



# Friends of Red Hill Valley

**Application for Review  
Filed Pursuant to Section 61 of the  
Environmental Bill of Rights**

**RE: ONTARIO ENVIRONMENTAL ASSESSMENT ACT**

**March 13, 2006**

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**RE: ONTARIO ENVIRONMENTAL ASSESSMENT ACT**

**APPLICANT NUMBER ONE**

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**Declaration of Ontario Residency:**

I solemnly declare that I currently reside in the Province of Ontario.

\_\_\_\_\_  
**DATE**

\_\_\_\_\_  
**SIGNATURE**

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**Declaration of Ontario Residency:**

I solemnly declare that I currently reside in the Province of Ontario.

\_\_\_\_\_  
**DATE**

\_\_\_\_\_  
**SIGNATURE**

**APPLICATION FOR REVIEW**  
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**RE: ONTARIO ENVIRONMENTAL ASSESSMENT ACT**

***Question 1: What is the subject-matter of the requested Review?***

The Applicants request a review of the Ontario Environmental Assessment Act ("Act"). In particular, the Applicants are concerned about Section 11.4<sup>(Tab 1)</sup> and the termless approvals issued under the Act.

Specifically, the Applicants ask that Section 11.4 be amended to provide more clarity about the review process and that all approvals issued under the Act in the future contain expiration or renewal dates.

The Applicants submit that undertaking this review is consistent with the Ministry of Environment's Statement of Environmental Values. Without improvements to s. 11.4 and approvals, there is legitimate potential for serious and irreparable harm to the environment. Furthermore, the Minister's Advisory Panel on Environmental Assessment in Ontario did not specifically address or consider these issues. Given the economic, political, and social upheaval associated with implementation of old projects in new conditions – such as the Red Hill Creek Expressway – the Applicants submit that all Ontarians would benefit from enhanced clarity, transparency, and fairness in the EA process.

***Question 2: What are the grounds for the requested Review?***

- I. The Red Hill Creek Expressway experience reveals serious flaws in the Act**
- II. Section 11.4 breaches the public's right to a timely, written decision**
- III. Section 11.4 is inconsistent with the Purpose of the Act**
- IV. Section 11.4 is inconsistent with the Ministry of Environment's Statement of Environmental Values**
- V. Termless approvals inappropriately constrain future decision-making**
- VI. Termless approvals are inconsistent with the Purpose of the Act**
- VII. Termless approvals contradict the Ministry of Environment's Statement of Environmental Values**
- VIII. Termless approvals are inconsistent with normal licencing practices**

## **I. The Red Hill Creek Expressway experience reveals serious flaws in the Act**

Before construction began on the Red Hill Creek Expressway, the Valley was the centrepiece of 700 hectares of linked publicly-owned parkland in the industrial east end of Hamilton. The 7-kilometre long valley encompassed part of the Niagara Escarpment and provided the only remaining natural corridor between the Escarpment and Lake Ontario. It was also the only large natural area in the east end of Hamilton-Wentworth. To this day, Red Hill Creek is the last of 14 streams that once flowed through Hamilton and is the second largest stream flowing into Burlington Bay / Hamilton Harbour.

Hamilton City Council first voiced its support for the construction of a highway through the Red Hill Valley in 1956. Twenty-nine years later (1985), a Consolidated Joint Board consisting of two members of the Ontario Municipal Board and one member of the Ontario Environmental Assessment Board approved the "Red Hill Creek Expressway" by a margin of 2 to 1. The lone representative of the Ontario Environmental Assessment Board published a 116-page dissent. In it, he argued that the new expressway should not be built in the Red Hill Valley.

In December 1990, the NDP government withdrew funding for the original expressway project, later replacing it with a newly envisioned and far less intrusive road. In November of 1995, the Conservative government resurrected the Red Hill Creek Expressway, rejected the alternative road and exempted changes to the original highway design from further environmental assessment.

