



September 3, 2012

Alyssa Cates
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Ministry of the Environment
Environmental Programs Division
Modernization of Approvals Project
Green Energy Approvals
135 St. Clair Avenue West
Toronto, ON M4V 1P5

Re: Conservation Ontario Comments on Additional Amendments to O. Reg. 359/09 (Renewable Energy Approvals under Part V.0.1 of the Environmental Protection Act) (EBR #011-6509)

Dear Ms. Cates:

Thank you for the opportunity to provide comment on “Additional Amendments to O. Reg. 359/09 (Renewable Energy Approvals under Part V.0.1 of the Environmental Protection Act)”. Conservation Ontario (CO) is the umbrella agency which represents Ontario’s 36 Conservation Authorities (CAs). Conservation Authorities, created in 1946 through the *Conservation Authorities Act*, are mandated to ensure the conservation, restoration and responsible management of Ontario’s water, land and natural habitats through programs that balance human, environmental and economic needs. Conservation Authorities support the green energy agenda and renewable energy projects in general, and recognize the need for such a mitigation strategy in response to climate change.

Although supportive of the green energy agenda, Conservation Ontario is concerned with the proposed amendments in this Environmental Registry posting. Under the auspices of reducing duplication with other requirements, through reducing natural feature setbacks and removing consideration of valleylands as natural features in the regulation, these amendments create a significant gap in the protection of natural heritage as opposed to addressing duplication with regulations. Gaps in environmental oversight may occur as one, CA regulations will not necessarily apply in all setback areas or valleylands, and two, CA regulatory authority is limited to natural hazard components for green energy proposals. Therefore, the result of these amendments may be that impacts to natural features may not have adequate environmental review.

Under the “Development, Interference and Alteration” Regulations, Conservation Authorities are empowered to regulate development and activities in or adjacent to river or stream valleys, Great Lakes and inland lakes shorelines, watercourses, hazardous lands and wetlands. If no additional hazards are

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present, CAs only regulate valleyland features that have depressional features associated with a river or stream. Therefore for valleyland features not associated with a river or stream, there would be no duplication of effort, but there would be the potential for a lack of environmental oversight.

The *Green Energy and Green Economy Act, 2009* amended Section 28(13) of the *Conservation Authorities Act* by adding subsection 13.1 “Grounds for refusing permission”. The amendment removes the ability of an Authority to refuse permission for “...development related to a renewable energy project” on grounds other than control of pollution, flooding, erosion or dynamic beaches, or to impose conditions relating to same. This specifically excluded “conservation of land” as grounds for refusal and for imposing conditions on a permission. “Conservation of land” is not defined in the *Conservation Authorities Act* or regulation, but it has been interpreted in judiciary proceedings. A working interpretation of “conservation of land” is “the protection, management, or restoration of lands within the watershed ecosystem for the purpose of maintaining or enhancing the natural features and hydrologic and ecological functions within the watershed”. This interpretation ensures the protection of natural features is only considered within the context of maintaining hydrologic and ecological functions within the watershed. To reiterate, the test of “conservation of land” cannot be used as grounds for the refusal of a CA permission.

Conservation Ontario has a desire to work with the province to identify strategies to provide flexibility to proponents of renewable energy projects, increase public transparency and align application requirements with the anticipated environmental impacts of a project. CO does not support taking these steps in a piecemeal fashion. There is a need for better coordination of renewable energy approvals; but the Ministry of Natural Resource’s suggestion that these amendments will result in a streamlined process may not be the case. In advance of amending legislation, a review of all existing legislation and regulations affecting renewable energy approvals should be undertaken. The goal of this review should be to identify a systems-approach to managing these approvals, which focuses on the triple-bottom line. This process should also focus on proponent certainty, to ensure that all aspects of the regulatory regime are complementary. At present, these proposed amendments do not appear to meet those goals.

Conservation Ontario provides the following comments related to the Proposed Natural Heritage Amendments.

#1 Reduce natural feature setbacks from 120 metres to 50 metres for the generation components of ground mount solar projects (e.g. panels).

The existing Ontario Regulation 359/09 setbacks are consistent with the standards prescribed through the Provincial Policy Statement (PPS) for other types of development. While it is acknowledged that these amendments are being brought forward after review of 120+ applications, there has been no justification provided as to why the standards should be reduced for green energy development. It is felt that solar projects have the potential to impact natural features even if setback further than 50 m. Under the *Green Energy and Green Economy Act* traditional approvals under the *Planning Act* do not apply. In some cases, the scale of development is similar to those typically requiring planning approvals, so justification should be provided as to why green energy approvals should require different setbacks than more ‘traditional’ development.

