



BY MAIL AND EMAIL

February 4, 2010

Carrie Hoskins, Program Officer
Ministry of Natural Resources
Natural Resource Management Division
Lands and Waters Branch, Renewable Energy
300 Water Street
Peterborough, ON K9J 8M5

Dear Ms Hoskins:

Re: Phase One - Review of the Ontario MNR's waterpower and windpower site release policies and procedures
EBR #: 010-7895

Please find enclosed Lake Ontario Waterkeeper's comments on the Ministry of Natural Resources Phase One revisions to the site release policies for wind and waterpower projects. If you have any questions or comments, please do not hesitate to contact our Counsel, Joanna Bull, at joanna@waterkeeper.ca, or (416) 861-1237.

Yours truly,

Mark Mattson
Waterkeeper & President

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BACKGROUND

In 2004, the Ontario Ministry of Natural Resources (the Ministry or the MNR) introduced policies and procedures to govern applications to develop wind or waterpower energy projects on Crown land, as defined under the *Public Lands Act*. The policies and procedures are referred to here as: the Windpower Policy, the Windpower Procedures, the Waterpower Policy, and the Waterpower Procedures. The four documents provide guidance for Ministry staff and prospective proponents on how to navigate the energy project development process.

In 2009, the Ontario Legislature promulgated the *Green Energy and Economy Act* (the *GEGEA*). The *GEGEA* created the *Green Energy Act* (the *Act*) and introduced changes to a variety of statutes, regulations, policies, and procedures administered by various ministries. It resulted in massive changes to Ontario's project licencing processes, energy plans, economy, and approach to environmental protection, including reductions in licencing and approvals processes under the *Ontario Water Resources Act* and the *Environmental Protection Act*.

In order to determine if the Ministry's policies need to change to comply with the *GEA*, the MNR has instituted a policy review. It began with the development of the, "Approval and Permitting Requirements Document for Renewable Energy Projects", which was posted on the Environmental Registry on June 9, 2009. On July 24, Lake Ontario Waterkeeper submitted a comment on the draft document. A revised version was released on September 24, 2009. On that same day, the MNR requested comments on whether it should change its water and wind power site release policies to comply with the *GEA*. The Ministry has placed a moratorium on new applications for these kinds of projects on Crown land until the review is completed.

The Ministry will undertake this review in two phases. The first will focus on aligning the procedural requirements of the policies with the *Act*. The second will look more broadly at the long-term purpose behind the site release policies in the context of the current government's approach to "green energy". The review will include an examination of the feed in tariff process and how approvals can be "streamlined".

LOW submitted comments on to the MNR on November 2, 2009 on the abstract idea of adapting the site release policies to the *GEA*. LOW made the following six recommendations in that comment:

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1. The Ministry of Natural Resources should strive to be a source of environmental protection in the face of the rollbacks to environmental protection introduced through the *Green Energy Act*.
2. The Ministry must consider its Statement of Environmental Values, including the obligation to work for ecological sustainability, in any decision regarding a change to its policies and procedures.
3. The Windpower Policy and Procedures should be expanded to include limits on the density of energy project development in a given area.
4. The Ministry should increase requirements for public notification and consultation at each stage of a project application, especially before meeting with the proponent behind closed doors.
5. The Ministry's policies and procedures should clearly state that Ministry advice to proponents shall be restricted to procedural instructions and formatting requirements. Outside of these bounds, advice given by the Ministry to proponents on substantive aspects of an application must be subject to public scrutiny and review.
6. The public should be notified and consulted at every stage of the proposed changes to the Ministry's site release policies. Pursuant to the *Environmental Bill of Rights*, the draft documents containing the proposed changes must be posted to the Environmental Registry. All further changes proposed as part of the review should also be posted for public review and comment through the Registry.

The proposal was uploaded to the Environmental Registry again on December 22, 2009 for an additional 45 days of public comment. This latest review period focuses on the specific proposed Phase One revisions to the waterpower and windpower site release policy and procedure documents. Lake Ontario Waterkeeper attended an information session on the proposed changes on January 27, 2010 in Toronto. The following comments were informed by both the proposed textual changes and the context provided by that information session. Most of our comments are relevant to "Phase Two", as defined by the MNR, but are offered at this time to encourage consideration throughout the revision process.

