



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

July 24, 2009

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AND

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AND BY EMAIL:

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Re: EBR Registry No. 010-6516

Re: EBR Registry No. 010-6708

Proposed Ministry of the Environment Regulations to Implement the Green Energy and Green Economy Act, 2009

Proposed Ministry of Natural Resources Approval and Permitting Requirements Document for Renewable Energy Projects

Dear Ms. Wallace and Ms. Jones:

The Canadian Environmental Law Association writes to provide comments regarding the above noted regulations pertaining to the proposed MoE approval process for renewable energy permits under the recently passed *Green Energy and Green Economy Act, 2009*, and the proposed Ministry of Natural Resources Approval and Permitting Requirements for those Permits.

CELA is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms.

CELA has extensive experience in assisting clients with environmental approvals, in assisting the public in participating in environmental decision making, and in providing advice and comment with respect to proposed environmental law and regulation. CELA's experience and expertise also includes the environmental assessment and land use planning aspects of those decisions. CELA also has extensive experience and expertise with respect to environmental health, access to environmental justice, and sustainable energy, among other things.

General Comments

CELA supports the overall goal of reducing energy use in Ontario through conservation and demand reduction and management programs, and of ensuring that we have a sustainable energy future for the province through a renewable energy future, and specifically in encouraging the development and operation of renewable energy supply. CELA supports definitions of renewable energy that include hydropower, solar power, wind energy, geothermal energy, and some forms of biomass such as utilization of energy recovery from anaerobic digestion of manure, sewage and food-waste. However as noted below in these submissions, it is essential to ensure that biomass, biogas and biofuel are all defined and permitted in a manner that is sustainable; the proposed definitions are not yet available. The proposed Renewable Energy Approval would define renewable projects subject to that new approval process as:

- Solar greater than 10 kilowatts
- Wind greater than 3 kilowatts
- Biogas / biomass – all anaerobic digestion or thermal treatment facilities other than on-farm facilities covered under the *Nutrient Management Act*.
- Hydro power – greater than a 2 metre head dam (height of falls) (and less than 200 MW).

CELA also supports an overall goal, implicit in the proposal, that the specific decisions and permits for renewable energy projects be made based on projects that will advance the goals of environmental sustainability, and will not be inappropriately sited so as to negatively affect the environment and public health. In that respect, a robust, transparent and credible approval system for renewable energy permits is required.

CELA strongly supports the establishment of an integrated "one window" provincial approval process for Renewable Energy Approval and the usage of the "complete application" concept. However, the province should explore opportunities to harmonize the new provincial process with federal Environmental Assessment requirements where applicable (for example, where the *Canadian Environmental Assessment Act* (CEAA) may be triggered as a result of federal funding or required federal permits). In addition to the case of off-shore wind turbines (mentioned at page 15 of the proposal), it is conceivable that other types of Renewable Energy facilities may also trigger CEAA obligations. For example a small scale hydro project may have potential impacts upon fisheries or navigation; or a solar farm may conceivably displace habitat for federal *Species At Risk Act* -listed species, etc.). Further submissions as to combining the processes are provided below in the section dealing with off-shore wind turbines.

Recommendation: The province of Ontario should ensure that its Renewable Energy Approval process is aligned with federal environmental assessment under the *Canadian Environmental Assessment Act* where applicable.

CELA submits that, contrary to the proposal, the Director should be expressly empowered to impose conditions which are different from, or more stringent than, the general standards and/or technology-specific standards set out in the Renewable Energy Permit regulation. If proponents or opponents had concerns about the exercise of the Director's discretion in specific cases, they may appeal the impugned conditions as of right to the Environmental Review Tribunal.

Recommendation: The Director should be expressly empowered to impose conditions varying from the regulatory standards, specifically including setbacks, both to increase or decrease setbacks required for a specific project.

Specific comments regarding aspects of the proposal for Renewable Energy Approvals are provided below.

***Comments re Part II Renewable Energy Approval Requirements
Application Process***

The *Environmental Bill of Rights* posting of the proposed Renewable Energy Approval should include a link to or set out the draft terms and conditions that the Director may be proposing to impose. Otherwise, stakeholders may not actually see or comment upon the proposed terms and conditions until very late in the process (i.e. when the final decision is posted to the EBR and triggers a 15 day appeal period).

Recommendation: The proposed terms and conditions of a Renewable Energy Approval should be provided during EBR consultation prior to a final decision by the Director.

Varying the Standards

As noted above, CELA submits that, the Director should be expressly empowered to impose conditions which are different from, or more stringent than, the general standards and/or technology-specific standards set out in the Renewable Energy Permit regulation.