Given the limited regulatory scope for CAs and municipalities under the *Green Energy and Green Economy Act* and the *Environmental Assessment Act*, concern has been raised about a lack of regulatory oversight, and it is necessary to demonstrate to the public why the reduced setbacks may be appropriate. These current standard setbacks have been supported by the Ministry of Natural Resources and the development industry and are widely understood in planning policy. A review of the science should be undertaken prior to the province making changes to the regulation, to demonstrate why this is not setting a dangerous precedent for all other forms of development.

Conservation Authorities role in the development process is to ensure that decisions are informed by the best watershed science available. CAs have made a concerted effort to ensure that their regulatory efforts under the *Conservation Authorities Act* are complementary to other approvals, such as those under the *Planning Act*. Therefore, CO is concerned that the setback requirements in this proposed amendment may be contrary to what is included under the *Conservation Authorities Act*. For example, CA regulations prescribe a 120 metre area of interference for provincially significant wetlands and between 30 and 120 metres for other wetlands. Disregarding the standard setbacks may be counterproductive as it creates the ability to advance projects (and associated expenditures) that will ultimately be hampered at the design/implementation stage. This amendment may increase proponent uncertainty and result in costly delays and revisions to the project.

#2 Reduce setbacks from 120 metres to 50 metres where there is an expansion of existing infrastructure (e.g. roads and transformer stations) or construction and installation of new transmission or distribution lines.

In addition to the comments outlined above, Conservation Ontario has concerns that a reduced setback from 120 metres to 50 metres for an expansion of existing infrastructure or construction and installation of new transmission or distribution lines may increase the potential for negative environmental impacts on the adjacent environmental feature. This is of particular importance in locations such as south-western Ontario where the natural features are already fragmented and development of green energy proposals has been concentrated. The assumption that the existing infrastructure does not impact on an environmental feature may eliminate the possibility to explore offsetting any negative impacts of infrastructure expansion or the cumulative impact of the development on the feature. This seems to be contrary to the spirit of the *Green Energy and Green Economy Act*.

#3 Remove consideration of valleylands as natural features in the regulation (no setback or assessment requirement).

As described in the opening of the letter, there are limitations associated with the application of the *Conservation Authorities Act* to green energy proposals. This calls into question how much duplication of effort is actually occurring through the review of these projects. For example, CA hazard regulations will not necessarily apply in all valleylands and CAs cannot review impacts to the natural heritage as a result of “conservation of land” considerations not applying. Compound this with a lack of PPS natural heritage review and there is potential for environmental harm to valleyland features, (including slope stability, watercourses and other environmental features).

Removing valleylands as land use feature represents a significant deviation from established planning practices for other types of development. These features are important from both a hydrological and ecological perspective. Furthermore, the evaluation of potential natural hazard impacts as a result of proposed development (such as is the case for a CA permit) does not equate to review of potential impacts to natural heritage features. Therefore, they should not be interpreted as parallel considerations.

#4 Align REA regulation development prohibitions for provincially significant southern and provincially significant coastal wetlands with Provincial Policy Statement direction under the Planning Act of infrastructure by allowing new transmission and distribution lines, and changes to existing infrastructure (e.g. roads, transmissions) in these natural features subject to the completion of an environmental impact study.

Contrary to what is indicated in the posting, this proposed amendment is inconsistent with the most recent provincial policy direction. For example, one of the stated aims of the proposed Great Lakes Protection Act is “to protect shorelines, coastal areas and wetlands”. The Draft Great Lakes Strategy indicates that “Protection of coastal wetlands provides even higher economic return ratios while helping to sustain Great Lakes ecosystem health”. In describing great lakes wetlands, the strategy indicates that “The protection of our wetlands has been strengthened by recent changes to provincial policies, regulations, and legislation” and furthermore, that through the proposed Act, that the government will pursue stronger protection for coastal wetlands during the PPS 5 Year review. Conservation Ontario supports the protection of all remaining coastal wetlands of any size or class. The health of coastal wetlands is crucial for many species and their survival as these areas provide breeding and rearing habitat, refuge, and foraging opportunities for many native species, including threatened and endangered species. There is concern that these proposed amendments will further jeopardize the protection of Ontario’s limited coastal wetlands.

