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ONTARIO'S RENEWABLE ENERGY APPROVAL REGULATIONS NOW IN FORCE NEW REGULATIONS AIMED AT STREAMLINING ENVIRONMENTAL APPROVALS PROCESS FOR RENEWABLE ENERGY PROJECTS

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Over the month of September, 2009, the government of Ontario introduced a total of 16 regulations under the *Green Energy and Green Economy Act, 2009* ("GEA"). Spanning a wide range of renewable energy issues and affecting 9 separate pieces of legislation, the new regulations form an integral part of the Ontario Government's plan to facilitate investment and create jobs in the green economy by making it easier to generate and sell renewable energy.

On September 24, 2009, 7 regulations were introduced which set out the details of the Ontario Government's Renewable Energy Approvals ("REA") program. Earlier in September, regulations were introduced to permit certain tax exemptions for municipal and city facilities for electricity generation projects as well as address issues such as cost recovery, mandatory information disclosure and net metering.

Highlights of the REA regulations include:

- Establishing the REA program, which has been created with the intention of streamlining the environmental approvals process for renewable energy projects
- Confirming applicable setbacks, including a 550 metre setback for large wind projects
- Setting out local, public and aboriginal consultation requirements
- Providing transition rules for existing environmental assessment ("EA") applications
- Exempting certain renewable energy projects from the requirements under the *Environmental Assessment Act* ("EAA")
- Establishing a new process for challenging REA decisions under the *Environmental Protection Act* ("EPA")
- Setting out the classification criteria for different types of renewable energy generation facilities.

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In addition, the Ministry of Natural Resources ("MNR") released a letter on September 24, 2009 to waterpower proponents who have applied as part of the MNR's site release process stating that "in order to maintain priority position within the MNR's site release process, applicants must submit an application to the FIT program within the FIT program launch period. Following the outcome of the Ontario Power Authority's FIT launch application process, the status of all Crown land applications will be reviewed and applicants will be contacted regarding the status of each of their applications."

Renewable Energy Approvals

The REA is a new streamlined environmental approvals process for renewable energy projects, which integrates municipal planning, environmental assessment, certificates of approval, and a variety of other approvals and licenses. It effectively replaces the previous two part environmental approvals process, which consisted of study requirements under the EAA and provincial standards under the EPA. Also designed to avoid unnecessary duplication, it is intended that the REA will facilitate a quicker and more efficient approvals regime in Ontario.

One of the key features of the REA is the new service guarantee, which promises that approved projects will receive all of their permits within six months of an application. Regulation 359/09 introduces the new approvals process and contains a comprehensive set of rules and requirements for obtaining an REA.

A summary of key elements of the new REA process is provided below.

1. Setback Requirements for Wind Facilities

Regulation 359/09, which applies to wind projects over 3 kW, introduces minimum setbacks which are summarized in the following table:

Size of Project	REA Requirement	Minimum Setback Requirements
Under 3 kW	No REA required	None
Between 3 kW and 50 kW	Require an REA but with simplified procedures	None
Over 50 kW	REA required	<ul style="list-style-type: none">• 550 metres from the nearest noise receptor;• the length of any turbine blade plus 10 metres from public road or railway rights of way; and• the distance equivalent to the height of the turbine from property boundaries.

The applicable minimum setback for any given wind project will be calculated in conjunction with the number and sound level rating of the turbines, as set out in the table below:

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Number of Wind Turbines	Minimum setback from closest noise receptor corresponding to number of wind turbine and sound power levels				
	102 dB	103 – 104 dB	105 dB	106 – 107 dB	> 107 dB
1 – 5 turbines	550 m	600 m	850 m	950 m	Noise study required
6 – 10 turbines	650 m	700 m	1000 m	1200 m	
11 – 25 turbines	750 m	850 m	1250 m	1500 m	
26+ turbines	Noise study required				

When determining the setback, in order to account for the combined contribution from neighbouring wind projects, all turbines within a three kilometre radius of a noise receptor must be taken into consideration. This includes turbines that are part of other projects, whether existing or planned.

An exemption from the 550 metre minimum noise setback requirement may be available if the ambient noise at a noise receptor is greater than 40 dB, and a study is undertaken to show the actual distance that the turbine must be in order to meet the sound level requirements outlined in the regulations.

The minimum property setback will not apply where the distance from the turbine to the property boundary is equal to or less than the length of any turbine blade plus 10 metres, and a study is conducted demonstrating that there will be no local adverse impacts; any preventative measures required to ensure this must be described.

Section 33 of Regulation 359/09 was also recently amended to clarify that if a project had been issued with a Certificate of Approvals (“CofA”) with respect to that project prior to September 24, 2009, it will be exempt from the minimum setback requirements discussed above.

2. Noise Requirements for Solar Projects

The following table summarizes the application of the REA to the different types of solar projects contemplated under Regulation 359/09:

Size and Type of Project	REA Requirement	Noise Study Requirements
Roof top or wall mounted	No REA required	None
Ground mounted up to 10 kW	No REA required	None
Ground mounted over 10 kW	REA required	<ul style="list-style-type: none"> Noise study demonstrating that the project can meet the 40 dB noise level requirement.

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3. Setback Requirements for Bio-energy Projects

There are various odour setback requirements in the REA for bio-energy projects, which include thermal treatment, anaerobic digestion, biofuel and landfill gas facilities. The setback requirements are dependent on the project location, project size and the type of organic material used. For example, most anaerobic digestion facilities located on a farm must be set back 250 metres from the nearest odour receptor, but this may be reduced to 125 metres if certain conditions are met. Certain facilities may also be required to provide a financial assurance estimate for decommissioning costs.