COMMENTARY

The Ministry must consider environmental implications as part of the site release process.

As part of these revisions, the Ministry of Natural Resources is attempting to reduce the scope of its site release decision-making process to eliminate environmental considerations. As Ministry staff explained at the January 27, 2010 information session, the Ministry hopes to reduce considerations at the site release stage to whether or not the project could theoretically be built. If a project does not have “fatal flaws”, like a non-negotiable land-use restriction, it will be able to pass the site release stage, even if there are serious environmental concerns associated with the proposal. The presenters explained that proponents had complained that they were required to address environmental concerns at the later environmental assessment stage, and therefore these should not be considered during site release.

Lake Ontario Waterkeeper submits that environmental concerns with a project or site can also amount to “fatal flaws” that should be caught at the site release stage of review. It is not prudent to release sites for projects that cannot be built due to ecological concerns. In cases where the fatal environmental flaw is inherent in the project proposal, this approach would cause land to be reserved for a proposal that is not likely viable, preventing potentially environmentally sustainable projects from proceeding in the area. In instances where the fatal environmental flaw is with the land itself, such as where the proposed site includes protected wetlands or Important Bird Areas, allowing a project to pass site release could waste both private and governmental resources. In the worst case scenario, releasing an environmentally sensitive site to development could result in projects being built where they should not be built. This is a foreseeable result if environmental concerns are not considered until a later stage of development, after significant amount of resources have been invested in the site and it is less feasible for a company to relocate their project.

Further, removing consideration of environmental effects from the site release decision-making is not consistent with the Ministry’s Statement of Environmental Values (SEV), which states that,

The Ministry’s mission is to manage Ontario’s natural resources in an ecologically sustainable way to ensure that they are available for the enjoyment and use of future generations. The Ministry is committed to the conservation of biodiversity and the use of natural resources in a sustainable manner.

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In *Lafarge Canada v. Ontario (Environmental Review Tribunal)*, the Ontario Superior Court of Justice found that a failure to explicitly consider and apply a Statement of Environmental Values when a prescribed ministry makes a decision on approvals and permits is grounds for review by the Environmental Review Tribunal.¹ It is therefore incumbent on the MNR to explicitly apply its SEV to all site release decisions. Ecological sustainability, the enjoyment and use of future generations, the conservation of biodiversity, and the use of natural resources in a sustainable manner must be considered as part of every site release decision. If these considerations are removed from the site release decision-making process, the Ministry's decisions could be subject to review by the Environmental Review Tribunal.

Recommendation 1: The Ministry's site release policies and procedures must require consideration of the environmental impacts of each potential project in order to protect the environment and to be consistent with the Statement of Environmental Values.

The site release policies should account for cumulative impacts.

There are many ways that the Ministry could strengthen environmental protection through its policies and procedures without causing undue overlap with the environmental assessment process. Of particular relevance at the site release stage is an evaluation of cumulative impacts of multiple projects on an area. Cumulative impacts refers to the "heaping up" or compounding of consequences on the environment of two or more independent sources or projects. An evaluation of cumulative impacts is particularly important in highly developed areas of Ontario, such as the area surrounding Lake Ontario. Instead of writing off these areas as polluted or void of natural areas, they deserve the highest level of protection. The most efficient and effective stage at which to consider this aspect of a project is at site release, before much money or time has been invested in a specific site.

One example is the grid cell requirement in the proposed Windpower Policy. The Policy limits applications to a total of 44 contiguous grid cells, or up to three non-contiguous grid cell groupings in close proximity to a maximum of 44 cells (section 2.1). The Windpower Policy and Procedures should be expanded to include limits on the density of energy project development in a given area. For instance, project applications could be restricted

¹ *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* [2008] O.J. No. 2460 [QL] [*Lafarge*].

to 44 contiguous grid cells with a specific buffer zone of grid cells on all sides of the proposed area. In this way, the MNR could prevent situations like the one currently observable in Prince Edward County, where six proposed wind projects could lead to the development of at least 285 wind turbines in a farming community of just over 1000 km².

Recommendation 2: The site release policies should prevent cumulative impacts by addressing the density of proposed projects.