Additionally, the proposed amendments do not appear to align with the Provincial Policy Statement. For example, given the intent to align the REA with the PPS, the PPS “Transportation and Infrastructure Corridors” section (1.6.6.4) states that “when planning for corridors and rights-of-way for significant transportation and *infrastructure* facilities, consideration will be given to the significant resources in Section 2: Wise Use and Management of Resources”. In addition, section 2.1.3 indicates that “Development and site alteration shall not be permitted in: a) significant habitat of endangered species and threatened species; b) significant wetlands in Ecoregions 5E, 6E and 7E; and c) significant coastal wetlands” with development specifically excluding “activities that create or maintain infrastructure authorized under an **environmental assessment process**”. Since no environmental assessment process is required under REA, this type of infrastructure development would not meet the definition to be excluded from the prohibition for development. An environmental impact study is not the equivalent of an environmental assessment process.

Conservation Ontario disagrees with the potential for intrusion of infrastructure into provincially significant wetland and provincially significant coastal wetlands by realigning the REA regulation development provisions as proposed. While the *Planning Act* does allow in limited circumstances for infrastructure to be located within these features, this infrastructure is generally public infrastructure, which will benefit the surrounding community. In the case of green energy proposals, some of the infrastructure, such as on-site transmission and distribution lines and roads are not owned by the public

and will only be subject to a short-term lease. This appears to be contrary to the vision in Section 2.1.1 of the PPS which indicates that “Natural features and areas shall be protected for the long term”.

As previously described, this proposed amendment may not be complementary to the *Conservation Authorities Act*, as a CA may feel that they cannot issue a permit for development in a significant wetland or significant coastal wetland due to the potential impact on the control of flooding, erosion, pollution or dynamic beaches. This lack of cohesive vision could result in a disservice to green energy proponents.

#5 Administrative policies to clarify the site investigation and evaluation of significance requirements of the REA regulation by removing the requirement to identify the function, attributes and composition of a feature during the site investigation.

Should the province elect to amend this Section 26 of Ontario Regulation 359/09 to remove the requirement to identify the function, attributes and composition of a feature during the site investigation, it is recommended that Section 27 of O. Reg. 359/09 also be amended to include the need to identify the function, attributes and composition of the feature during the “Evaluation of Significance” phase. This would reflect the province’s goal to focus studies during the site investigation stage of the project to solely identifying features and boundaries, but would not lose the environmental rigour of conducting appropriate evaluations of significance should the proponent elect to locate work within the proposed setback.

Caution should be given to proponents who choose to only identify the features and boundaries on a property, as there may be instances where the function, attributes and composition of a feature during the site investigation may be warranted. For example, boundary delineation may not always be sufficient given drainage impacts to wetlands.

The importance of identifying the function, attributes and composition of a feature during the site investigation may also be heightened should the province elect to proceed with reduced or eliminated setbacks as per proposed amendments #1-3. Impacts of major construction and site alterations such as roadways on surface and groundwater resources and areas adjacent to wetlands, for example, are not necessarily confined to 50 m setback areas. In this case, this amendment may be counterproductive as it creates the ability to advance projects (and associated expenditures) that will ultimately be hampered at the implementation/design stage.

Conclusion

Conservation Ontario reiterates the desire to work with the province to achieve the goals of identifying strategies to provide flexibility to proponents of renewable energy projects, increase public transparency and align application requirements with the anticipated environment impacts of projects. There is a need for better coordination of approvals however, this coordination of approvals should only commence once a review of all existing legislation and regulations affecting renewable energy projects have been undertaken. The goal of this review should be to streamline processes and to establish a mutually supportive policy framework which balances economic, social and environmental needs.

As described, the assertion that currently there is duplication of regulatory effort may not be the case. Conservation Authority regulations will not apply in all cases to valleyland features and CAs cannot apply the test of “conservation of land” to renewable energy applications. A review of a proposal from a natural hazards perspective should not be considered equivalent to the review of the impacts to natural heritage features. Therefore, there is a potential for gaps in environmental oversight to occur as a result of these proposed amendments.

Conservation Authorities have endeavoured to ensure that their regulatory efforts under the *Conservation Authorities Act* are complementary to other approvals. The proposed amendments to the minimum setback requirements may be contrary to what is outlined in the *Conservation Authorities Act*. Reducing the standard setbacks appears to be counterproductive for proponents and does not create the mutually supportive policy framework which is required to truly advance the Green Economy.

Conservation Ontario is keen to work with the province to come up with collaborative solutions for streamlining approvals in the context of a balance of economic, social and environmental concerns. Should there be any questions about the enclosed, please do not hesitate to contact me at extension 228.

Sincerely,



Leslie Rich
Policy and Planning Officer

c.c. All Conservation Authority CAOs/GMs
Environmental Commissioner’s Office