The ability of the Director to deviate from the specified setbacks is an essential safeguard as not all circumstances can be predicted in advance. The power of a Director to exercise discretion and deviate from standards, even where specific quantitative standards are specified is a normal provision in environmental legislation. For example,

- section 21 of O.Reg.419/05 (Local Air Quality), allows the issuance of air approvals under section 9 of the *Environmental Protection Act* (EPA) with more “stringent” standards than those prescribed by regulation;
- section 9 of Regulation 347 (Waste Management), expressly provides that the prescribed regulatory requirements do not apply where terms and conditions of a waste approval under section 39 of the EPA impose “different” requirements; and
- section 2(4) of O.Reg.232/98 (Landfills), which again provides that the prescribed regulatory requirements do not apply where terms and conditions of a waste approval under 39 of the EPA impose “different” requirements.

Transition

CELA submits that proponents should continue with applications under existing requirements if they are already submitted. Rather, the new Renewable Energy Approval rules should apply to all new applications (or amendments to existing permits) filed on or after the effective date of the new regulation.

CELA submits that criteria are required in the regulation as to what constitutes a "significant" modification of an existing facility (i.e. increased capacity, expanded footprint, etc.).

Recommendation: Existing applications should continue under current requirements.

Third Party Appeal of Directors Decision

CELA supports the provision of a 9 month timeframe for ERT decisions, but submits that the ERT must be given jurisdiction to extend this deadline, upon written notice (with reasons) to the

Director. Arbitrary deadlines or rushed decisions are not necessarily in the public interest. Furthermore, the ERT must be able to control its own process and deal with parties who are or are not providing all required information by the deadlines imposed by the tribunal.

Recommendation: The Environmental Review Tribunal should have power to extend the nine month deadline for a decision upon an appeal of a Renewable Energy Approval in appropriate circumstances.

Consultation

Transparency and engagement are core values of the Ministry of the Environment's Statement of Environmental Values. It is essential that the new process for Renewable Energy Approvals provide very full and transparent opportunities to members of the public and surrounding communities to obtain information about proposals, about studies done to assess proposals, and to provide extensive input into those proposals and their potential impacts on communities. Such engagement normally assists to ensure better decisions are made, proposals are improved, and communities are very satisfied with the projects. This should be especially true of renewable energy projects. If communities are of the view that they have not obtained all and timely information, that they are being denied access to pertinent information, or that their questions and concerns are not being addressed, then the credibility of both the process of approval renewable energy projects, as well as the specific projects themselves, suffers. There also may be missed opportunities to improve projects based on the input of the public and communities.

The Renewable Energy Approval checklist appears to require only a "consultation summary". CELA submits that the Renewable Energy Approval regulation, itself, should be much more prescriptive in terms of the timing and content of the proponent's consultation obligations, rather than leaving this important matter largely to proponent discretion, or addressing this matter in unenforceable guidance documents. Early electronic posting of proposals should be specified to allow for early engagement by the community. One possibility is use of Information postings under the Environmental Bill of Rights registry. Further and better detail is needed in the regulation itself to provide binding direction on the form and content of the notice and its distribution to interested or affected persons.

Furthermore, since the process is already designed so as to reduce the number of different approval processes that may apply to a Renewable Energy project; the quid pro quo must be a very robust and credible public notice and consultation process.

Recommendation: The Renewable Energy Approval regulation should be prescriptive as to form and content of notice and its distribution to interested or affected persons.

The consultation checklist should also require proponents to address financial assurance, monitoring or reporting, and contingency plans as well as emergency response.

Recommendation: Consultation and conditions of Renewable Energy approval should include requirements as to financial assurances, monitoring and reporting, contingency plans and emergency response.

CELA does not object to the proposal that notice be provided, but that community consultation meetings not be required, for wind power over 3kW and sound power rating under 102 dBA; wall or roof mounted solar over 10kW, or small farm-based biogas and biomass combustion facilities; however for the latter a threshold size should be specified under which the exemption from public meeting is available.

Recommendation: A threshold size for exemption of public meeting requirements for farm-based biogas and biomass combustion facilities should be specified.

Municipal Consultation

CELA submits that the Green Energy Act and regulations should be interpreted and designed so as to permit Integrated Community Energy Planning (see www.questcanada.org). In communities with approved Integrated Community Energy Plans, CELA submits that the project proponent also be required to consult with the municipality with respect to consistency of the proposed project with the Integrated Community Energy Plan.

Recommendation: Integrated Community Energy Planning should be facilitated pursuant to Renewable Energy Approvals' process; project proponents should be required to consult with municipalities who have approved integrated community energy plans to ensure consistency with those plans.

