



BY MAIL AND FACSIMILE

April 22, 2009

Trevor Day, Clerk
Standing Committee on General Government
Committees Branch
99 Wellesley Street West
Room 1405, Whitney Block, Queen's Park
Toronto, ON M7A 1A2

Dear Mr. Day:

Re: Bill 150, *Green Energy and Green Economy Act*

Please find enclosed Lake Ontario Waterkeeper's comments on the above-mentioned matter. If you have any questions or comments, please do not hesitate to contact Joanna Bull, Articling Student, at joanna@waterkeeper.ca, or (416) 861-1237.

Yours truly,

Mark Mattson
Waterkeeper & President

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BACKGROUND

The development, consultation, and introduction processes associated with Bill 150, the *Green Energy and Green Economy Act* [the *Act*] is unprecedented in Ontario's history. In the spring of 2008, the steering committee of the "Green Energy Act Alliance" invited individuals and organizations to participate in their campaign to bring a green energy act to Ontario.¹ The Alliance was (and to our knowledge remains) a coalition of organizations including the Ontario Sustainable Energy Association, Ivey Foundation, Pembina Institute, Community Power Fund, Environmental Defence, Ontario Federation of Agriculture, David Suzuki Foundation, and the First Nations Energy Alliance.² These organizations represent a mix of public and corporate interests. To our knowledge, none of the Alliance's members represent government.

By fall of 2008, the Alliance was hosting "visioning" sessions to develop the act. Within a few months, their recommendations were submitted to the Ontario government for consideration.³ Less than one month after they were submitted, Premier Dalton McGuinty announced that his government would introduce a green energy act.⁴ Draft legislation appeared and Bill 150 passed First Reading in the Legislature two weeks later.⁵

The public consultation process for the proposed legislation has been as swift and as limited as its development process. The text of the bill at First Reading was posted to the Environmental Registry for the minimum period of time required by law. The bill passed Second Reading before it was referred to committee for review, and many members of the public (including Lake Ontario Waterkeeper) have been denied an opportunity to appear before that committee.

¹ http://www.greenenergyact.ca/Page.asp?PageID=122&ContentID=908&SiteNodeID=215&BL_ExpandID=

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http://www.greenenergyact.ca/Page.asp?PageID=122&ContentID=910&SiteNodeID=203&BL_ExpandID=45

³ http://www.greenenergyact.ca/Storage/23/1477_GEA-Proposal-1-1.pdf

⁴ <http://www.premier.gov.on.ca/news/ProductPrint.asp?ProductID=2838>

⁵ http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2145&detailPage=bills_detail_status

Public polling data, media coverage, and selective representations may make it appear to the Committee as though public support for the bill is strong and broad. Our commentary below is offered as a caution to the Committee, however. This bill is ambitious. It will result in massive changes to Ontario's project licencing processes, energy plans, economy, and approach to environmental protection. These changes are too significant and too important to be adjudicated by the barometer of lop-sided public opinion reports.

COMMENTARY

Lake Ontario Waterkeeper is an eight-year old Canadian charity based in Toronto, Ontario. Our president, Mark Mattson, is one of the province's most experienced environment and energy lawyers. We have participated in energy project licencing processes, environmental assessments, and policy hearings on countless occasions.

As a grassroots organization dedicated to swimmable, drinkable, fishable waters for *every* community on this lake, we navigate the regulatory process on a daily basis. We study licence applications. We work with independent scientific experts. We prosecute polluters, and we appeal unreasonable or environmentally threatening permits. We represent thousands of individuals and volunteer organizations who live with energy issues every single day - and whose voices your Committee has never heard.

Over the years, we have witnessed the profound impacts energy development and energy policies have had on our watershed. No other industrial development costs as much money or leaves as many scars in its wake. No operation on Lake Ontario kills more fish on an annual basis than our nuclear power plants. No development proposals have had impacts on rural and close-knit communities as strongly felt as those for industrial wind plants. No single industry stands as firmly in the way of environmental restoration on Lake Ontario as the energy industry.

We support the renewable energy industry. We support efforts to curb greenhouse gas emissions, decentralize our energy system, and drive our energy demand down. As a public interest organization, however, we also have a duty to support citizen's rights to be part of decision-making, to have access to information, and to participate in fair, legal and accountable government processes. We have a responsibility to share with you all of our

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knowledge and research about the way good decisions are made and about the way to protect and restore the environment.

