



BY EMAIL AND MAIL

September 7, 2010

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Ministry of the Environment
Environmental Programs Division
Program Planning and Implementation Branch
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Dear Mr. Duffey:

Re: Renewable Energy Approval Requirements for Offshore Wind Facilities
An Overview of the Proposed Approach
EBR# 011-0089

Please find enclosed Lake Ontario Waterkeeper's comments on the Ministry's proposed offshore wind development policy. If you have any questions or concerns about these comments, please feel free to contact Joanna Bull, Counsel for Lake Ontario Waterkeeper, at 416-861-1237.

Yours truly,

Mark Mattson
Waterkeeper & President

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BACKGROUND

In 2009, the Ontario Legislature created the *Green Energy Act* (the *GEA*) and made a variety of associated changes to provincial statutes, regulations, policies, and procedures. These changes resulted in a significant restructuring of Ontario's project licensing processes, energy plans, economy, and approach to environmental protection, resulting in a reduced level of scrutiny and public participation in licensing and approvals processes under the *Ontario Water Resources Act* and the *Environmental Protection Act*.

On September 24, 2009, Ontario Regulation 359/09 (Renewable Energy Approvals under Part V.0.1) made under the *Environmental Protection Act* was introduced to provide detailed rules for *GEA* implementation. O.Reg. 359/09 classifies all offshore wind facilities as Class 5 renewable energy projects, regardless of name plate capacity or sound power level, because the turbines are located in direct contact with surface water. Due to the complexity and uncertainty surrounding the construction of industrial wind facilities in surface water, Class 5 facilities are subject to special requirements and proponents must submit reports setting out the expected environmental impacts, proposed mitigation measures, and an environmental monitoring plan.

Despite setting out additional application requirements for offshore wind projects, O.Reg. 359/09 does not address siting constraints, which may be the most important environmental consideration with respect to turbine development. In recognition of this omission, the Ministry of the Environment (MOE) is now working to finalize a policy on offshore wind siting that will lay the foundation for developing more specific requirements for these projects in the regulation. Once the policy is developed, corresponding amendments to O.Reg. 359/09 will be proposed on the Environmental Registry.

In its discussion paper (the Discussion Paper) entitled, "Off-shore Wind Facilities: Renewable Energy Approval Requirements", the MOE sets out various considerations related to the protection of human health and the environment relevant to offshore wind projects and proposes potential policy options for regulating offshore development.

One proposed policy is the establishment of an, "Offshore Exclusion Zone", or OEZ, of five kilometres for each offshore wind project. The OEZ's five kilometres would be measured from the shoreline of the Great Lake or other inland water body, including from the shoreline of "major islands". Proponents would be restricted from siting wind turbines within the OEZ, although related infrastructure, like transmission lines, will be located within the exclusion zones. The OEZ would establish a minimum setback distance; projects may be required to move more than five kilometres from shore on the basis of other concerns noted during the Renewable Energy Approval (REA) process.

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COMMENTARY

The proposed policy is a positive first step towards a provincial turbine siting process that is protective of the environment.

The Discussion Paper states that the proposed policy is intended to be, “in keeping with the government’s priority to protect human health and the environment”. It states that the proposals are meant to protect the province’s natural and cultural heritage, protect inland water bodies, including the Great Lakes, and to ensure that Ontarians enjoy safe beaches, drinking water, food, and fish. The Discussion Paper states that the proposed five kilometre Offshore Exclusion Zone will protect drinking water because most drinking water intakes are less than four kilometres from shore, so the setback will see projects generally sited at least one kilometre from an intake. Further, the five kilometre zone closest to shore will capture most recreational near and onshore activities like swimming and recreational boating. The Discussion Paper also notes that nearshore areas are particularly important biologically for many species because they are generally more diverse and productive than offshore areas.

Lake Ontario Waterkeeper appreciates this important first step towards recognition at the provincial level of the environmental impacts of improperly sited wind turbines. Turbine siting has been ignored by decision-makers in the past, with detrimental effects on the environment and on public uses of the lake. For example, during the approvals process for the Wolfe Island Wind Project near Kingston, siting issues were identified by public intervenors for a small number of the proposed turbines. Although many of the most significant problems with the project could have been addressed by adjusting turbine siting, re-siting the problematic turbines was not considered. A comprehensive provincial siting policy and associated regulations could prevent such an avoidable environmental harm in the future.