Natural Heritage and Water Bodies

As noted above in CELA's introductory submissions, the Director should be empowered to impose terms and conditions which vary from the prescribed minimum setbacks for natural heritage. (CELA makes the same submission below with respect to the proposed noise setbacks regarding land-based turbines (page 13 of the consultation document) – i.e. that the set-backs may be increased as well as decreased).

As noted earlier, a number of existing regulations under the EPA do allow the issuance of approvals with terms or conditions that are "different" from, or more "stringent" than, province-wide standards prescribed by regulation. Such an approach should also be included in the Renewable Energy Permit regulation in order to give the Director (or the Environmental Review Tribunal, standing in the shoes of the Director in case of appeal) the necessary flexibility to craft appropriate and protective site-specific terms and conditions. However, at the same time, it is necessary that there be guidance as to when the standards would be varied. CELA agrees with the recommendations of Ontario Nature vis a vis the natural heritage setback standards as follows:

Recommendation: The REA process must prohibit development within the 120 metre setback unless the project proponent can demonstrate that there will be no harm to the significant natural heritage feature or sensitive hydrologic features.

Recommendation: Where it is determined that the 120 metre buffer is likely to be insufficient to prevent harm to the natural feature, the Director issuing the approval must have the discretion to require the proponent to undertake further studies and to extend the setback and/or mitigate the harmful impacts. The standard for mitigation should be “no net loss.”

CELA submits that there is no mention in respect of the Natural Heritage provisions of the requirement for cumulative effects analysis, contrary to such requirement as a mandatory consideration in environmental decision-making in the most recent Ministry of the Environment Statement of Environmental Values, dated October 2008.

Recommendation: In appropriate cases the Director should have the discretion to impose terms and conditions based upon a standard for mitigation of “net gain” (for example, recreation of new habitat, or restoration of previously degraded habitat) as a condition of approval, especially in light of the historic loss of natural heritage across southern Ontario in particular.

It is important that renewable energy projects not only protect provincially significant natural heritage features, but also locally and regionally significant natural heritage features. This proposed Renewable Energy Approval will replace several existing approval processes, including municipal decision making, and many of the locally and regionally significant features are normally addressed by local decision makers. However, relatively few features have been assessed even for provincial significance, and it would not be appropriate to limit natural heritage protection to identified provincially significant features.

Project proponents should be required to submit a detailed site plan including an inventory of all natural heritage features within 120m of any proposed facilities. As part of this study, proponents must evaluate the natural heritage features and identify those that are considered locally, regionally or provincially significant.

For proposals within Provincial Parks and Conservation Reserves, any development should show a net benefit to the ecological integrity of the site.

In addition, references to “significant” and “mitigation” must be better defined by the MOE and MNR as they pertain to Renewable Energy facilities. The term mitigation should refer to a no-net loss of ecological value. To avoid confusion and conflict, determining the significance of sites must be defined. Cumulative impacts as a result of these projects must also be examined by the director.

Monitoring the impact on natural heritage features and wildlife should be included as a condition of approval.

Accordingly CELA recommends:

Recommendation: Assessment of the presence of locally, regionally and provincially significant wetlands, woodlands, valley-lands, wildlife habitat, coastal wetlands and Areas of Natural and Scientific Interest within 120 metres of a proposed project should be conducted by the proponent.

Recommendation: Provisions to mitigate any impacts such that there is no net loss of ecological value should be required by the Director in the Renewable Energy Approval.

Recommendation: For proposals within Provincial Parks and Conservation Reserves, any development should show a net benefit to the ecological integrity of the site.

Water bodies should be treated in the same manner as natural heritage features, including specific assessment of impact and ensuring no net loss of ecological value and examination of cumulative effects.

CELA also agrees with the submissions of Ontario Nature regarding the need for systems based ecosystem protection and supports the following recommendation:

Recommendation: The Renewable Energy Approval regulation should explicitly address the issue of maintaining connectivity among natural features and require project proponents to consider and address impacts of proposed projects on natural heritage systems and landscape linkages.

Provincial Policy Plans

CELA agrees that specific provisions are required to specify the requirements for Renewable Energy Approvals that are necessary to ensure that Provincial Policy Plans and the aims and objectives of those plans are respected.

Niagara Escarpment

Clarification is required where a proponent for a project within the Niagara Escarpment Plan will require a development permit under the *Niagara Escarpment Planning and Development Act*, as to the appeal route regarding a development permit i.e. as to whether it would proceed under the Act to a Niagara Escarpment Hearing Officer, rather than the ERT per se.

