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RENEWABLE ENERGY APPROVALS

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[1] This paper is intended to provide a general guide to the subject matter only. It does not constitute and should not be relied on for legal or other advice.

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1 INTRODUCTION

Renewable energy is one of the main planks of the Ontario Liberal government's strategy to fulfill its long-standing promise to close coal-fired electricity generation plants in Ontario by, in the most recent incarnation of that promise, 2014.

In a series of measures, starting in 2009 with the *Green Energy and Green Economy Act (GEGEA)*[3], the McGuinty government kick-started renewable energy development and generation in Ontario.

Among those measures, two are chiefly responsible for this stimulus. One is the streamlining of several approvals previously required for development into a single "Renewable Energy Approval" (REA). The other is the introduction through the Ontario Power Authority (OPA) of a feed-in tariff (FIT) that offers long-term contracts paying generous rates for renewable energy projects selling power to the grid.

This paper does not focus on the FIT save to note that it restricts solar development on prime agricultural land and requires proponents to include specified percentages of domestic, i.e Ontario, content in the goods and labour costs of their projects.

Supporters of the government's initiatives include environmentalists, in favour of the greenhouse gas emission reductions resulting from closure of coal-fired

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[3] S.O. 2009 c. 12. The *GEGEA* enacts the *Green Energy Act, 2009* and amends 15 other Acts including the *Electricity Act,* the *Ministry of Energy Act,* the *Ontario Energy Board Act*, the *Environmental Protection Act*, the *Building Code Act,* and the *Planning Act*.

generation plants, and renewable energy developers, keen to benefit from the premium rates payable under the FIT.

Detractors include NIMBYs, concerned that renewable energy projects will have an adverse effect on the use, enjoyment and resale value of their properties, municipalities, concerned at the loss of their traditional planning control powers and sceptics, unconvinced by climate change arguments and concerned about what they view as the high cost of renewable energy.

These stereotypes do not, of course, do justice to the wide range of opinion on the topic. So, for example, there are municipalities, keen to exercise their new powers under the *GEGEA* to generate renewable energy but concerned, nonetheless, at the loss of their planning powers; there are home owners concerned about both the effects of climate change and the alleged health risks of wind turbines near their homes.

2 WHAT IS A RENEWABLE ENERGY PROJECT?

The *Environmental Protection Act* defines "renewable energy project" as the "construction, installation, use, operation, changing or retiring of a renewable energy facility"[4] and "renewable energy generation facility" 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

[4] *Environmental Protection Act*, R.S.O. 1990 c. E.19 s. 1 by reference to the *Green Energy Act*, S.O. 2009 c. 12, s. 1.

and technologies as may be prescribed by regulation, but does not include an associated waste disposal site, unless the site is prescribed by regulation for the purposes of this definition" [5]

Renewable energy sources include wind, water, biomass, biogas, biofuel, solar energy, geothermal energy, tidal forces and other energy sources prescribed by regulation.[6]

Biogas is defined to include landfill gas and gas from the anaerobic digestion of biomass, source separated organics or other organic matter available at a farm operation.[7]

3 HOW WERE APPROVALS "STREAMLINED"?

The *GEGEA*

- exempted renewable energy projects, other than waterpower projects[8], from environmental assessment requirements under the *Environmental Assessment Act*
- consolidated approvals under the *Environmental Protection Act* for renewable energy projects, other than waterpower projects, into a single REA[9]
- curtailed municipal powers under the *Planning Act*[10].

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5 *Environmental Protection Act*, *supra*, section 1, by reference to *Electricity Act*, S.O. 1998, Chapter 15 Schedule A, s. 2.

6 *Electricity Act*, *ibid.* s. 2.

7 O. Reg. 160/99 Definitions and Exemptions, s. 1.

8 Waterpower projects do not require an REA; they are subject to the *Environmental Assessment Act.* Some are covered by a Class Environmental Assessment.

9 *Environmental Protection Act*, *supra*, Part V.0.1 and O. Reg. 359/09, (Renewable Energy Approvals Regulation).

The *GEGEA* amended the *Planning Act* to create a number of exemptions for renewable energy generation facilities. These exemptions include altering subsections 50(3) and 50(5) to ensure that subdivision and part lot control restrictions do not apply to renewable energy project leases between 21 and 50 years.

Most significantly, the *GEGEA* created a new section 62.0.2, which exempts renewable energy generation projects from numerous sections of the *Planning Act*, including those dealing with official plans,[11] zoning by-laws,[12] demolition control areas,[13] and development permit systems.[14]

The impact of these changes on challenges to renewable energy projects cannot be overestimated. Prior to the *GEGEA,* municipalities were considered the key review and approval body for the construction of a renewable energy project. Under the *Planning Act*, municipalities have the power to enact Official Plans and zoning by-laws to determine local planning policy and to restrict the use of land respectively.[15]

Renewable energy projects frequently required an application to the municipality to amend either or both the Official Plan and zoning by-laws. If a municipality

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[10] *Planning Act* R.S.O. 1990, c. P.13

[11] *Ibid.* at section 24.