The Ministry must have regard to the Integrated Power Systems Plan.

While the introduction of the *Green Energy Act* and the associated Feed-In Tariff (FIT) program has created changes to the renewables approvals process, all energy planning in Ontario must still have regard to the province's Integrated Power Systems Plan (IPSP).

According to section one of *Ontario Regulation 424/04*, made under the *Electricity Act*, 1998, the Ontario Power Authority (OPA) **shall** develop and submit an integrated power system plan and **shall** submit an update of that plan every three years. Further, section 25.30 (1) of the *Electricity Act* requires the OPA to develop and submit an IPSP to the Ontario Energy Board (OEB) once during each period prescribed by the regulations, or more frequently if required by the Minister or the Board. Such a requirement was communicated to the OPA by the Minister of Energy and Infrastructure on September 17, 2008. At that time, he temporarily suspended the OEB hearing on the Plan and asked that a revised IPSP be submitted to the Board by March 17, 2009. No extension to that timeframe has been issued by the Minister and the IPSP is still outstanding. The hearing has remained suspended pending receipt of the updated Plan.

The law requires that a province-wide electricity plan be developed by the OPA and evaluated by the OEB in a hearing. While the OPA may be including a holistic planning approach into the FIT program, it will not satisfy the legal requirement for a hearing.

Recommendation 3: The MNR must consider the impacts and interactions of the IPSP while revising the site release policies.

The Ministry should continue to enforce set-backs for all “receptors” in a context of aboriginal rights and public consultation.

The Ministry refers to features that require set-backs or buffers as “receptors”. Examples include homes, hunt camps, and cottages. At the January 27th information session, proponents expressed concern about their ability to locate receptors in northern Ontario where structures may be erected in remote areas and used sparingly for hunting or recreation. The MNR staff informed the group that the Ministry does not have location information for many such structures outside the more developed south, and that locating receptors is the responsibility of proponents.

Lake Ontario Waterkeeper supports the enforcement of set-backs for all receptors, including hunt camps, recreation camps, and trap cabins that may only be used at certain times of the year. The protection of these structures can be linked in many cases to the rights of first nations people, and underscores the importance of all forms of public consultation. While it is important for proponents to research the location of such structures, no survey will be as effective as direct consultation with local people about the way they use the land in question.

Recommendation 4: Set-backs should continue to be enforced as part of the site release policies, and information about receptors should be gathered by all available means, including public consultation.

The Ministry must preserve the democratic rights of Ontarians to participate in environmental decision-making.

As part of its efforts to reduce duplication and increase the efficiency of the site release process, the MNR is considering the best approach to public notification and consultation during site release. This was the subject of conversation at the January 27 information session and will be considered in more depth as part of “Phase Two” of the revisions. At the January meeting, many industry representatives expressed concern about public notification requirements at the time of site release, claiming that they must notify the public as part of the EA and it should not be part of site release.

Public notice and the opportunity to comment is one of the most basic procedural rights guaranteed by Canadian common law, as most other participation rights flow from it. As

Professor David Mullan writes:

It is one of the fundamentals of procedural fairness that those affected by decisions coming within its ambit should in general receive notice of the process about to be undertaken in a sufficient degree of detail and in a timely enough fashion to enable the effectuation of their participatory entitlements.²

Professor Mullan describes a spectrum of notice requirements depending on the nature of the decision being made, with quasi-criminal or employment decisions requiring a highly personalised and specific form of notice, while decisions affecting the public more broadly may only require publication of general details in local newspapers. As the decisions being made as part of the site release process more closely resemble the latter, LOW submits that a form of notice modelled on public decision-making is appropriate. This would require the MNR to consider the most appropriate **medium** to communicate that a decision regarding site release is being made, so as to ensure that all those affected by the decision receive the notice in practice. The notice also must include enough **detail** to ensure the public understands the potential consequences of the decision and how they can get involved if they wish to do so.

Proponents at the January 27 information session expressed concern that notifying the public at such an early stage in the process would cause concern in the community before the proponent has conducted any studies to address those concerns. This is a legitimate issue that the MNR should address, but it cannot vitiate the public's right to notice and comment. Instead, it should be addressed by considering the appropriate form of notice and participation, and by giving the public all the available information. This includes the fact that the proposal is at an early stage and when the community can expect detailed studies to be released.