***Part IV – Explanation of Technology-Specific Requirements
Land-Based Wind Turbine Facilities***

CELA supports the proposal that wind turbine facilities of 3kW or less not require a Renewable Energy Approval and be exempt from those approval requirements as well as exempt from the Environmental Protection Act section 9 permit requirements.

Noise

With respect to the proposal for fixed setbacks for noise protection, CELA submits that the Director should be empowered to impose terms and conditions which vary from the prescribed minimum setbacks. CELA has earlier set out examples of other environmental statutes which provide that type of Director's discretion. There are circumstances in which the particular proposal, given the geography, landforms, and technology choice, would not be expected to cause adverse noise impacts at closer distances. In addition, the technology is constantly evolving and the impacts may change accordingly for that reason. Similarly, just as we submitted for natural heritage features, the discretion of the Director must be to vary the requirements in either direction from the standard, either to allow for installations within lower setbacks or to provide for greater setback requirements, depending upon the specific circumstances.

Recommendation: The Director should be empowered to impose terms and conditions which vary from the prescribed minimum setbacks.

Bird/Bat studies

The requirements for bird and bat studies should be expanded to include butterflies. The studies for birds, bats and butterflies should consider not only habitat, but migration patterns and impacts upon sustainability of a species' population. In addition, the project must assure no net loss of ecological value in relation to the birds, bats and butterflies, habitat, migration patterns and impacts on population.

Recommendation: Studies should include not only birds and bats, but also butterflies, and not only habitat but also migration patterns and impacts upon population sustainability, and ensure no net loss of ecological value in these respects.

Decommissioning

Decommissioning plans for both on-shore and off-shore wind turbine facilities should also include financial assurance considerations. Subject to certain exceptions (such as anaerobic biogas digesters on farms), private proponents should be required to post appropriate financial assurance (i.e. irrevocable bonds, letters of credit, etc.) to secure the performance of their various obligations during the operational & closure phases of the project. This is a normal requirement for example of private landfill proponents.

Recommendation: Subject to specified exceptions, private proponents of Renewable Energy projects should be required to post appropriate financial assurances to secure the performance of obligations under operational and closure phases of the project.

Off-shore Wind Turbine Facilities

As noted earlier, CELA submits that all federal environmental assessment requirements should be harmonized with the review for the renewable energy approval, in that while the requirements for the federal process would not be varied, the process should be conducted in conjunction with the provincial renewable energy approval process and participants should be given the opportunity to participate in both processes simultaneously. The province of Ontario should enter into a specific agreement (as both the federal and provincial legislation envisages) with the federal government as to carrying out those processes in conjunction for renewable energy approvals. This would assist in both simplifying the processes, making them more accessible and comprehensible to the public, and in synchronizing the time frame for approvals.

Recommendation: The province of Ontario should enter into a specific agreement with the federal government as to carrying out the processes of the provincial Renewable Energy Approval and the federal environmental assessment in conjunction with each other.

Biogas, Biomass and Biofuels

With respect to the definitions of biogas, biomass and biofuel, which remain undefined at this time, CELA submits that non-organic waste should not be included in these definitions. Furthermore, CELA submits that the definitions and standards pertaining to these fuels or energy sources must be sustainable in order to ensure the sustainability of forest ecosystems and functions and agricultural soils and lands. Removal of biomass which is presently left to regenerate the soils and ecosystems of harvested forests and agricultural lands may lead to long term depletion of essential stores of energy, organic matter, and other aspects of a healthy ecosystem; accordingly these issues must be evaluated in order to arrive at sustainable definitions. There are some available definitions of sustainable biomass; a number of biomass certification efforts are underway on the international front, and it will be essential to thoroughly consider and review the available definitions and the implications of choosing a specific definition. It will also be important to take into account carbon balance and green house gas emission calculations to ensure that the approach adopted in Ontario is sustainable from a climate change perspective.

In addition, CELA submits as outlined below, with respect to solar photovoltaic facilities, that OMAFRA should develop guidelines as to the utilization of class 1, 2 and 3 agricultural lands for biomass production or solar photovoltaic energy production, so as to protect food production capacity in the province, as well as to support renewable energy initiatives without compromising the health and capacity of Ontario's agricultural lands.

CELA supports and adopts the recommendations put forward by Ontario Nature in its submissions to these proposals as follows:

Recommendation: The approvals process for biomass facilities must deal comprehensively with the potential impacts of biomass extraction and production on wildlife, biodiversity, soil quality and composition, water quality and ecosystem function. This should include a monitoring plan to assess environmental impacts and deal with them through adaptive management.

