



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

June 14, 2010

BY EMAIL

Secretary
Environmental Review Tribunal
655 Bay Street, Suite 1500
Toronto, Ontario
M5G 1E5

Dear Sir/Madam:

**RE: PROPOSED AMENDMENTS TO ERT RULES OF PRACTICE AND
DRAFT ERT GUIDE REGARDING APPEALS OF RENEWABLE ENERGY
APPROVALS**

These are the comments of the Canadian Environmental Law Association (“CELA”) with respect to the proposed amendments to the Tribunal’s Rules of Practice in relation to third-party appeals of renewable energy approvals (“REAs”) under section 142.1 of the *Environmental Protection Act* (“EPA”). We have also included some suggestions to improve the draft Guide that has been prepared by the Tribunal for public education and outreach purposes in relation to this matter.

PART I - INTRODUCTION

In general, CELA is supportive of the overall content and direction of the proposed Rule changes, particularly since the Tribunal is faced with a tight 6-month deadline for hearing and deciding third-party appeals against REAs. However, we submit that certain proposed Rules should be reconsidered or revised prior to their implementation. In particular, CELA makes the following specific recommendations for the Tribunal’s consideration:

CELA RECOMMENDATION #1: Proposed Rule 28a(e) should be deleted or, in the alternative, should be amended to specify that the Notice of Appeal must include a preliminary (or anticipated) statement of issues and material facts.

CELA RECOMMENDATION #2: Proposed Rule 28c(a) should be amended by deleting the phrase “by the Director”, and proposed Rule 28c(b) should be reworded as follows: “who made submissions to the Director regarding the proposed renewable energy project.”

CELA RECOMMENDATION #3: Proposed Rule 28d should be reconsidered and/or deleted. In the alternative, proposed Rule 28d should be re-cast to impose a positive obligation upon the Director to immediately provide the appellant with copies of requested Table 1 reports filed under O.Reg.359/09.

CELA RECOMMENDATION #4: Proposed Rule 28e should be amended to clarify: (a) when the schedule will be provided by the Tribunal to the parties; (b) whether additional matters may be addressed in the schedule; (c) whether the Tribunal will receive the parties’ input on the schedule; (d) whether the schedule will be determined at or after the first preliminary hearing; and (e) whether the Tribunal expects the parties to discuss or negotiate prospective schedule deadlines prior to the first preliminary hearing. Proposed Rule 28e(a) should be reconsidered or deleted.

CELA RECOMMENDATION #5: Proposed Rule 28f should be amended to require persons seeking party, participant or presenter status to serve their requests upon the parties. Proposed Rules 28f(b) and (c) should be deleted.

CELA RECOMMENDATION #6: Proposed Rule 28(i) should be deleted.

As noted above, CELA recognizes that O.Reg.359/09 under the EPA imposes a 6-month deadline upon the Tribunal for holding hearings and rendering decisions in third-party appeals of REAs. In our view, however, a faster process is not necessarily a better (or fairer) process, and CELA submits that procedural safeguards in the existing Rules of Practice should not be unduly constrained or arbitrarily compressed for the sake of administrative expediency.

Accordingly, when finalizing the proposed Rule changes, CELA submits that the Tribunal’s paramount objective should be to ensure that third-party appeals of REAs are adjudicated in an efficient and fair manner.

PART II - BACKGROUND

CELA is a non-profit, public-interest group established in 1970 to use existing laws to protect the environment and advocate environmental law reform. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens’ groups before trial and appellate courts and administrative tribunals on a wide variety of environmental protection and resource management matters.

Over the past four decades, CELA lawyers have represented or assisted parties in countless proceedings before the Tribunal, its predecessors (i.e., EA Board and Environmental Appeal Board), related administrative bodies (i.e., Joint Board, Niagara Escarpment Hearing Office, etc.), and other quasi-judicial boards, commissions or inquiries established under provincial and federal law (i.e., Ontario Municipal Board, Canadian Nuclear Safety Commission, Walkerton Inquiry, etc.). CELA has also participated as a member of the Tribunal’s “Client Advisory Committee” since it was first established by the EA Board many years ago.

In Tribunal hearings, CELA lawyers do not represent proponents, municipalities, or regulatory officials. Instead, we typically represent individuals, citizens’ groups or non-profit organizations which are interested in, or potentially affected by, facilities or activities that are approved or licenced under the EPA and other provincial statutes. In the renewable energy context, our client community conceivably includes persons who may be opposed to, or in support of, the issuance

of a REA under Part V.0.1 under the EPA. Accordingly, as REAs are issued across Ontario, CELA may be called upon to represent persons who file third-party appeals in relation to poorly sited or improperly designed renewable energy projects. Conversely, CELA may represent persons who wish to intervene as a party in support of a renewable energy project that is otherwise subject to a third-party appeal.