The preservation of the right to public notice and participation is especially important in the context of the *Green Energy Act*, which represented a rollback in the level of transparency and public participation in energy project decision-making in Ontario. In the interest of streamlining approvals and encouraging industry to develop renewable energy projects, the province decreased the public's rights to access information through the *Freedom of Information and Protection of Privacy Act*. Transparency, public consultation, fairness and appeal rights have all been curtailed by the *GEA* and associated statutory and regulatory

² David J. Mullan (2001) "Essentials of Canadian Law: Administrative Law" (Toronto: Irwin Law) at Chapter 13, p.1. Note: Widely-published in the administrative law area, Professor Mullan's work is often cited by the courts, including the Supreme Court of Canada.

changes. There is consequently a strong need for Ontario to consider bolstering other sources of due process and environmental protection in the renewable energy project approvals process. The Ministry's wind and waterpower site release policies and procedures are one such source. The protections for the environment and the public interest contained therein should be upheld or increased to offset reductions elsewhere.

As described in Lake Ontario Waterkeeper's comments of November 2, 2009, one specific aspect of the site release process that requires more public participation is the pre-screening meeting stage. The Ministry's Windpower Policy requires applicants to prepare a Site Description Package (SDP) including feedback resulting from consultation with aboriginal communities, as well as maps and other detailed information about the site and the surrounding environment. Currently, the proponent is not required to consult with, or even to notify, the public at this stage.

Applicants are then required to meet with the MNR District Office to conduct a pre-screening meeting. At this meeting, the Ministry and the proponent review the SDP and coordinate the environmental assessment, approval, permitting, and information requirements with the MNR approvals process. In addition to a site review, the Ministry uses the meeting to, "identify the Ministry's land use planning interests and/or constraints and other environmental, resource, **public** or aboriginal issues that the Applicant will be required to address throughout the review process" (Windpower Procedures, s.2.4, emphasis added). A similar process is followed when the proponent wishes to proceed with the wind plant development.

In both cases, while the proponent will have notified local aboriginal communities and gathered initial responses and feedback, no notification or consultation with the general public or local non-Aboriginal communities will have occurred. The proponent and the Ministry are then required to identify "public issues" without informing or hearing from the public. This represents a significant flaw in the approvals process.

Further, there is the potential for serious conflicts of interest to arise around the Ministry's meetings with proponents. The policy and procedures documents for both wind and waterpower projects should clarify that the MNR's role is not to advise proponents on how to avoid or bypass requirements in place to protect the environment. Rather, it should be clearly stated that Ministry advice shall be restricted to procedural instructions and formatting requirements. Outside of these bounds, advice given by the Ministry to proponents on substantive aspects of an application must be subject to public scrutiny

and review. It must not occur behind closed doors, both to ensure that the public and the environment benefit from the intended protections in the approvals process, and to ensure that one proponent is not favoured over any other.

Recommendation 5: The public must be notified and provided with the opportunity to comment before the Ministry makes any decisions about site release.

Recommendation 6: The site release policies should not allow for closed-door meetings between proponents and Ministry staff outside of discussions limited to procedural aspects of a site release application.

RECOMMENDATIONS

In light of the above commentary, Lake Ontario Waterkeeper offers the following recommendations. These comments should be read in conjunction with our comments submitted November 2, 2009. We look forward to continuing to participate in this process throughout the revision period.

1. The Ministry's site release policies and procedures must require consideration of the environmental impacts of each potential project in order to protect the environment and to be consistent with the Statement of Environmental Values.
2. The site release policies should prevent cumulative impacts by addressing the density of proposed projects.
3. The MNR must consider the impacts and interactions of the IPSP while revising the site release policies.
4. Set-backs should continue to be enforced as part of the site release policies, and information about receptors should be gathered by all available means, including public consultation.
5. The public must be notified and provided with the opportunity to comment before the Ministry makes any decisions about site release.
6. The site release policies should not allow for closed-door meetings between proponents and Ministry staff outside of discussions limited to procedural aspects of a site release application.

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