Our specific recommendations are outlined below. More generally, we wish to underscore our concerns that the public consultation process surrounding the introduction of Bill 150 has been deeply flawed.

We underscore this because, by-and-large, the weak consultation processes that typically accompany energy projects are the primary trigger for controversy and community division. In our experience, most communities draw great pride from their ability to do something positive for the environment. Most individuals are comfortable with renewable energy technologies such as windmills and solar panels. That does not mean that every renewable energy project, in every form, built anywhere is a good idea. Consultation is meant to allow decision-makers to learn from local wisdom, to respond to advice and concerns voiced by the people who will live with the consequences of decision. **If the consultation process for Bill 150 and the *Green Energy and Green Economy Act* itself is not legitimate, then how can the public have any confidence that the new consultation processes created by the bill will be?**

There is a shadow cast over the *Green Energy and Green Economy Act* because the public consultation process has been flawed in at least three ways.

First, the Act has been sold to the people of Ontario, much as a new product or service is sold. It appears as though the government has spent more money and more time developing advertising campaigns for transit shelters and billboards than it has spent on dialogue with the public.⁶ By-and-large, the government's focus has not been on informing the public about what the *Act* says or will mean; only that the changes are a good thing.

Second, the bill actually passed Second Reading *before* the official public comment period ended, undermining the legitimacy of the consultation process. The bill was posted to the Environmental Registry on February 24, 2009 for a thirty-day comment period expiring March 26, 2009. On March 11, 2009, the bill passed Second Reading in the Ontario Legislature and was referred to the Standing Committee on General Government for

⁶ One bus shelter ad near our office was literally posted for longer than the legislation was posted on the environmental registry.

review.⁷ At this time, the principle, scope and object of the bill has fixed; the committee may only add, remove, or change specific clauses within the legislation. **Due to the failure to send the bill to committee before second reading, no one within government has the authority to actually incorporate significant public recommendations into the legislation.** In order for the mandatory consultation process facilitated via the Environmental Registry to have had any legitimacy whatsoever, that consultation process had to have been completed *before* the bill passed Second Reading.

Third, Bill 150 has been accompanied by a very unfortunate campaign to stifle or drown out debate and dissent. Even before the Act's introduction, individuals and volunteer organizations who questioned the wisdom of specific aspects of renewable energy projects were alienated. Ontario could be characterized as having an "all or nothing" attitude: you either support wind power or you are opposed to wind power; you either support solar power or you are opposed to solar power. Groups such as Wolfe Island Residents for the Environment (WIRE), for example, were alienated and labelled "anti-wind" because they recommended moving twelve out of eighty-nine wind turbines out of environmentally sensitive areas. The scientifically-based work on set-backs for turbines from environmentally sensitive areas, for which WIRE was ridiculed, is now cited by the creators of Bill 150 as a key lesson for all wind developers.

Concerns about bias in the Province's approach to decision-making and public consultation go all the way to the top. In his recent comments about the proposed *Act*, Premier Dalton McGuinty stated that, "NIMBYism will no longer prevail" in Ontario, suggesting that any criticisms of renewable energy projects are illegitimate. Only weeks before introducing the bill in the Legislature, Minister Smitherman called residents NIMBYs for opposing the siting of an industrial wind plant off the Scarborough Bluffs in Toronto.⁸ The Minister said that only safety and environmental concerns will be legitimate objections to energy projects covered by the *Act*; by inference, this statement suggests that concerns about such wind plants are *not* rooted in safety or environmental concerns.

We understand that, at this stage, the committee's authority to make changes to the Act's primary objectives and scope is severely limited. In addition to these general observations and comments, please consider our specific recommendations below.

⁷ http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2145&detailPage=bills_detail_status

⁸ Rob Ferguson, "Turbine complaints 'absurd': Smitherman says opponents in Scarborough Bluffs have worked themselves into an 'artificial lather'", Toronto Star (12 February 2009).

RECOMMENDATIONS

Recommendation #1: The name of the Act should be changed to “The Renewable Energy Technologies Support Act”.

