



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

January 8, 2007

BY FAX

Gord Miller
Environmental Commissioner of Ontario
1075 Bay Street, Suite 605
Toronto, Ontario
M5S 2B1

Dear Mr. Miller:

**RE: O.REG. 276/06: E.A. EXEMPTION FOR ONTARIO'S INTEGRATED POWER
SYSTEM PLAN
EBR APPLICATION FOR REVIEW FILE # R2006004**

On November 7, 2006, we wrote to you to object to the ongoing failure by the Ministry of the Environment (MOE) to file its response to the above-noted EBR Application for Review within the timeframe prescribed under the EBR. In particular, the prescribed deadline for the MOE's response in this case was August 21, 2006, but the MOE failed to meet this statutory requirement.

We subsequently received a letter from your office dated December 6, 2006, in which ECO counsel David McRobert indicates that your office shared CELA's concerns regarding the process delays, and that your office had contacted the MOE about its overdue response to the EBR application.

On December 22, 2006, approximately four months after the prescribed deadline, we finally received a copy of the MOE response from Assistant Deputy Minister John Lieou in a letter dated December 21, 2006. This MOE response arrived at CELA after our office had closed for the holidays, and, coincidentally, just after the Ontario Legislature had adjourned for the holidays.

In the circumstances, we strongly suspect that the curious timing of the delivery of the MOE response was motivated by an ill-advised attempt to minimize timely opportunities for public, media and political scrutiny of the MOE's bizarre position on this controversial matter.

In addition, we note that neither Mr. Lieou's cover letter, nor the attached "review summary," actually addresses or explains why the MOE missed the prescribed deadline by approximately four months.

In our view, the MOE's dilatory response to CELA's EBR Application for Review clearly represents serious non-compliance with section 70 of the EBR, which prescribes a 60 day deadline for the MOE's response. In addition, we view this unexplained and inexcusable delay as a continuation of the MOE's non-compliance with the EBR when O.Reg.276/06 was

originally passed in contravention of mandatory EBR requirements for public notice and comment. Moreover, we are in complete agreement with Mr. McRobert's statement in the December 6th letter to CELA that "such delays frustrate the public interest, undermine the EBR, and hamper the Commissioner's ability to report to the Legislature."

Aside from the questionable timing of the MOE response, CELA also strongly objects to the vacuous content of the MOE response. In our view, the MOE response is unacceptable, unpersuasive and unresponsive to the issues and concerns raised in CELA's EBR Application for Review. Similarly, it appears that the MOE's "reasons" for refusing to conduct the requested review are precisely the same reasons that you correctly rejected in your June 19, 2006 press release.

For example, Mr. Lieou's cover letter repeats the MOE's specious claims that the regulation is merely "administrative" in nature, and that the regulation was made in a manner that was "consistent" with the purpose and intent of Part II of the EBR. These claims cannot be sustained or taken seriously, and your June 19th press release properly notes that:

This is the first regulation under the Environmental Assessment Act that has not been posted on the Environmental Registry for public review and comment in the 12-year history of the Environmental Bill of Rights. This decision goes against the whole principle of governmental accountability and transparency enshrined in the Act. Exempting the province's long-term electricity plans from the environmental assessment process – to consider the possible impacts of those plans – is clearly environmentally significant and should have been posted on the Registry for public comment.

Given the MOE's reliance upon discredited and unsupportable claims about the nature of the regulation, we cannot accept Mr. Lieou's assurance that CELA's EBR application was "carefully considered" when the MOE decided against conducting the requested review. Indeed, the paucity of detail in the MOE response, the lack of any credible policy analysis, and the MOE's circular legal reasoning (i.e. the IPSP was never subject to the EA Act, but had to be designated in order to be exempted) collectively suggest to CELA that the issues raised in the EBR Application for Review were not "carefully considered"; instead, they were largely ignored or glossed over for what appear to be purely political considerations.

Similarly, in relation to CELA's concern about the MOE's non-compliance with its Statement of Environmental Values (SEV), the MOE's "review summary" baldly asserts, without elaboration or proof, that the SEV was considered during the consideration of the EBR Application for Review. In the absence of any explanation or evidence demonstrating how this was done, CELA submits that the MOE's self-serving claim should be wholly rejected by your office.

More fundamentally, CELA submits that the governmental accountability and public participation objectives of the EBR are seriously undermined if a prescribed Ministry is permitted to file unsubstantiated drivel as its "response" to a duly filed and detailed EBR Application for Review.

As you know, the province's long-term electricity planning exercise – which O.Reg.276/06 purports to exempt from coverage under the *Environmental Assessment Act* (EA Act) – is a matter of considerable public interest and profound environmental significance. More importantly, as the MOE delayed its response to CELA's EBR Application for Review, the Ontario Power Authority (OPA) continued to develop the components of the Integrated Power System Plan in accordance with directives from the Minister of Energy, but outside of the EA Act.

In this regard, we note that over the holidays, the Ontario Energy Board (OEB) quietly released its *Report of the Board on the Review of, and the Filing Guidelines Applicable to, the Ontario Power Authority's Integrated Power System Plan and Procurement Processes* (December 27, 2006). Our review of this Report confirms CELA's concern that the forthcoming OEB proceedings will not constitute an acceptable substitute for EA Act coverage because, among other things, the OEB proceedings do not appear to envision serious examination (or re-visiting) of the goals, alternatives, and underlying assumptions of the IPSP submitted by the OPA.

For the foregoing reasons, we regard this as an extremely urgent situation which warrants your immediate intervention to uphold the integrity of the EBR, and to ensure governmental accountability for its acts and omissions in relation to O.Reg.276/06. Accordingly, we hereby request that your office immediately prepare and issue a Special Report under section 58(4) of the EBR.

It is our understanding that your next Annual Report is not due until October 2007. However, because the next provincial election will be occurring at that time, it is reasonable to anticipate that your next Annual Report may be delayed pending the post-election return of the Ontario Legislature. In addition, this matter may be effectively moot by that time if the IPSP has been completed and submitted to the OEB for review and approval. Therefore, this matter should not be deferred to your next Annual Report, and we submit that a Special Report in this case is both necessary and desirable in order to ensure governmental accountability in a timely manner.

We would also point out that although the EBR has been in effect for over a decade, surprisingly few Special Reports have been released over the years. In our view, the Special Report is a potent tool that is tailor-made for situations such as the instant case, where the MOE has consistently failed to comply with its EBR obligations in relation to the largest, costliest and most environmentally significant energy infrastructure decision in Ontario's history.

Please contact the undersigned if you have further questions or comments, and we look forward to your reply to this request for a Special Report.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Richard D. Lindgren
Counsel

cc. Mark Winfield, Pembina
Jose Etcheverry, David Suzuki Foundation
Shawn-Patrick Stensil, Greenpeace Canada



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FAX COVER SHEET

DATE: January 8, 2007

TO:	ORGANIZATION/FIRM	FAX NUMBER	
Gord Miller	Environmental Commissioner of Ontario	416	325-3370

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Total number of pages (including cover sheet) - 5

Operator: RL

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MESSAGE

Please see attached letter dated January 8, 2007.