[12] *Ibid,* Part V, *City of Toronto Act,* s. 113.

[13] *Ibid.* section 33.

[14] *Ibid.* section 70.2, *City of Toronto Act,* s. 114.

[15] *Planning Act*, R.S.O. 1990, c. P.13, sections 17 and 34.

decided that a renewable energy project was not consistent with good planning, it could refuse the application or impose conditions upon an approval. A refusal or the imposition of onerous conditions confronts a proponent with a potentially lengthy and costly appeal to the Ontario Municipal Board (OMB). Even an approval could result in a third party appeal to the OMB. In each case, the consequent cost and delay were a powerful deterrent to the project.

Because of the vulnerability of local politicians to local public opinion, detractors viewed municipal planning powers among the main weapons in the arsenal of NIMBY opponents to renewable energy projects in their neighbourhood.

The *GEGEA* also replaced the third party right of appeal to the OMB with a limited right of appeal to the Environmental Review Tribunal (ERT) against the grant of an REA. An appellant has 15 days from the date of the decision to file an appeal. A hearing can only be requested on the grounds that the renewable energy project will cause "serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment."[16] The ERT can only review an REA on these grounds. The burden is on the person requesting the hearing to prove the harm alleged.[17] This is an onerous burden that is difficult for an appellant to discharge.

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[16] *Environmental Protection Act*, *supra*, section 142.1.

[17] *Ibid.*, section 145.2.1.

4 WHAT ARE THE REQUIREMENTS FOR AN REA APPLICATION?

Requirements for an REA application are contained in Ontario Regulation (O. Reg. 359/09) (REA Regulation) as amended by Ontario Regulation (O.Reg. 521/10) on December 20, 2010 effective January 1, 2011 (Amendments).

4.1 PROJECTS THAT NEED AN REA

Most renewable energy projects need an REA. Those that do not, include: wind facilities capable of generating 3 kilowatts (kW) or less, ground-mounted solar facilities capable of generating 12 kW or less, rooftop and wall mounted solar of any size, regulated mixed anaerobic digestion facilities and anaerobic digestion facilities processing non-regulated waste on farms and water power projects. The digestion facilities are subject to a Nutrient Management Strategy[18] and waterpower projects subject to the *Environmental Assessment Act*[19].

4.2 ENVIRONMENTAL ASSESSMENT

A proponent of a renewable energy project must assess and mitigate impacts and potential environmental effects associated with the project during:

- Construction
- Design and operation

[18] under the *Nutrient Management Act, 2002*

[19] RSO 1990, c E.18. Small to medium scale waterpower projects, such as new facilities less than 200 megawatts in capacity and most waterpower facility expansion projects are covered by a Class Environmental Assessment. New facilities 200 megawatts or larger must undergo an individual Environmental Assessment.

- Decommissioning

4.3 SETBACKS

One of the trade-offs for removing municipal planning controls was the introduction in the REA Regulation of a series of setback requirements for renewable energy projects. The Amendments provide some flexibility in the consideration of noise receptors relevant to the calculation of those setbacks.

Wind facilities over 50 kW generating a noise level of 102 dBA or louder must meet a minimum 550-metre setback from buildings on used by people, such as a residence, on land where, broadly speaking, the proponent is not the owner and has not entered into an agreement with the owner.

Subject to this minimum, the setback distance is calculated according to the number of turbines at a site and the collective noise produced but may be mitigated if the proponent prepares a report in accordance with the MOE's "Noise Guidelines for Wind farms".

There is an overriding noise limit of 40 dBA (approximately the noise level in a quiet office or library) but, again, this may be mitigated where the proponent can show higher background noise levels from the road.

All turbines over 50 kW must be set back the height of the tower from properties where the landowner is not involved in the project. This can be reduced to a distance equal to the blade length plus 10 metres where there are no surrounding land use concerns. These facilities must also be set back a distance equal to blade

length plus 10 metres from the right of way for roads and railways. Additional setbacks for prescribed natural heritage features may also apply in certain circumstances.

Offshore wind facilities, originally to be part of the REA regime, have been subject to a government-imposed moratorium since February 11, 2011.

Most farm-based anaerobic digestion facilities must be set back at least 250 metres from buildings used by people. However, facilities that can meet a set of best management practices to mitigate potential odour and other impacts may qualify for a reduced setback of 125 m.

