

Ministry
of the
Environment

135 St. Clair Avenue West
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Ministère
de
l'Environnement

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DEC 21 2006

RECEIVED DEC 22 2006

Ms. Michelle Swenarchuk, Executive Director and
Canadian Environmental Law Association
130 Spadina Avenue, Suite 301
Toronto, ON M5V 2L4

And

— Mr. Richard D. Lindgren, Counsel
Canadian Environmental Law Association
130 Spadina Avenue, Suite 301
Toronto, ON M5V 2L4

Dear Ms Swenarchuk and Mr. Lindgren:

Pursuant to Section 62 of the *Environmental Bill of Rights, 1993* (EBR), on June 22, 2006 my ministry received your Application for Review pursuant to Section 61 of Part IV of the EBR. The application makes a request for a review of Ontario Regulation 276/06: *Designation and Exemption of the Integrated Power System Plan (IPSP)* ('the regulation'). In accordance with Section 117 of the EBR the Minister has delegated her decision making authority on this matter to me.

After careful consideration of the request, in accordance with sections 67 and 68(1) of the EBR, I am with this letter providing notice in accordance with Section 70 of the EBR that I have decided that the public interest does not warrant a review of the regulation. The reasons for my decision are detailed in the attached document. In summary, my decision is based on the following:

- Section 16 of the EBR includes an exception to the requirement to post a regulation made under the *Environmental Assessment Act* (EAA) if it is predominantly financial or administrative in nature.
- The regulation is administrative in nature. It confirms that the EAA does not apply to the IPSP. It also confirms the legislative framework in the *Electricity Act, 1998*. The EAA applies only to undertakings of Her Majesty the Queen and public bodies. The IPSP is being prepared by the Ontario Power Authority (OPA). The *Electricity Act, 1998* specifically provides that the OPA is not a Crown agent for any purpose. Therefore, the OPA's activity of developing the IPSP is not subject to the EAA. The regulation simply confirms this.

Ms. Michelle Swenarchuk & Mr. Richard D. Lindgren

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- The regulation was made in the last five years and was made in a manner that is consistent with the intent and purpose of Part II of the EBR (i.e. it was administrative in nature).

Thank you for your application for review.

Yours truly,



John Lieou
Assistant Deputy Minister
Integrated Environmental Planning Division
Ministry of the Environment

c: Gord Miller, Environmental Commissioner of Ontario
Peter Lapp
Jim Lewis
Cathy Clarke

attachment

Environmental Bill of Rights, 1993 Application for Review
Review Summary

EBRO File No.: 06EBR006.R

Issue: The applicants have requested that the Ministry of the Environment (Ministry) undertake a review of Ontario Regulation 276/06: Designation and Exemption of the Integrated Power System Plan (IPSP).

Review Recommendations:

The Assistant Deputy Minister (ADM), Integrated Environmental Planning Division has completed the preliminary consideration of the application for review. After careful consideration of the request, and in light of Section 67 and 68(1) of the *Environmental Bill of Rights, 1993* (EBR), the ADM has concluded that a review is not warranted.

In accordance with Section 117 of the EBR, the Minister has delegated her power to make decisions regarding applications for review to the ADM.

Background:

S. 61(1) of the EBR reads,

"Any two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister."

The application for review, submitted by Michelle Swenarchuk and Richard D. Lindgren, was received by the Ministry on June 22, 2006. The application specifically identifies Ontario Regulation 276/06 made under the *Environmental Assessment Act* (EAA) as the regulation for which a review is requested.

Overview of Regulation

Ontario Regulation 276/06 ('the regulation') was approved by the Lieutenant Governor in Council on June 12, 2006. The regulation designates then exempts the IPSP from the requirements of Part II of the EAA, and exempts all Crown activities related to an IPSP from the requirements of Part II of the EAA.

The EAA applies only to undertakings of Her Majesty the Queen and public bodies. The IPSP is being prepared by the Ontario Power Authority (OPA). The *Electricity Act, 1998*

specifically provides that the OPA is not a Crown agent for any purpose. Therefore, it was necessary to first designate the IPSP subject to the EAA as it is not an undertaking that is subject to the EAA, and therefore could not be exempted without first designating it.

The regulation was posted on the government's e-laws website on June 14, 2006 after it was filed with the registrar on June 12, 2006. Even though posting the regulation was not a requirement of the EBR, the regulation was posted on the Environmental Registry for information purposes on June 15, 2006. On June 20, 2006, the information notice was revised to provide the public with a 30-day comment period.