In the spring of 2003, the Mayor of Hamilton declared that Expressway construction was imminent, despite numerous changes in circumstance and new information that had come to light. These changes include:

- Approval for the Expressway had been issued to a different corporate entity
- The City of Hamilton was convicted of multiple environmental offences for various undertakings in the Red Hill Valley
- Hamilton Harbour was designated an "Area of Concern" under the *Great Lakes Water Quality Agreement* and promised extra protection from environmental degradation
- A more appropriate, alternative design for the road had already been developed
- The new Expressway would require blasting through the treasured Niagara Escarpment, an action that was intentionally left out of the original project

Many members of the community were outraged, expressing their concerns about the potential impacts of the new Expressway and the lack of public consultation with contemporary residents. They expressed their concerns through letter writing campaigns, submissions to the local media, protests, educational tours of the valley, political organization, and a 105-day occupation of the forest. Where private citizens were concerned about property impacts, they formed neighbourhood associations and retained counsel.

Before significant construction activities began in the Valley, Lake Ontario Waterkeeper wrote to the Minister of Environment to request that the approval for the Red Hill Creek Expressway be reconsidered<sup>(Tab 2)</sup>. Section 11.4 of the Act allows for such a request when there is evidence of new information and/or a change of circumstances.

The Minister of Environment did not respond to our original request, and a provincial election was held. Lake Ontario Waterkeeper wrote again to then Environment Minister Leona Dombrowsky, asking that the request be fast-tracked in order to address the mounting tension in the valley<sup>(Tab 3)</sup>. The same day this request was submitted, Waterkeeper and Friends of Red Hill Valley held a press conference at Queen's Park to draw attention to the issue. While the conference was underway, police entered the valley and arrested four more protestors.

That day, Ministry spokesperson John Steele told the Hamilton Spectator that, "We've agreed that we'll review it. I think it's important that we allow our technical people to review this new information and the minister will announce her decision by the middle of the month." In anticipation of this announcement, Waterkeeper wrote again to the Ministry of Environment on November 13, 2003<sup>(Tab 4)</sup>; December 17, 2003<sup>(Tab 5)</sup>; January 23, 2004<sup>(Tab 6)</sup>; and June 24, 2004<sup>(Tab 7)</sup>.

In addition to Waterkeeper's numerous submissions, many members of the public wrote to the Ministry of Environment. After filing a Freedom of Information request, Waterkeeper discovered that members of the public wrote at least 149 letters between December 2003 and August 2004. Each letter was written by a member of the public or a public interest group, addressed to the Ontario Ministry of the Environment, and supported a reconsideration of the Red Hill Expressway environmental assessment approval.

During this same period of time, the Ministry of Environment wrote at least 123 responses to these requests. These responses consistently indicated that the Ministry of the Environment was still reviewing Lake Ontario Waterkeeper's request for a Ministerial reconsideration under s.11.4(1) of the *Environmental Assessment Act*<sup>(Tab 8)</sup>.

Despite the Ministry's promises, no response from the Minister has been forthcoming. March 21, 2006 will mark the two-year, seven-month anniversary of Waterkeeper's first request. And still, the Minister has not made a decision. Meanwhile, construction on the Red Hill Creek Expressway is underway – the project is expected to be completed by fall of 2007.

To the Applicants' knowledge, Waterkeeper's request for a reconsideration of the Red Hill Creek Expressway project was the first time that the public attempted to use Section 11.4(1). Unfortunately, the Red Hill Creek Expressway experience illustrates very serious shortcomings with the Section 11.4 process. **The Applicants are especially concerned that the Minister's silence in the wake of the Red Hill request creates a precedent that is likely to prejudice future applications for reconsideration under Section 11.4.**

The Applicants submit that Section 11.4 is critical to the overall operation and purpose of the Act. This is the only section that provides the public with a tool for reviewing approvals. Without this tool, it would be virtually impossible for citizens to bring to the attention of the Minister any changes in circumstance or new information concerning an approval. Concerns about Section 11.4(1) are described in grounds II through IV of this application.

The Applicants submit that expiry dates (or renewal dates) on approvals issued under the Act would help guarantee the Act meets its goals of ensuring wise management of the environment and the betterment of the people of Ontario. Concerns about the lack of expiry dates on approvals are described in grounds V through VIII of this application.

## **II. Section 11.4 breaches the public's right to a timely, written decision**

Section 11.4(1) of the Ontario Environmental Assessment Act gives the Minister of the Environment the power to reconsider an environmental assessment approval when changes in circumstance occur or new information arises concerning an application. The Applicants submit that Canadian law and the rules of natural justice require the Minister to exercise this power fairly.