A “Green Energy and Green Economy Act” is presumably about environmental protection. That is the intent that the name conveys. It is certainly the way this bill has been sold to the public. To be clear, however, *this* statute has very little to do with environmental protection. It will not make Ontario’s waters swimmable. It will not ensure clean, safe drinking water for the province’s citizens. It will not protect fish from cooling water intakes or outflows. It will not facilitate the restoration or protection of fish habitat.

The *Green Energy and Green Economy Act* is about promoting and encouraging the economic development of specific renewable energy technologies. There are many laudable reasons for promoting, subsidizing, and supporting low-carbon emissions energy technologies; so many reasons, in fact, that there is no need for the *Act* to masquerade as something that it is not. A title that more accurately reflects the intent and objectives contained within the legislation would help to further its objectives.

Recommendation #2: Nuclear energy generation should be explicitly excluded from the definition of “renewable energy source” and the application of the Act.

According to s.1(1), “renewable energy generation facility” has the same meaning as in the Electricity Act, 1998. This term doesn’t currently appear in the Electricity Act, but Bill 150 will add it, defined as:

a generation facility that generates electricity from a renewable energy source and that meets such criteria as may be prescribed by regulation and includes associated or ancillary equipment, systems and technologies as may be prescribed by regulation, but does not include any associated works that produce, process, handle or store waste used to generate electricity, unless the works are prescribed by regulation for the purposes of this definition.

The Act defines “renewable energy source” as:

an energy source that is renewed by natural processes and includes wind, water, biomass, biogas, biofuel, solar energy, geothermal energy, tidal forces and such other energy sources as may be prescribed by the regulations, but only if the energy source satisfies such criteria as may be prescribed by the regulations for that energy source.

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Therefore, the *Act* does not define the projects it will apply to, leaving this open to definition in the regulations. There is no guarantee that this definition could not include nuclear generation via regulation. Given the significant environmental damage caused by nuclear power production in Ontario, and the fact that nuclear fuels based in uranium are not renewable, the *Act* should explicitly exclude the possibility of application to nuclear power facilities.

Recommendation #3: Sections 3 and 4 of the proposed Act and Section 3 of Schedule K of the Bill should be removed to preserve local control over land use planning and environmental quality.

The designated goods provisions in section 3 of the *Act* removes the ability of municipalities (and other bodies outside the legislature or parliament) to make rules restricting the use of certain goods. In certain cases, this may have positive results since, for instance, the Lieutenant Governor in Council may designate goods like clotheslines, which some municipalities or condominium boards have tried to ban for aesthetic reasons. However, if the designated goods are not as unequivocally safe as a clothesline, this provision could see the removal of local power to control the use of potentially harmful goods like compact fluorescent light bulbs.

Similarly, Section 4(2) and (3) allow designated “renewable energy projects” to contravene municipal laws that would otherwise apply to them, if those laws prevent or restrict the project. This section should be removed to preserve local control over the environment.

More significant is the threat to local autonomy posed by Schedule K, wherein changes to the *Planning Act* are described. The removal of local power to control and plan the environment via Official Plans and by-laws is an affront to the principles of democracy. It removes the people with the most direct knowledge of an area and those who will experience any consequences of a project from the decision-making process. It goes against a fundamental principle of all green movements: think globally but act locally.

The move to restrict local power contradicts the evidence from projects that have been built in the province showing the extent of concern and engagement local people have for their environment. There is no evidence to support the Premier’s comments that local communities have a record of being “NIMBYs” or of rejecting legitimate energy projects for reasons unconnected to safety or environmental concerns. Instead, as in the case of the Wolfe Island Wind Plant, local concerns often focus on environmental and safety issues.

To say that municipalities must be disempowered or NIMBY-ism will prevail is a form of fear-mongering that disregards municipal track records, and discounts the validity of local knowledge of and care for the environment.

To ensure the utmost level of environmental protection, Ontario should be drawing on the passion of local communities rather than excluding their voices. The changes to the *Planning Act* in section 3 of schedule K of the bill should be removed.

Recommendation #4: Section 10 should be removed from the bill.

Section 10 of the *Act* establishes a Renewable Energy Facilitation Office, which will spend government money helping private proponents develop “renewable energy projects”. This section of the *Act* binds the government, through legislation, to create a government-funded and staffed agency dedicated to serving a specific segment of for-profit private companies. As such, it represents a profound perversion of the principles of democracy.