Additional setbacks are provided for designated classes of renewable energy projects within prescribed distances from a variety of natural heritage features and water bodies: including significant areas of natural and scientific interest (ANSIs), significant wetlands (northern, southern and coastal), significant valleylands, significant woodlands, significant wildlife habitat, provincial parks & conservation reserves, lakes, permanent and intermittent streams, seepage areas, and trout lakes designated by MNR.

In some cases, these setbacks can be reduced if a proponent prepares an environmental impact study and shows how monitoring and mitigation measures may mitigate any negative impacts that have been identified. Additional requirements have been set for projects to be located in the Greenbelt or on the Oak Ridges Moraine.

4.4 CONSULTATION

Project applicants must engage the public, municipal governments and Aboriginal communities in discussions about their proposed energy projects.

Nearby landowners

At an early stage of project planning, applicants must notify all landowners adjacent to or within 120 meters (550 meters for Class 3, 4 or 5 wind energy projects) of the proposed project location and place a notice in a local newspaper.

Municipal governments

Applicants must consult with the municipality (or municipalities) in which their projects would be located.

The Ministry of the Environment provides applicants with a form that outlines what to address with municipal officials. The form requests municipal feedback on matters related to

- municipal services and infrastructure such as the proposed road access
- rehabilitating areas disturbed and/or municipal infrastructure damaged during construction
- emergency management procedures/safety protocols related to the facility

Proponents must provide a draft "Project Description Report" and the municipal consultation form to the municipality at least 30 days prior to the first public meeting. Draft reports (but not the confirmation letters from other ministries) must be provided to municipalities 90 days prior to the final meeting.

Public Consultation

Applicants are required to hold a minimum of two community consultation meetings, before submitting their applications to the ministry. Notice must be given at least 30 days before the first meeting and 60 days before the final meeting. Project documents must be made available to the public in advance of these meetings.

Once the ministry accepts an REA application and has confirmed that the application meets all requirements set out in the regulation, it will be posted on the Environmental Registry, which indicates that the application is under review.

This is another opportunity for community members to submit comments on the proposed project directly to the ministry. The ministry takes all comments received into account when making decisions on project applications.

Within 10 days of the notice being posted on the Environmental Registry, applicants must make all of their application documents available to the public on their company website (or a website dedicated to the proposed project).

Applicants must also place a notice in a local newspaper informing the public of the application submission and the opportunity to submit comments on the proposed project directly to the Ministry via the Environmental Registry.

Aboriginal Consultation

Aboriginal consultation is primarily the responsibility of the Crown. However, the REA Regulation explicitly requires[20] proponents to consult with Aboriginal

[20] REA Regulation, *Supra,* section 17

communities who have constitutionally protected aboriginal or treaty rights that may be adversely impacted by the project or who may otherwise be interested in any negative environmental effects of the project. The proponent must obtain a list from the REA Director of any communities who, in the opinion of the Director, fall within these categories[21].

The Ministry of the Environment has posted a draft REA Aboriginal Consultation Guide on the Environmental Registry for public comment for 90 days from August 2, 2011.

In the meantime, the "Draft Aboriginal Consultation Guide for preparing a Renewable Energy Approval (REA) Application" serves as interim guidance to proponents of renewable energy projects in consulting with Aboriginal communities, and to give communities themselves some idea what to expect in the event they are approached by developers.

4.5 COMPLETE SUBMISSION

To allow the Ministry of the Environment to comply with its "guarantee" to process REA applications within six months, the applicant must make a "complete submission". A complete submission includes information about the applicant, a description of the project and reports showing that the applicant has complied with the environmental assessment, setback and consultation requirements.

Beyond these core reports, an applicant must show that impacts on archeological and heritage resources are identified, assessed and mitigated, as appropriate. So,

[21] REA Regulation, *Supra,* section 9

for example, the applicant must prepare an environmental effects monitoring plan in respect of birds and bats in accordance with guidelines published by the Ministry of Natural Resources (MNR)[22]. Similarly, the applicant must show that the facility meets setback requirements for significant natural heritage and water features, or, if not, document a mitigation plan. The applicant must demonstrate that the approach it has taken reduces or eliminates the negative impacts to the feature and, for significant natural heritage features, that the MNR reviewed its approach.

Various ministries co-ordinate the review of the complete submission and other permits and approvals. The government has also created the Renewable Energy Facilitation Office (REFO), an umbrella body with no regulatory responsibilities, to help guide applicants and others through the approvals and Feed-In Tariff (FIT) processes.