Canadian law requires that administrative and governmental decision-making be done fairly<sup>(Tab 9, par. 16-19)</sup>. Even discretionary powers such as those granted to the Minister of Environment by Section 11.4 are conferred in trust and must be exercised reasonably, in good faith<sup>(Tab 10, p. 13-14)</sup> and according to the rules of natural justice<sup>(Tab 9, par. 16-19)</sup>. The rules of natural justice require that decision-making bear the minimum indicia of fairness when: the decision being made is of serious nature; the decision is of great importance to those affected; and, the statutory section along with the decision-maker's actions have created a legitimate public expectation that decision-maker will exercise her powers fairly<sup>(Tab 11)</sup>.

The Applicants submit that serious requests for reconsideration submitted by the public pursuant to Section 11.4(1) meet these criteria. As a result, members of the public who make a request to the Minister of Environment under Section 11.4(1) have a legitimate expectation that two specific minimum indicia of fairness will be present: (a) a decision will be made, and (b) the decision will be written and timely. In the Red Hill experience, the public's expectation that the Minister would make a decision whether or not to reconsider the approval was affirmed by the Ministry's repeated assurances that a response was forthcoming.

The Supreme Court of Canada upheld the right to a timely, written decision as a minimum indicia of fairness for three reasons: first, because timely, written decisions engender in decision-makers more careful reasoning processes; second, because they promote better decision making; and, third because they inspire greater public confidence<sup>(Tab 12, par. 18-28, 39-40, 53-54)</sup>.

Timely, written decisions are not just the basic indicia of fairness in decision-making; they are crucial to the facilitation of rights of appeal, judicial review and generally, of public participation in decision-making processes. A decision-maker's failure to issue a timely, written decision may result in insurmountable prejudice to applicants in terms of subsequent appeal, review and participation rights. Furthermore, the failure to respond in a timely manner may be tantamount to rendering a negative decision without reasons. In this situation, an applicant's appeal, review or participation rights are essentially revoked.

Thus, mandating that a timely, written decision be issued meets the minimum requirements of natural justice and fairness and is fundamentally important to ensuring justice for affected people.

### **III. Section 11.4 is inconsistent with the Purpose of the Act**

Section 11.4(1) of the Act gives the Minister the power to reconsider an environmental assessment approval when a change in circumstance occurs or when new information arises concerning an application. This power must be exercised in accordance with the Purpose of the Act: “the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.”<sup>(Tab 13)</sup>

Because Section 11.4 fails to impose an explicit duty to issue a timely decision, however, it allows projects to proceed in the face of unintended, irreparable environmental damage. Thus, the absence of an explicit Ministerial duty to issue a timely, decision fails to ensure the protection and conservation of the environment.

Similarly, Section 11.4's failure to impose an explicit duty to provide timely, written response to requests for reconsideration also undermines the Act's goal of “wise management”. “Manage” can mean supervise, steer, preside over, over see, officiate, guide, govern or regulate. “Wise” can mean well-informed, sound, reflective, prudent, discerning or judicious<sup>(Tab 14)</sup>. By allowing the Minister of Environment to ignore, overlook, or remain ignorant of changes in circumstance or new information, Section 11.4 fails to ensure “wise management”.

### **IV. Section 11.4 is inconsistent with the Ministry of Environment's Statement of Environmental Values**

The Ministry of Environment's Statement of Environmental Values (“SEV”) states that the Ministry will ensure government accountability, an ecosystem approach, resource conservation, environmental protection and public participation in governmental decision-making. A copy of the SEV is included at Tab 15.

Because Section 11.4 fails to impose an explicit duty to issue a timely, written decision, it allows government to avoid making a meaningful decision within a meaningful timeframe. Thus, it fails to ensure government accountability.

Because Section 11.4 fails to impose an explicit duty to issue a timely, written decision (even when new information shows that the environment will be harmed), it fails to ensure an ecosystem approach, resource conservation or environmental protection.

Two parts in the SEV promise public access to governmental decision-making - Parts I and IV. Because Section 11.4 fails to impose an explicit duty to issue a timely, written decision (even when the public has requested one) it fails to ensure public access to environmental decision-making.