However, as recognized in the Discussion Paper, the establishment of an OEZ will not fully protect the integrity of our lakes for swimming, drinking, and fishing. Offshore areas are also important biologically, providing habitat and spawning areas for cold-water fish species. While the Discussion Paper asserts that turbine bases could create new fish habitat, that statement is not supported by scientific evidence, nor is it clear that it is common to all locations and all types of turbines. The OEZ will not correspond with shipping routes through the Great Lakes, nor will they protect “marine cultural heritage” in the form of archaeological sites.

Lake Ontario Waterkeeper supports the MOE’s efforts to protect the environmental, social, and cultural value of Ontario’s surface water. In order to complete this important work and to augment the proposed OEZ, we make the following specific recommendations:

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1. If a setback is implemented, it should be a minimum setback rather than an exclusion zone.

The Discussion Paper explains that the proposed OEZ will establish the minimum setback distance for offshore turbines. Further setbacks may be required if studies completed as part of the REA process show that a greater distance from shore is required. However, if the restriction is established as a “zone”, instead of a “minimum”, the policy may be construed or interpreted as support or approval for projects outside the exclusion zone. It seems likely that setback distances over five kilometres will only be required in exceptional circumstances. The MOE can avoid this problem with a simple change. By referring to the new policy as a minimum setback distance and making it clear that the actual setback will be determined based on the site specific, science-based review, the MOE can avoid setting five kilometres as a status quo.

Recommendation 1: Clearly identify five kilometres as a minimum setback distance subject to site specific, scientific review, rather than an exclusion zone.

2. All shorelines should trigger the proposed setbacks.

The Discussion Paper explains that the mandatory setbacks will be measured from all shorelines and “major islands”. No definition of “major island” is provided. Some of the most ecologically and culturally significant areas in Lake Ontario are the small islands in the lake, including Main Duck, Amherst, Timber, False Duck, Yorkshire, Wolfe, and Simcoe Islands. Each of these islands provides wildlife and fish habitat, and some represent the least disturbed natural areas remaining on the lake. Each deserves the same amount of protection given to the mainland.

Recommendation 2: Remove the qualifier “major”, so that the setbacks apply to all shorelines, including all island shorelines.

3. In order to ensure that the public is consulted with respect to turbine siting, the MOE should implement setbacks from other significant features in concert with those developed by the MNR.

The approval processes for energy projects conducted by the Ministry of Natural Resources (MNR) were also profoundly impacted by the introduction of the *GEA*. The MNR is responsible for the administration of Crown land in Ontario under the *Public Lands Act*, so that any developments on Crown land must receive land use approval from the Ministry. Since the beds of most lakes in Ontario are Crown land, offshore wind project proponents require approval from the MNR before they begin the MOE’s Renewable Energy Approval (REA) process.

Accordingly, the MNR has been undertaking a phased review of the process by which Crown land is made available for energy projects, including offshore wind projects, since the introduction of the *GEA*. LOW has been actively participating in the MNR's review through written comments and consultation sessions. Concurrent with the MOE's work on a setback policy, the MNR is consulting the public regarding restrictions that should be placed on wind projects sited on Crown land. Specially, the MNR is seeking input on features or "receptors" that should trigger a setback for energy project siting. Examples include navigation lanes, sensitive environmental areas, commercial fishing zones, and other "Great Lake specific considerations". LOW will be providing comments on this matter to the MNR on October 4, 2010.

As it currently stands, the MNR's site release process does not involve consultation with the public. At a consultation session in January 2010, industry representatives indicated that there should be no public consultation during site release because proponents have to notify and consult the public as part of the REA process. However, if that approach is adopted by the MNR, there will be no public consultation associated with the MNR's siting decisions and no public input regarding the identification of receptors and appropriate setbacks.

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. The preservation of the right to public notice and participation is especially important in the context of the *GEA*, 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 right 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 changes. There is consequently a strong need for Ontario to consider bolstering other sources of due process and environmental protection in the REA process.

In order to ensure that the public has the opportunity to participate in the identification of important features that should require either the minimum setback or a larger setback, these features or receptors must be part of the REA process administered by the MOE, where they will be part of the public consultation process. Since the MNR is currently developing a list of these features, the MOE may consider adopting that list as part of the REA to ensure the approvals process is consistent without compromising the public's right to participate.

Recommendation 3: The MOE's siting policy should include setbacks from important features or receptors like Important Bird Areas, ecologically sensitive areas, and designated parks.

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RECOMMENDATIONS

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

- 1. Clearly identify five kilometres as a minimum setback distance subject to site specific, scientific review, rather than an exclusion zone.**
- 2. Remove the qualifier “major”, so that the setbacks apply to all shorelines, including all island shorelines.**
- 3. The MOE’s siting policy should include setbacks from important features or receptors like Important Bird Areas, ecologically sensitive areas, and designated parks.**

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