Summary of the Request

The request for review was premised on three grounds, including:

1. The regulation was not subject to public notice and comment requirements and therefore was made in contravention of Part II of the EBR;
2. The regulation does not represent sound environmental planning and is contrary to the public interest; and,
3. The regulation is deficient because it fails to impose any terms and conditions upon the proponent to ensure that the IPSP is: developed with meaningful public input; and, that it adequately identifies, analyses, and mitigates any potential impacts on the environment.

EBR S. 67 Preliminary Consideration

S. 67(1) of the EBR reads,

"The minister shall consider each application for review in a preliminary way to determine whether the public interest warrants a review in his or her ministry of matters raised in the application."

S. 67(2) of the EBR reads,

"In determining whether the public interest warrants a review, the minister may consider,

- (a) the ministry statement of environmental values;*
- (b) the potential for harm to the environment if the review applied for is not undertaken;*
- (c) the fact that matters sought to be reviewed are otherwise subject to periodic review;*
- (d) any social, economic, scientific or other evidence that the minister considers relevant;*
- (e) any submission from a person who received a notice under section 66;*
- (f) the resources required to conduct the review; and*
- (g) any other matter the minister considers relevant.*

S. 67(2)(a) "the ministry statement of environmental values"

The Statement of Environmental Values was considered during this assessment of the application for a review.

S. 67(2)(b) "the potential for harm to the environment if the review applied for is not undertaken"

Section 16(1) of the EBR states:

"If a minister considers that a proposal under consideration in his or her ministry for a regulation under a prescribed Act could, if implemented, have a significant effect on the environment, the minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented".

However Section 16(2) provides an exception:

"Subsection (1) does not apply to a regulation that is predominantly financial or administrative in nature".

Prior to making the regulation the Minister considered Part II of the EBR, including Section 16. Because the regulation is administrative in nature it was exempted from the proposal posting requirements of the EBR.

The regulation simply confirms the application of the EAA as it applies to the IPSP and the legislative framework in the *Electricity Act, 1998* insofar as the OPA is not a public body or a Crown agent. Therefore, its activity of developing the IPSP is not subject to the EAA.

Given the above, the IPSP would not be subject to Part II of the EAA regardless of whether or not the regulation was made.

The applicants provided no new evidence of a potential for harm to the environment from implementing the regulation.

S. 67(2)(c) "the fact that matters sought to be reviewed are otherwise subject to periodic review"

The matters sought to be reviewed are not subject to periodic review.

S. 67(2)(d) "any social, economic, scientific or other evidence that the minister considers relevant"

Given the fact that the regulation is administrative in nature inasmuch as it confirmed the existing application of the EAA in relation to the IPSP, no social, economic,

scientific or other evidence was considered relevant in the preliminary consideration of the application for review.

S. 67(2)(e) "any submission from a person who received a notice under Section 66"

A notice under Section 66 was not warranted in this case.

S. 67(2)(f) "the resources required to conduct the review"

The resources required to conduct a review were not considered to be a determining factor with respect to the conclusion not to review the regulation.

S. 67(2)(g) "any other matter the minister considers relevant"

During the preliminary consideration of the application for review, the ADM considered Ontario Regulation 277/06 made under the *Electricity Act, 1998* and the process it requires the Ontario Power Authority (OPA) to undertake in developing the IPSP.

The regulation requires the OPA to consult with affected stakeholders. The regulation also requires the OPA to provide a sound rationale, including an analysis of the impact on the environment of any electricity project, and an analysis of the impacts on the environment of a reasonable range of alternatives to projects requiring an environmental assessment within five years of the completion of the IPSP. In addition, the OPA is required to develop and submit an IPSP every three years to the Ontario Energy Board (OEB). This will ensure that current energy needs are reflected in the OPA's energy plan.

Once the OEB receives the IPSP for review and approval, it will seek submissions from those who are interested in participating in the review process. The OEB will hold public hearings as part of its consideration and review of the IPSP.

EBR S. 68

Ss. 68(1) of the EBR states,

"For the purposes of ss. 67(1), a minister shall not determine that the public interest warrants a review of a decision made during the five years preceding the date of the application for review if the decision was made in a manner that the minister considers consistent with the intent and purpose of Part II."

The regulation that is the subject of the Application for Review was made on June 12, 2006. In addition to the preceding preliminary considerations, given the fact that the decision to make the regulation was made in a manner that is consistent with the intent and purpose of Part II of the EBR, (i.e. it was administrative in nature) Section 68(1) of the EBR applies to this application.

Conclusion

Based on the preliminary consideration required by Section 67(1) of the EBR and the prohibition provided in Section 68(1), the ADM has concluded that the public interest does not warrant a review of Ontario Regulation 276/06.