### **Recommendation #1**

The Applicants recommend that Section 11.4 be amended to provide more clarity about the review process. A model for procedural clarity can be found in the Environmental Bill of Rights. The Applicants recommend that this, or a similar process, be followed when requests for reconsideration are submitted:

- Within 10 days, the minister must acknowledge that a request has been received and post a notice on the EBR registry. The minister may also give notice to those who "might have a direct interest in matters raised in the application," for example, the project proponent.
- Minister decides whether or not to conduct a review.
- Within 60 days of receiving the application, the minister must decide whether or not to undertake the review and give notice of that decision to the applicants, any person the minister has notified of the request, and the EBR Registry.
- Within 30 days of completing the review, the Minister must give notice of the outcome to any person who had received notice as part of the review process, including the EBR Registry.
- Where the Minister agrees that there has been a change in circumstance and/or there is new information such that a review is warranted, the Minister should refer the matter to the Environmental Review Tribunal. The ERT would then hold a hearing to assess whether there is a need for new terms and conditions or whether changes to the project constitute a new undertaking, pursuant to S. 12 of the Act.

## **V. Termless approvals inappropriately constrain future decision-making**

Environmental Assessment approvals issued under the Act (such as the authorization to construct the Red Hill Creek Expressway) do not have expiration dates or renewal requirements. Thus, these approvals are "termless".

Termless approvals allow proponents to proceed with projects many years, even generations, after the initial permissions were granted. Without expiration dates or renewal requirements, neither the government nor the proponent have a duty to consider changes in scientific knowledge, economic or social policy. As a result, communities may be unfairly constrained by past decisions.

Such decision-making was clearly demonstrated in the Red Hill case. The Niagara Escarpment Commission explicitly stated this when it passed the following resolution:

The Niagara Escarpment Commission wished the Minister and the Region to be aware that it believes it is constrained by the Cabinet approval of 1987. *There have been major improvements in our understanding of the environment and the effects of an Expressway in the past 10 years.* If the Commission was considering the matter 'de novo' it would have recommended a full Environmental Assessment<sup>(Tab 16, p. 5)</sup>. *(emphasis added)*

The principle of Intergenerational Equity commonly included in international environmental law acknowledges that constraining future decision-making violates the rights of future generations. This principle affirms that all humans, past, present and future, hold the natural environment of our planet in common and that the present generation is both the beneficiary of the planet's natural resources and the trustee of these resources for future generations<sup>(Tab 17)</sup>. The Supreme Court of Canada has written that Intergenerational Equity is reflected in Canadian environmental laws, which may be regarded as evidence of, "an emerging sense of inter-generational solidarity and acknowledgement of an environmental debt to humanity and the world of tomorrow."<sup>(Tab 18, par. 19)</sup>

## **VI. Termless approvals are inconsistent with the Purpose of the Act**

The Purpose of the Act, as described in Section 2 is: "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."<sup>(Tab 13)</sup>

Termless approvals allow projects to commence many years after they were initially reviewed. As revealed by the Niagara Escarpment Commission, scientific understanding changes rapidly<sup>(Tab 16 and above)</sup>. Approvals issued a generation ago will be based on outdated science and are unlikely to reflect contemporary best practices for environmental protection and conservation.

Section 2 also identifies the goal of “wise management”. Management is, by definition, an ongoing process<sup>(Tab 19)</sup>. “Wise management” suggests that the government decision-making should account for temporal and contextual differences between the date on which a project was approved and the present time. Expiration or renewal dates on approvals would ensure the goal of wise management.

### **VII. Termless approvals are inconsistent with the Ministry of Environment's Statement of Environmental Values (“SEV”)**

As noted above, the SEV states that the Ministry will ensure government accountability, an ecosystem approach, environmental protection, and resource conservation when making decisions. A copy of the SEV is included at Tab 15.

Termless approvals fail to ensure government accountability, an ecosystem approach, environmental protection, or resource conservation because they permit decision-making based on outdated science without consideration of contemporary best practices.