4. Consultation Requirements

Regulation 359/09 sets out stringent consultation requirements which are aimed at engaging local and Aboriginal communities, as well as municipalities, in the approvals process. The requirements include a minimum of two public consultation meetings, communication with Aboriginal communities regarding the potential impact on Aboriginal or treaty rights, and consultation with municipalities regarding infrastructure issues.

5. Protection of Natural, Archeological and Heritage Sites

REA applicants will also have to conduct a self-assessment to determine whether the property on which the project is located is protected or is classed as an archaeological or heritage site. If so, authorization must be obtained from the appropriate statutory agency, and an archaeological or heritage assessment undertaken. All applicants must also conduct a natural heritage assessment, consisting of a records review, site investigation and an evaluation of significance for the site.

6. Prohibitions

Regulation 359/09 includes a series of prohibitions related to, among other things, the construction, installation or expansion of renewable energy generation facilities located near water bodies, conservation areas and specified wetlands.

7. Appeals

A new procedure for challenging an REA decision has been introduced, which will be by way of an Environmental Review Tribunal ("ERT") hearing under the EPA, rather than the leave-to-appeal process under the Environmental Bill of Rights ("EBR"). The grounds for obtaining a hearing are that engaging in the REA will cause either (a) serious harm to human health or (b) serious harm to plant life, animal life or the natural environment. ERT decisions must be made within 6 months of the hearing.

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8. Transition Rules

The regulation sets out 4 categories of transition rules for renewable energy projects that were at various stages of the pre-REA approvals process:

Category 1 – Projects that obtained all approvals and permits prior to September 24, 2009

Projects in this category may enjoy a complete exemption from all of the REA requirements. These projects will remain subject to those CofAs and other permits and approvals already obtained in contemplation of the project. The existing site plan agreement will remain in force, and municipal planning approvals will no longer be required. Since a CofA was issued prior to September 24, 2009, Category 1 projects will be subject to third party leave-to-appeal procedures under the EBR; however, a project that has already completed an EA cannot be appealed.

Category 2 – Projects that have not completed an EA, but were issued a notice of completion and had an Ontario Power Authority (“OPA”) contract in place as of September 24, 2009

Projects that fall under this category still require an EA and a CofA. Although Category 2 projects will not require an REA, designs for wind projects must meet the setbacks outlined in the regulation and discussed above. Projects will not be subject to the new third party ERT hearings under the Environmental Protection Act (“EPA”). As with Category 1 projects, existing site plan agreements will remain in force and municipal planning approvals will no longer be required.

Category 3 – Projects that did not require an EA, had an OPA contract and were not prohibited by a municipal zoning by-law or order as of September 24, 2009

An REA will not be required for projects captured under the Category 3 transition rules. Such projects, largely expected to be solar and biomass projects, will continue to be subject to any obligations under an existing CofA. Moreover, applicants will be required to obtain a letter from their municipality confirming that the project is not prohibited by any municipal zoning by-laws or orders. Projects will be subject to the existing EBR leave-to-appeal process rather than the new ERT hearings under the EPA. Again, existing site plan agreements will remain in force and municipal planning approvals will no longer be required.

Category 4 – Projects that were issued with a statement of completion but were not issued with all approvals and permits and did not have an OPA contract as of September 24, 2009

Projects which fall under Category 4 will require an REA and will therefore be subject to all of the REA requirements contained in Regulation 359/09. Credit for studies and consultations already completed may be available towards future REA applications. These projects will not be subject to either the new third party ERT hearing procedures under the EPA or the leave-to-appeal process under the EBR.

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9. Other Exemptions from the REA

Water power projects do not require an REA, but are subject to the current rules under the Class Environmental Assessment regime.

The following are also exempted from the requirement to obtain an REA:

- renewable energy generation facilities with a name plate capacity of less than or equal to 500 kW, and where less than 90 percent of electricity generated at the facility is generated from a renewable energy source
- renewable energy generation facilities with a name plate capacity of greater than 500 kW, and where less than 95 percent of electricity generated at the facility is generated from a renewable energy source.

10. Exemptions from Environmental Assessment

Three new regulations made under the EAA provide exemptions for certain renewable energy projects from the requirements of the EAA. Regulation 360/09 and Regulation 361/09 deal with electricity projects and waste management projects respectively. The qualifying criteria are broadly the same for both and include:

- projects that were issued with an EA as of September 24, 2009
- projects that were issued with all of the necessary approvals and permits as of September 24, 2009
- projects that were issued with a notice of completion and had an OPA contract in place as of September 24, 2009
- renewable energy generation facilities with a name plate capacity of less than or equal to 500 kW, and where less than 90 percent of electricity generated at the facility is generated from a renewable energy source
- renewable energy generation facilities with a name plate capacity of greater than 500 kW, and where less than 95 percent of electricity generated at the facility is generated from a renewable energy source.

In addition, Regulation 364/09 exempts the Ontario Government from the requirements of the EAA for undertakings carried out only for the purposes of implementing a renewable energy project or renewable energy testing project.

Together, the regulations discussed above will have wide-ranging implications for businesses, municipalities and other renewable energy stakeholders in Ontario.

For more information with respect to the REA program or REA facilitation, the *Green Energy and Green Economy Act, 2009* or any of the government of Ontario's green economy initiatives, please contact **Linda Bertoldi** at 416-367-6647 or lbertoldi@blgcanada.com, **Adam Chamberlain** at 416-367-6172 or achamberlain@blgcanada.com or **Mark Rodger** at 416-367-6190 or mrodger@blgcanada.com.

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