider the impact of impaired surface water quality or, the risk of impaired surface water quality including the public's perception that surface water quality may impair the adjacent Holland Marsh. Recall that the Holland Marsh is located downstream of the Project and is directly connected as a result of the Holland Canal running through the Project lands. Since water is drawn from the Canal for irrigation purposes, and the marketability of products from the Holland Marsh depends upon the public's perception that the products are clean and safe, the Proponent ought to have considered the risk of the chemicals identified in Table 2.1 of the ERR escaping to the Canal. The Proponent fails to pick up this concern in Section 4.3.5 of the ERR dealing with agriculture or 4.3.9 of the ERR dealing with socioeconomics.

63. There is a significant concern that locating a facility of this kind, immediately adjacent to and upstream of the Holland Marsh will create a market stigma on Holland Marsh products such that the continued viability of the Holland Marsh for agriculture will be affected. The Proponent fails to deal with this item, or to identify any mitigation with respect to this item. Had the Proponent been required to consider alternatives, including alternative locations, these impacts on the Holland Marsh would have become immediately apparent as part of the review.
64. Figure 2.3 of the ERR (site layout) is not consistent with the Regional Floodplain as depicted on Lake Simcoe Region Conservation Authority mapping and as a result, significant elements of the Project could be subject to flooding should the Regional Storm be repeated, causing irreparable harm to the downstream Holland Marsh as a result of surface water contamination.³⁶

L. PRE-MATURITY

65. In addition to the absence of site specific studies related to the existing acoustic environment, the need for the Project, a consideration of alternatives leading to the conclusion that the subject site is the best location for the Project, and insufficient review of the natural environment, the Proponent has identified a number of studies which remain outstanding. These include an Environmental Management Plan, an Environmental Health and Safety Plan, an Erosion and Sediment Control Plan, a site specific Stormwater Management and Spill Response

³⁶ Tab 21



Plan. In addition, the Director indicated that the Proponent is required to produce a Natural Heritage Evaluation, Hydrological Evaluation and Environmental Impact Statement.

66. It is also noted in the ERR that another approval that may be required related to the generating station may be from Transport Canada for aeronautical obstruction. The stacks and lighting of the Project have the potential to impact private airstrips in the vicinity of the Project as a result of their physical size and as a result of air turbulence from the hot exhaust. However, this impact has not been assessed by the Proponent. The Proponent does not appear to have conducted a study of local private airstrips.
67. Furthermore, approval of the Project by the Director is also premature given the need for a Stage 2 Archaeological Survey on the site of the proposed Project. It is recommended in the 2008 Stage 1 Archaeological Assessment of the Proposed York Energy Centre (page VI), in the companion Archaeological Assessment prepared by D.R. Poulton & Associates, September, 2008) that a Stage 2 Archaeological Survey be conducted to address the potential for significant archaeological remains. It is further confirmed in the ERR at page 112 that the proposed site of the Project has "moderate archaeological potential". We have no evidence that the Proponent has completed a Stage 2 Archaeological Survey. None of the aforementioned studies, plans or approvals are a condition of the Director's approval.
68. Given the insufficiency of on-site study, the Director is unable to say that the conclusions of the ERR are correct. Rather, we believe that further studies will indicate that a site located off of the Greenbelt and away from the Holland Marsh would have been a better choice. Until these reports are available for review and comment, and until the land-use matters addressed in the proceeding paragraphs have been successfully concluded in order to bring the proposal into compliance with the *Greenbelt Plan*, ROP, local OP, and local Zoning By-law, it is premature to issue any approval or exemption under the *Environmental Assessment Act*.

M. GLOBAL WARMING

69. The Director has not adequately addressed CCKT's concern that raising the Project to an Environmental Review is insufficient given the current crisis of global warming.



70. According to Table 4.1 in the ERR, there is the potential for the Project to create an adverse effect during operations from the emission of greenhouse gases such as carbon dioxide and methane. Greenhouse gases contribute to global warming. Furthermore, the companion Air Quality Assessment report ("AQAR") states that the combustion process will result in greenhouse gases such as carbon dioxide and nitrous oxide. Nitrous oxide has a global warming potential. Table 4.1 in the AQAR suggests that the maximum emissions rates for nitrous oxide is 19.57 g/s and for carbon dioxide is 75.48 g/s. For each day that the Project is producing electricity, this would amount to an additional 3,727 pounds of nitrous oxide and 14,377 pounds of carbon dioxide being released into the atmosphere unnecessarily. Allowing the Project to proceed without an individual EA means that at least 6,607,960 pounds of greenhouse gases per year will be emitted into the atmosphere without the benefit of a fulsome environmental review when there is the alternative to not build the Project at all or at a smaller size as noted in OPA's studies. The Honourable Dalton McGuinty said during a session in the Ontario Legislative Assembly in April 2006 that "when it comes to natural gas, prices tend to be volatile, and it remains a significant contributor to global warming"³⁷.

N. THE NEED FOR A FULL ENVIRONMENTAL ASSESSMENT

71. The process undertaken by the Proponent leads to an exemption from the requirement to undertake a full EA. The supporting reports do not have the scope, or contain the same factual detail as an EA. For example, the Proponent has submitted an ERR with virtually no site-specific study. Under the *Environmental Assessment Act*, and a consideration of alternatives, one would expect an analysis based on the actual environment as opposed to what could be gleaned from a literature review or a few site visits. Of course, protection of the environment is commensurate with the level of study. One would expect the level of study to be commensurate with the size of the facility.
72. Also fundamental to the concept of an EA, which is missing from the screening process permitted by Regulation 116/01, is the need to consider alternatives. It is a well understood principle of both land-use planning and environmental planning that a consideration of alternatives will lead to

³⁷ Tab 22