Government is always free to adopt policies and procedures to support projects it believes are in the public interest. It does not need to legislate the creation of this kind of office. To do so institutionalizes a profound conflict-of-interest in the regulatory process and undermines the government’s authority as a regulator.

The proposed office’s role would be to help “renewable energy projects” gain approval, which means the projects will qualify for help before any approvals process is undergone. This is an example of how scrutiny for projects will be reduced by the *Act*: how can it be decided that a project is renewable, such that it qualifies for this support, if it hasn’t been evaluated yet? The operation of this office would be based on providing support to projects that appear renewable on their face, increasing their chances of gaining approval, without first assessing the actual environmental impacts of the proposals to determine if they are actually harmful to the environment.

In considering Section 10, the Committee should also turn its attention to the meaning of, “providing proponents with information in respect of interactions with local communities”. If this phrase implies that information about a project should be withheld or massaged before being released to local communities, the section should be struck in the interest of accountability and transparency.

Recommendation #5: Sections 11(2) and 11(3) should be amended such that documents are subject to the *Freedom of Information and Protection of Privacy Act*.

Section 11 makes information provided by the proponent to the Renewable Energy Facilitation Office confidential. Section 11(3) deems all such information to be “a trade secret” for the purposes of the *Freedom of Information and Protection of Privacy Act* [FIPPA]. This provision will decrease transparency associated with any project covered by the *Act*, which in turn decreases accountability. If the information referred to consists of trade secrets in need of protection, they will be covered by the FIPPA. Extending extra secrecy to this information implies that more will be withheld from the public than is actually a trade secret.

These clauses are contrary to the purpose of the FIPPA as described in section 1 of that *Act*, and a violation of the public’s right to access records in Section 10 of the FIPPA. Once again, the *Act* is infringing the rights of Ontarians, ensuring the government works harder to protect and promote the desires of corporations than non-corporate citizens.

Recommendation #6: The implications of the leave-to-appeal test in Schedule G are unclear and must be clarified.

In Schedule G, Bill 150 introduces changes to the *Environmental Protection Act* that include a new leave-to-appeal test for persons other than the proponent regarding a decision of the Director under section 139. This test is stringent, requiring proof that the project will cause serious and irreversible harm to plant life, animal life, human health or safety or the natural environment. The onus of proof is on the citizen requesting the review.

It is unclear how the bill, and particularly the introduction of this new leave-to-appeal test, will impact the test for leave-to-appeal to the Environmental Review Tribunal that is set out in section 41 of the *Environmental Bill of Rights*. If the tests co-exist, such that projects could be appealed via either *Act*, and meet either leave test to reach the Tribunal, the changes in the bill do not appear to limit the public’s right to participation. However, if the new test is meant to replace the test in the *EBR*, the bill creates a serious problem of access to justice, in that the new test is even more restrictive than the current one.

If this is the case, changing the leave-to-appeal test amounts to taking away the public’s right to appeal; a right currently protected by the *EBR*. This is all the more chilling in light

of the way the proposed bill also encroaches on the public's right to access documents and to be consulted. If the bill passes in its current form, there will be a special projects office dedicated - by law - to promoting and protecting the interests of the renewable energy industry. It is neither prudent nor reasonable to also take away the public's last right to appeal to an independent decision-maker.

Lake Ontario Waterkeeper requests a thorough review and clarification of the leave test introduced in the bill, and the implications for the other avenues of appeal the Tribunal.

SUMMARY OF RECOMMENDATIONS

In summary, Lake Ontario Waterkeeper submits the following specific recommendations to the Committee, to be considered in the context of our comments expressed above:

- 1. The name of the *Act* should be changed to “*The Renewable Energy Technologies Support Act*”.**
- 2. Nuclear energy generation should be explicitly excluded from the definition of “renewable energy source” and the application of the *Act*.**
- 3. Sections 3 and 4 of the proposed *Act* and Section 3 of Schedule K of the Bill should be removed to preserve local control over land use planning and environmental quality.**
- 4. Section 10 should be removed from the bill.**
- 5. Sections 11(2) and 11(3) should be amended such that documents are subject to the *Freedom of Information and Protection of Privacy Act*.**
- 6. The implications of the leave-to-appeal test in Schedule G are unclear and must be clarified.**