5 DOES REA REPLACE ALL APPROVALS?

The REA replaced some but not all provincial and municipal requirements and does not replace applicable federal requirements. This paper does not attempt to provide an exhaustive list of approvals. Other provincial approval requirements include:

[22] "Birds and Bird Habitats: Guidelines for Wind Power Projects" 2010 and the recently updated "Bats and Bat Habitats: Guidelines for Wind Power Projects" 2011

- approval from MNR under various statutes, including the *Public Lands Act*[23], the *Lakes and Rivers Improvement Act*[24], the *Endangered Species Act*[25] and the *Fish and Wildlife Conservation Act*[26]

- site release from MNR where the project is to be constructed on Crown land. The MNR is currently reviewing its policies and procedures for site release for wind and waterpower projects

- permit from the Ministry of Transportation where a project is located within the Ministry's right-of-way or where access roads to a project connect to existing public roads under the Ministry's jurisdiction

- permit from a Conservation Authority - where the project is in an area regulated by the conservation authority under the *Conservation Authorities Act*[27] and may affect the control of flooding, erosion, dynamic beaches or pollution

- permit from the Niagara Escarpment Commision for projects in an area of development control under the *Niagara Escarpment Planning and Development Act*[28]

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[23] RSO 1990, c P.43

[24] RSO 1990, c L.3

[25] SO 2007, c 6

[26] SO 1997, c 41

[27] RSO 1990, c C.27

[28] RSO 1990, c N.2

In addition, the Ontario Energy Board, which regulates the province's electricity and natural gas sectors, may have additional licensing, notice and/or approval requirements.

Examples of municipal requirements include non-planning by-laws such as municipal building permits under the provincial *Building Code Act, 1992*[29] and, more controversially, by-laws purporting to restrict renewable energy project development on grounds of harm to public health.

Potentially applicable federal approval requirement might include environmental assessment where triggered under the *Canadian Environmental Assessment Act*[30], because, say, the project is on federal land or is federally funded or because of the impact on fish habitat.

6 WHERE DOES THAT LEAVE THE OPPONENTS OF RENEWABLE ENERGY PROJECTS?

Challenges to and under the legislation have proved unsuccessful so far.

In *Hanna v. Ontario (Attorney General)*[31], an application to Ontario's Divisional Court for judicial review of the setback limits in the REA Regulation was rejected principally because the court said that an appeal to the ERT was the appropriate

[29] SO 1992, c 23

[30] SC 1992, c 37

[31] 2011 ONSC 609 (Div. Ct.) per Cunningham, A.C.J., Jennings and Aston JJ. (March 3, 2011)

forum. An application for leave to appeal to the Court of Appeal was refused without reasons in June 2011.

Erickson v. *Director, Ministry of the Environment*[32], involved an appeal to the ERT against the grant of an REA for a 20 MW wind facility in Chatham-Kent (Kent Breeze wind farm). While acknowledging that "the evidence shows that there are some risks and uncertainties associated with wind turbines that merit further research", the ERT concluded that there was not enough evidence before it to discharge the burden imposed by the REA Regulation, namely to show that the project will cause serious harm to human health.

Some municipalities have used the power granted by the *Municipal Act, 2001*[33] to pass by-laws relating to the health, safety and well being of its citizens to try to regulate renewable energy development. In essence these by-laws place the burden on the proponent to demonstrate that the project will benefit or not harm the health, safety and well-being of residents.

Ontario's *Municipal Act, 2001* explicitly states that a by-law will be inoperative if it conflicts with a provincial or federal Act, regulation, or instrument, so as to frustrate the purpose of that Act, regulation, or instrument[34]. Although inconsistent with *GEGEA's* withdrawal of municipal planning powers, it is not immediately clear that such a by-law conflicts with the legislation so as to frustrate its purpose.

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[32] (July 18, 2011), Case Nos. 10-121/10-122, per DeMarco and Muldoon, online: ERT

[33] S.O. 2001, c. 25.

[34] *Ibid,*. at s. 14.

The Supreme Court of Canada held In *Spray-Tech*[35] that a by-law that sets a more stringent standard than that required by a provincial statute might not frustrate the purposes of the provincial legislation. A by-law that requires no harm to the health, well-being and safety of residents, is arguably more stringent than the "serious harm to human health" test to be applied by the ERT.

7 CONCLUSION

Ontario's recent election returned a Liberal minority government, which suggests that its renewable energy initiatives and approval regime will continue unabated.

So, it seems, will opposition to that regime. A family in Chatham-Kent has recently commenced a civil action against the Kent Breeze wind farm alleging adverse health and other effects from the wind turbines. The action seeks damages and an injunction to shut down the wind farm.

At the end of September, the council of Arran-Elderslie passed two by-laws one imposing a set-back for wind-turbines of 2000 meters and the other relating to fire emergency response arrangements for high-angle rescues at structures higher than 45.72 meters.

It remains to be seen if these challenges will be successful and reverse the unsuccessful trend in the jurisprudence to date.

[35] 114957 Canada Ltee (Spray-Tech, Societe d'arrosage) v. Hudson (Ville), 2001 SCC 40