



BY MAIL AND EMAIL

November 2, 2009

Sue Jones, Technical Officer
Ministry of Natural Resources
Natural Resource Management Division
Lands and Waters Branch
300 Water Street, Floor 5
PO Box 7000
Peterborough, ON K9J 8M5
Email: susan.jones@ontario.ca

Dear Ms Jones:

Re: 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 proposed review. 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 the 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". Lake Ontario Waterkeeper intends to participate throughout the Ministry's review process. These comments are offered in recognition that the review is at a preliminary stage and will be built upon throughout the review period.

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COMMENTARY

There are serious deficiencies in the Ministry’s “Approval and Permitting Requirements Document for Renewable Energy Projects” that should not be continued or reinforced in the site release policies.

In response to the Ministry’s EBR posting on the draft Approval and Permitting Requirements document, LOW submitted that the policy as written would create loopholes that could foster abuses of process and unfair decision-making. Section 2.2 of the document would have given the Ministry discretion to reduce the scope of approval and permitting requirements for renewable energy projects. LOW commented that renewable energy projects are already subject to a reduced review process under the *GEA*, such that the proposed reduction in s.2.2 would be a further lessening of safeguards in the review process. Further, the reductions introduced a high degree of discretion and reduced transparency. The document did not provide any decision-making criteria, require public notice or consultation, provide appeal rights to the public, or require written reasons for decisions.

The final version of the document reflects LOW’s recommendation. The section that would have given the Ministry the discretion to reduce the requirements for proponents has been removed. Instead, section 8 of the document states that, “All requirements may not need to be fulfilled for all projects based on the specific approvals required”. While this statement could be clarified further to explain why specific approvals may not be required in certain cases, the removal of complete discretion to reduce requirements is a positive change.

Unfortunately, the rest of LOW’s recommendations regarding the draft document were not implemented in the final version. LOW commented that the document reduces transparency and accountability by allowing the Ministry to approve changes to a project after the approvals process is complete. As written, the document allows proponents to consult the public on the basis of one plan, then change the plans once approvals are obtained without any further public review. This represents a blow to public participation rights and remains in the final version of the MNR document.

LOW also commented on the creation of the Renewable Energy Facilitation Office [REFO], a government staffed and funded office designed to help private, for-profit companies build energy projects. The creation of the REFO institutionalizes a profound conflict of interest

and undermines the government's ability to act as an independent regulator. LOW is particularly concerned with the language used to describe the purpose of the office: The REFO, "will assist project proponents at any stage of the approvals cycle". This language, and the associated aim to act for private interests, persists in the final version of the MNR document.

LOW further identified a failure in the document to require site plans to include non-commercial fisheries. As recreational and subsistence fisheries stand to be impacted by developments like offshore wind plants, LOW recommended the addition of a requirement for their inclusion in site plans. Though the document includes the requirement to identify fish habitat, populations, and fisheries as part of a records review, non-commercial fisheries are still excluded from site plan requirements.

While LOW recognizes that the Ministry must balance various interests when creating or amending policies, those interests should all be public. If the provincial government prioritizes private interests over public ones, its independence, accountability, and ability to protect the people of Ontario and the natural environment will be compromised. LOW submits that aspects of the Ministry's Approval and Permitting Requirements document fail to reflect sound environmental policy and could represent decreased procedural fairness in the government's decision-making process. The Ministry has an opportunity to remedy these problems through its site release policies and procedures.

The Ministry of Natural Resources must ensure that its site release policies protect the environment.

The Ministry's Windpower Policy states that, "Ontario supports clean, renewable power generation" (section 3.5). It is essential that these terms are not conflated: clean and renewable are not synonyms. Many renewable wind and water power installations cause real environmental damage. For instance, when Canadian Hydro Developers built 86 wind turbines on Wolfe Island, the company built and widened roads to allow for truck and crane access. In the process, they allowed gravel to be dumped in Big Sandy Bay Wetland, destroying wildlife habitat. Hydroelectric dams have a range of effects on rivers, including impeding navigation, flooding, mercury contamination, sedimentation and fish kills.

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The Ministry of Natural Resources has the opportunity to be a source of environmental protection in the face of the rollbacks to environmental protection introduced through the *Green Energy Act*. While the *Green Energy Act* supports industrial power developers, the MNR's role should be to provide a layer of environmental protection that is required for environmental sustainability.

There are many ways that the Ministry could strengthen environmental protection through its policies and procedures. One example is the grid cell requirement in the Windpower Policy. The Policy gives the MNR the right to limit the number of applications from any one applicant, and restricts the number of applications on one grid cell grouping to one (section 4.1). The Windpower Procedures limit 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 2.1.1).

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 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.

Bolstering environmental protection in response to rollbacks under the *GEA* would be in keeping 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.

In *Lafarge Canada v. Ontario (Environmental Review Tribunal)*, the Ontario Superior Court of Justice found that a failure to explicitly consider and apply the Statement of Environmental Values when the Ministry of the Environment 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 consider its obligation to work for ecological sustainability in any decision regarding a change to its policies and procedures.

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

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

The introduction of the *Green Energy Act* 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 changes. It is not clear that decisions about renewable energy projects made under these new and changed provisions would be upheld by the courts. 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.

Site Description Package and Pre-screening Meeting

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. 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.2.2, 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 subvert or avoid 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.

The Ministry should consult the public at each subsequent stage of this review process.

The EBR posting states that, “[a]nother posting will be made in the Fall outlining the proposed changes to site release as part of Phase 1, including identifying any additional public consultation opportunities”. Lake Ontario Waterkeeper submits that the public should be consulted at every stage of the proposed changes. While we appreciate the proactive approach taken by the Ministry in soliciting comments at this stage of the review, it is difficult to provide helpful information or research without seeing the actual proposed changes. When these changes are identified and drafted in Phase One, the public should have the opportunity to review the proposal and make comments. Pursuant to the *Environmental Bill of Rights*, the draft documents containing the proposed changes must be posted to the Environmental Registry. Lake Ontario Waterkeeper intends to comment on those draft documents, and to continue to participate throughout the review. We ask that the Ministry keep us informed of all future information and participation notices.

RECOMMENDATIONS

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.