Part III of the SEV also ensures that the Ministry will take a precautionary approach in its decision-making. This means that in the face of risk, caution must be exercised in favour of the environment. Termless approvals allow a project to continue despite the appearance of new risks and as such, fail to ensure a precautionary approach

Public Participation is called for in two Parts of the SEV: I and IV. The Ministry pledges to ensure public access to decision-making that is consultative, effective, timely, open and fair. Termless approvals prohibit effective and timely, open or fair consultation with the affected generation.

### **VIII. Termless approvals are inconsistent with normal licencing practices**

Normally, licences granted to individuals or corporations are accompanied by a series of conditions, behavioural standards, expiration or renewal dates, and rules by which the privilege can be revoked. This is true for every professional privilege issued in Ontario, including licences issued to doctors, lawyers, pharmacists, and individuals registered under the Gaming Control Act<sup>(Tab 20)</sup>. In every case, the public has tools by which it can force a review of a previously issued licence. Termless approvals effectively limit this normal, public right.

### **Recommendation #2**

The Applicants ask that all approvals issued under the Act in the future contain expiration or renewal dates. If a proponent chooses to renew an old approval, the Applicants recommend a that a process similar to the Certificates of Approval process unfold:

- A notice of Intent to Renew should be publicized and posted on the EBR Registry.
- If a request is made, the application should be referred to the Environmental Review Tribunal for a hearing. This hearing would assess whether there is a need for new terms and conditions or whether changes to the project constitute a new undertaking, pursuant to S. 12 of the Act.

### CONCLUSION

Based on the grounds outlined above, the Applicants submit that the Ministry of Environment should accept this application for review. The Applicants suggest that these grounds illustrate serious flaws with the Ontario Environmental Assessment Act: Section 11.4 breaches the public's right to a timely, written decision, is inconsistent with the Purpose of the Act, and is inconsistent with the Ministry of Environment's Statement of Environmental Values. Termless approvals inappropriately constrain future decision-making, are inconsistent with the Purpose of the Act, and contradict the Ministry of Environment's Statement of Environmental Values and are inconsistent with other normal licencing practices. Experience suggests that these flaws combine to create a legitimate potential for future harm to the environment.

**Question 3: What is the evidence that supports the requested Review?**

|        |   |
|--------|---|
| Tab 1  | “Reconsideration of decisions”, Section 11.4(1), <i>Ontario Environmental Assessment Act</i>            |
| Tab 2  | Letter from Lake Ontario Waterkeeper to Minister of Environment, August 21, 2003                        |
| Tab 3  | Letter from Lake Ontario Waterkeeper to Minister of Environment, November 5, 2003                       |
| Tab 4  | Letter from Lake Ontario Waterkeeper to Minister of Environment, November 13, 2003                      |
| Tab 5  | Letter from Lake Ontario Waterkeeper to Minister of Environment, December 17, 2003                      |
| Tab 6  | Letter from Lake Ontario Waterkeeper to Minister of Environment, January 23, 2004                       |
| Tab 7  | Letter from Lake Ontario Waterkeeper to Minister of Environment, June 24, 2004                          |
| Tab 8  | Affidavits of Timothy Watson and Andrea Bradley   |
| Tab 9  | <i>Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)</i>                   |
| Tab 10 | <i>Roncarelli v. Duplessis</i>  |
| Tab 11 | Wade, Sir William. <i>Administrative Law</i> . Oxford University Press: Eighth Edition. Pages 413, 525. |
| Tab 12 | <i>Baker v. Canada (Minister of Citizenship and Immigration)</i>  |
| Tab 13 | “Purpose”, Section 2, <i>Ontario Environmental Assessment Act</i>                                       |
| Tab 14 | Definition, “Wise,” and “Manage”, Thesaurus.com   |
| Tab 15 | Ministry of Environment, <i>Statement of Environmental Values</i>                                       |
| Tab 16 | Recommendations of Deborah Ramsay, Niagara Escarpment Commission, February 3, 1999, p. 5.               |
| Tab 17 | Weiss, E. Brown. <i>In Fairness to Future Generations</i> .   |
| Tab 18 | <i>Imperial Oil Ltd. V. Quebec (Minister of the Environment)</i>  |
| Tab 19 | Definition, “Management,” Thesaurus.com   |
| Tab 20 | Normal Licencing Standards – overview by Lake Ontario Waterkeeper                                       |