

RENEWABLE ENERGY APPROVALS UNDER PART V.0.1 OF THE ENVIRONMENTAL PROTECTION ACT (“EPA”) - AMENDMENTS TO REGULATION 359/09 UNDER THE EPA BY REGULATION 521/10 - WITH EMPHASIS ON WIND PROJECTS

Regulation 359/09, made September 24, 2009 to implement the Renewable Energy Approval (“REA”) process provided for by Part V.0.1 of the EPA, has been amended by Regulation 521/10, filed with the Registrar of Regulations and posted on the Environmental Registry December 20, 2010 to be effective January 1, 2011.

Because Regulation 521/10 was posted only as of December 20, 2010 and is to take effect January 1, 2011, there is only a very limited “window” within which a proponent can publish a project proposal notice on or before December 31, 2010. A proponent who has published a project proposal notice on or before December 31, 2010, has the option, as detailed hereafter, of having Part IV, including Table 1, of Regulation 359/09, as it existed prior to amendment, continue to apply to the project, or of having provisions of the amendments effected by Regulation 521/10 apply to the project by providing notice of such election to the Director as part of the application for a REA.

Background

Regulation 359/09 was made September 24, 2009 to implement the Renewable Energy Approval process created by amendments to the EPA made by the *Green Energy & Green Economy Act*, 2009. On October 7, 2010 the Ministry of the Environment (“MOE”) posted proposed amendments to Regulation 359/09 on the Environmental Registry for a 45 day period with comments to be received by November 21, 2010. By Regulation 521/10, filed with the Registrar of Regulations and posted on the Environmental Registry December 20, 2010 to be effective January 1, 2011 (the “Amendment”), amendments were made to Regulation 359/09.

The text that follows highlights specific provisions of the Amendment.

Definition of Noise Receptor – “Dwelling”

The Amendment changes the definition of noise receptor by replacing “overnight accommodation” with “dwelling”, a new defined term specifying a location capable of being used as permanent or seasonal residence with cooking, eating, living, sleeping and sanitary facilities.

Vacant Lots – Changed Location From Centre of Lot

The Amendment changes the location identified as a noise receptor for a vacant lot from the centre of such a lot to a location where a building would normally be located, having regard to the existing zoning by-laws and typical building patterns in the area and is consistent with the MOE *Noise Guidelines for Wind Farms*. The Amendment also adds a defined term “inaccessible vacant lot” which is utilized to specify that the noise receptor location on a vacant lot is limited to a vacant lot other than an inaccessible vacant lot.

Noise Receptors To Be Determined As Of Application For REA – Option To Issue Draft Site Plan

The Amendment changes the time at which all noise receptors must be identified and considered, for purposes of the wind turbine setback prohibitions, from the time of construction to the time a draft site plan is issued. The Amendment also provides proponents the option of issuing a draft site plan with the proposed location of wind turbines set out and provides that such draft site plan will expire 6 months after publication unless the proponent makes an application for a REA within that 6 months or unless the Director extends the 6 month period, upon written application made within the 6 month period, if the Director is satisfied that the proponent cannot submit an application for a REA within the 6 month period due to circumstances beyond the control of the proponent. This requirement to consider all noise receptors at the time the site plan is made public also applies to projects that have made a site plan publicly available prior to the Amendment coming into force.

Cumulative Noise Assessment

The Amendment requires proponents to consider all existing and publicly known wind turbine projects with sound power level equal to or greater than 102 dBA within a 3 km radius of a noise receptor when considering the proponent's site plan and complying with noise setback requirements.

Public Notification Of Meetings

The Amendment requires public notice 30 days prior to the first public meeting and 60 days prior to the final public meeting.

Public Notification Of Renewable Energy Projects

The Amendment requires written notice of a project to all adjacent landowners in addition to all landowners within 550 metres of the project location in respect of a Class 3, 4 or 5 wind energy project.

Public Notification Of Application For A REA

The Amendment requires a proponent to post all documents that accompany a REA application on the proponent's website within 10 days of the proponent's application being posted on the Environmental Registry and, within the same time period, requires the proponent to provide public notice of the application being accepted for review by the MOE by way of publication of a newspaper notice containing specified information.

Wind Turbine Specifications Report – “Measurement Uncertainty Value” and “Tonality”

The Amendment requires that the wind turbine specification report for Class 3, 4 or 5 wind projects include acoustic emissions data in accordance with Canadian Standards Association

standards and changes the term “Uncertainty Value” to “Measurement Uncertainty Value” and adds the term “Tonality” to the specification report requirements.

Bird And Bat Monitoring Plan

The Amendment requires proponents of Class 3, 4 and 5 wind projects to complete an environmental effects monitoring plan for birds and bats with the plan to be prepared in accordance with “Birds and Bird Habitats: Guidelines for Wind Power Projects” dated October 2010, as amended from time to time and available from the Ministry of Natural Resources (“MNR”) and “Bats and Bat Habitats: Guidelines for Wind Projects” dated March 2010, as amended from time to time and available from the MNR. Both Guidelines have been posted on the Environmental Registry. The comment period on the Bird Guidelines expired December 20, 2010 while the comment period on the Bat Guidelines expired May 28, 2010. Neither Guideline has been finalized but the criteria and procedures identified in both Guidelines are deemed acceptable to MNR as interim direction until final Guidelines are approved.

Director Discretion

The Amendment provides discretion to the Director in terms of the specific requirements contained in Part IV of Regulation 359/09, including Table 1, if the Director is of the opinion that failure to comply with the requirements will not compromise an adequate understanding of the negative environmental effects of engaging in the renewable energy project or if the Director is of the opinion that failure to comply with such requirements will improve consultation respecting the project.

Transition Provisions – Grandfather Part IV If Prior Project Proposal Notice With Option To Elect To Have Amended Provisions Apply

The Amendment provides that a proponent who has published a project proposal notice on or before December 31, 2010 has flexibility to have Part IV, including Table 1, as same existed prior to the Amendment, continue to apply to the proponent’s project or to elect to have one or more provisions of Part IV, including Table 1, amended by the Amendment apply to the project, provided the proponent gives notice of the election to the Director as part of the application for a REA.

The Amendment, further, provides that a proponent who has published a project proposal notice on or before December 31, 2010 may elect to have the sections of the Amendment that refer to the bird and bat monitoring plan requirement apply to the proponent’s project by giving notice of the election to the Director as part of the application for a REA.

The Amendment further provides that a proponent who has published a project proposal notice on or before December 31, 2010 has flexibility to have the definition of “woodland” as same existed prior to the Amendment continue to apply to the proponent’s project or to have the definition of “woodland” as amended by the Amendment apply to the proponent’s project by giving notice of the election to the Director as part of the application for a REA.

The Amendment further provides that a proponent who has published a project proposal notice on or before December 31, 2010 may also elect to have the definition of noise receptor in respect of vacant lots, as same existed prior to the Amendment, continue to apply to the proponent's project by giving notice of the election to the Director as part of the application for a REA.