by Paul Manning

RENEWABLE ENERGY IN ONTARIO

Approvals and challenges

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, 2009* (GEGEA),[1] 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 article does not focus on the FIT except 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.

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"[2] 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 …"[3]

Renewable energy sources include wind, water, solar, biomass, biogas, biofuel, energy, geothermal energy, tidal forces, and other energy sources prescribed by regulation.[4]

How Were Approvals Streamlined?

The GEGEA:

- exempted renewable energy projects, other than waterpower projects,[5] 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;[6]
- curtailed municipal powers under the *Planning Act*,[7] most significantly by exempting renewable energy generation projects from numerous sections of the *Planning Act*, including those dealing with official plans,[8] zoning by-laws,[9] demolition control areas,[10] and development permit systems.[11]

The GEGEA also replaced the third party right of appeal to the Ontario Municipal Board with a limited right of appeal to the Environmental Review Tribunal (ERT) against the grant of an REA. An appellant must show that the renewable energy project will cause "serious harm to human health or serious

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1 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, 1992*, and the *Planning Act*.

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

3 *Environmental Protection Act, supra*, section 1, by reference to *Electricity Act, 1998*, S.O. 1998, c. 15, Sch. A, s. 2.

4 *Electricity Act, 1998*, *ibid*., s. 2.

5 Waterpower projects do not require an REA; they are subject to the *Environmental Assessment Act,* R.S.O. 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.

6 *Environmental Protection Act*, *supra*, Part V.0.1 and O. Reg. 359/09 as amended by O.Reg. 521/10 (Renewable Energy Approvals Regulation).

7 *Planning Act*, R.S.O. 1990, c. P.13.

8 *Ibid.*, at s. 24.

9 Note 7, *supra,* Part V, and *City of Toronto Act*, s. 113.

10 Note 7, *supra,* s. 33.

11 Note 7, *supra,* s. 70.2, and *City of Toronto Act*, s. 114.

and irreversible harm to plant life, animal life or the natural environment."[12]

Requirements for an REA Application

Most renewable energy projects need an REA. Requirements for an REA application are contained in the REA Regulation.[13]

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; and
- decommissioning.

Setbacks

The REA Regulation imposes a series of setback requirements for renewable energy projects across Ontario to replace the individual setback requirements applied by individual municipalities.

Prescribed setbacks include those for wind farms, farm-based anaerobic digestion facilities, natural heritage features, and water bodies. Additional requirements have been set for projects to be located in the Greenbelt or on the Oak Ridges Moraine.

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 metres (550 metres 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 (MOE) 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; and
- 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 public meeting.

Public consultation – Applicants are required to hold a minimum of two community consultation meetings, before submitting their applications. 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 MOE 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 MOE 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[14] proponents to consult with aboriginal 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.[15]

Complete submission

The applicant must make a "complete submission," including 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.

An applicant must also show that impacts on archeological and heritage resources are identified, assessed, and mitigated, as appropriate, and that the Ministry of Natural Resources (MNR) reviewed its approach.

Various ministries coordinate the review of the complete submission and other permits and approvals. The government has also created the Renewable Energy Facilitation Office to help guide applicants and others through the approvals and Feed-In Tariff processes.

Does REA Replace All Approvals?

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

- approval from MNR under various statutes, including the *Public Lands Act*,[16] the *Lakes and Rivers Improvement Act,*[17] the *Endangered Species Act*[18] and the *Fish and Wildlife Conservation Act;*[19]
- site release from MNR where the project is to be constructed on

12 *Environmental Protection Act*, *supra*, s. 142.1.

13 See note 6, *supra*.

14 REA Regulation, *supra*, s. 17.

15 REA Regulation, *supra*, s. 9.

16 R.S.O. 1990, c. P.43.

17 R.S.O. 1990, c. L.3.

18 S.O. 2007, c. 6.

19 S.O. 1997, c. 41.

Crown land (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*[20] and may affect the control of flooding, erosion, dynamic beaches, or pollution;
- permit from the Niagara Escarpment Commission for projects in an area of development control under the *Niagara Escarpment Planning and Development Act*.[21]

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*[22] 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*,[23] because, say, the project is on federal land or is federally funded, or because of the impact on fish habitat.

Where Does that Leave Project Opponents?

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

In *Hanna v. Ontario (Attorney General)*,[24] 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 Environmental Review Tribunal (ERT) was the appropriate 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,[25] 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*[26] to pass by-laws relating to the health, safety, and well-being of their 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.[27] 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.

The Supreme Court of Canada held in *Spray-Tech*[28] 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.

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 setback for wind-turbines of 2000 metres, and the other relating to fire emergency response arrangements for high-angle rescues at structures higher than 45.72 metres.

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

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20 R.S.O. 1990, c. C.27.

21 R.S.O. 1990, c. N.2.

22 S.O. 1992, c. 23.

23 SC 1992, c. 37.

24 2011 ONSC 609 (Div. Ct.) per Cunningham, A.C.J., Jennings and Aston JJ. (March 3, 2011).

25 (July 18, 2011), Case Nos. 10-121/10-122, per DeMarco and Muldoon, online: Environmental Review Tribunal <www.ert.gov.on.ca/english/decisions>.

26 S.O. 2001, c. 25.

27 *Ibid.*, at s. 14.

28 *114957 Canada Ltee (Spray-Tech, Societe d'arrosage) v. Hudson (Ville)*, 2001 SCC 40.