Recommendation: The definition of biomass, and the new rules and standards that will guide biomass extraction and production must be based on sound science and must aim first and foremost to sustain and protect the natural environment.

Biogas Facilities (Anaerobic Digesters)

For clarification, CELA assumes that the facilities using manure in anaerobic digesters will continue to meet the requirements of the *Nutrient Management Act* and its regulations. That should be made clear in any relevant descriptions of the program.

Farm-based Anaerobic Digestion Facilities Accepting Regulated Waste

Again, CELA assumes that these facilities will continue to meet the requirements of the *Nutrient Management Act* and its regulations.

Non-Farm Based Anaerobic Digestion Facilities

CELA supports the proposed studies and the principle that these facilities must not cause an adverse effect.

Biomass Facilities (Thermal Treatment)

Thermal Treatment of Woodwaste, On-Farm Thermal Treatment of Mixed Biomass and Non-Farm Thermal Treatment of Mixed Biomass

These facilities will generally be required to conduct an Emission Summary and Dispersion Modelling report to evaluate air emissions pursuant to O.Reg.419/05. However, this regulation still relies upon point-of-impingement standards for individual chemicals, and does not address long-term contaminant loadings or cumulative effects. At the same time, the Ministry of Environment Statement of Environmental Values requires that cumulative effects of air emissions are duly considered and mitigated. Accordingly the Renewable Energy Permit regulations must ensure that cumulative effects are considered and mitigated.

Recommendation: The regulations must ensure that cumulative effects of air emissions from proposed Renewable Energy projects are considered and mitigated.

Landfill Gas Facilities

Although the proposal suggests that the landfill gas facilities and the works used to collect the landfill gas will be approved under the Renewable Energy Approval, versus other operations relating to landfill operations which will continue to be subject to existing *Environmental Protection Act* part V approvals, CELA submits that the demarcation line between these approvals should be more clearly specified and the integration between them must be considered. The operations will have an impact on the location, type, quantity, feasibility of landfill gas collection and energy generation, and likewise, the landfill gas collection and generation systems will have impacts on the receipt of waste and operations and closure of the landfill site in general.

Hydro Electric Facilities

In addition to the proposed matters pertaining to a Water Taking the proponent should be required to demonstrate that the proposal will maintain ecological function.

In general, the content of the Renewable Energy approval for hydro should be subject to the same requirements as a water taking permit, and should continue the present requirements for a Water Power permit under the *Lakes and Rivers Improvement Act*.

Recommendation: The Renewable Energy Approval for hydro-power should be subject to the same requirements as a water taking permit, and should continue the present requirements for water power permits under the *Lakes and Rivers Improvement Act*.

CELA agrees that large scale water power projects above 200 MW continue with the individual environmental assessment process.

Solar Photovoltaic Facilities

CELA submits that solar photovoltaic facilities may be permitted in a range of locations across the province. CELA would submit that the province not set absolute constraints in location of photovoltaic facilities in agricultural lands, but that the classification of the agricultural lands be one of the considerations in imposing additional terms and conditions, including ensuring no irrevocable harm to soil productivity. In general, CELA submits that Ontario's class 1, 2 and 3 agricultural lands must be preserved and utilized for food production (an issue relevant to biomass as well). CELA also submits that the Director be empowered, upon consultation with OMAFRA to decline an application in circumstances where it would unreasonably impact available agricultural lands for food production, either as a project in itself or cumulatively.

CELA submits that guidelines should be developed by OMAFRA in terms of determining which agricultural lands should be permitted for energy production purposes, with respect to either solar photovoltaic or biomass production.

CELA also supports and encourages the province to support renewable energy projects and approvals in the redevelopment and re-use of brownfield lands in the province, including solar photovoltaic facilities and other renewable energy generation and efficient energy use in the redevelopment plans.

Recommendation: OMAFRA should develop criteria and guidelines for determining which agricultural lands should be permitted for energy production purposes, whether solar photovoltaic or biomass production.

Roads and Transmission Lines

CELA supports the submissions of Ontario Nature with respect to roads and transmission lines. Both types of infrastructure lead to fracturing of the ecosystem, and bring additional negative impacts from the new access. Accordingly, CELA echoes the following recommendation:

Recommendation: The Renewable Energy Approval regulation should outline principles or standards to be used to prevent, control and/or mitigate the negative environmental impacts of access roads and transmission lines. For the Far North, the Renewable Energy Approval should require approval through completed and approved land use plans.

All of which is submitted by the Canadian Environmental Law Association
July 24, 2009



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CELA Publication Number: 662
ISBN: 978-1-926602-19-6