Given CELA's mandate and administrative law experience, we have reviewed the proposed Rule changes from the perspective of parties who may initiate, or respond to, an appeal under section 142.1 of the EPA. Moreover, when considering the proposed provisions, CELA applied the following three assessment criteria:

- are the proposals consistent with the principles of fairness and natural justice, both at common law and as codified in the *Statutory Powers Procedure Act* ("SPPA")?
- do the proposals facilitate access to environmental justice and help safeguard the public interest?
- do the proposals achieve the stated purposes of Part V.0.1 of the EPA and the Tribunal's current Rules of Practice (i.e., Rule 1).

PART III - CELA COMMENTS ON PROPOSED RULE AMENDMENTS

(a) Content of Notice of Appeal

CELA notes that the content requirements for third-party appeals of REAs are already set out in subsection 142.2(1) of the EPA. Therefore, CELA is unclear whether the Tribunal can or should prescribe some of the additional content requirements in proposed Rule 28a.

To the extent that some sub-paragraphs of this new Rule essentially mirror the requirements of subsection 142.2(1) of the EPA, CELA questions the rationale for having Rule 28a repeat what is already required by statute. However, CELA is more concerned about some of the proposed provisions in Rule 28a which go well beyond subsection 142.2(1) of the EPA, and which purport to impose additional obligations upon REA appellants.

For example, proposed Rule 28a(e) requires the REA appellant to include "a statement of the issues, material facts and submissions relevant to the subject matter of the appeal that the Appellant intends to present at the main Hearing." Keeping in mind that this requirement would be triggered at a very early stage of the proceedings (i.e., just after the REA was issued, and well before production, disclosure and other procedural steps are completed), CELA submits that it is both unrealistic and premature to expect third-party appellants to be in a position to fully identify "the issues, material facts, and submissions" within the Notice of Appeal.

Accordingly, CELA submits that proposed Rule 28a(e) should be deleted or, alternatively, should be amended to specify that only a "preliminary" (or "anticipated") statement of issues and material facts should be included within the Notice of Appeal. The requirement for "submissions" to be included in the Notice of Appeal should be wholly deleted from proposed

Rule 28a(e) since the Notice of Appeal is intended to serve as a pleading rather than a factum containing argument.

CELA RECOMMENDATION #1: Proposed Rule 28a(e) should be deleted or, in the alternative, should be amended to specify that the Notice of Appeal must include a preliminary (or anticipated) statement of issues and material facts.

(b) Providing Public Notice of the Appeal

Proposed Rule 28c suggests that within four days of receiving the Notice of Appeal, the Director is obliged to provide the Tribunal with a list of names/addresses of all persons who had been given notice under O.Reg.359/09 regarding the REA application, and of all persons who notified the Director that they have an interest in the proposed project.

CELA understands that this provision is intended to serve as a substitute for the usual Tribunal practice of requiring the appellant to contact the local municipality to obtain a list of property owners within 120 metres of the subject property. CELA has no objection to placing this obligation upon the Director to furnish the Tribunal with the prescribed list, particularly since the Director may often be better placed than the appellant to promptly collect and forward such information to the Tribunal.

Contrary to the wording of Rule 28c(a), however, the notice required under O.Reg.359/09 is not provided by the Director, but by the proponent. Accordingly, the phrase “by the Director” should be deleted from proposed Rule 28c(a). Similarly, Rule 28c(b) should be amended to specify that the Director is obliged to forward the names/addresses of all persons who made submissions on the REA (not just those who provided “notice” that they have “an interest” in the project).

CELA RECOMMENDATION #2: Proposed Rule 28c(a) should be amended by deleting the phrase “by the Director”, and proposed Rule 28c(b) should be reworded as follows: “who made submissions to the Director regarding the proposed renewable energy project.”

(c) Pre-Filing Copies of Relevant Reports

Proposed Rule 28d suggests that within 14 days of receiving the Notice of Appeal, the Director is obliged to provide the Tribunal with “all applicable reports” set out in Table 1 of O.Reg.359/09 that “relate” to the limited grounds of appeal which are recognized by subsection 142.1(3) of the EPA. Again, CELA has no objection in principle to the imposition of production obligations upon the Director, but we have some serious concerns about the timing, purpose and practicality of this specific proposal as currently drafted.

First, it is unclear what evidentiary weight (if any) that the Tribunal intends to give these proponent-drafted reports, especially during pre-hearing proceedings. If the intent of this early production is to allow the Tribunal members to quickly acquaint themselves with the project particulars, then CELA is concerned about the fairness and appropriateness of allowing the Tribunal to read unsworn reports containing statements that have yet to be proven by the report

authors at the hearing, and that are likely to be contentious to the appellant or other parties. In effect, providing the Tribunal with a closed-door opportunity to privately peruse the proponent's reports may inadvertently influence the Tribunal members' perception of the issues in dispute, create a reasonable apprehension of bias, and otherwise prejudice the interests of the appellant.

Second, CELA notes that proposed Rule 28d purports to confer some discretion upon the Director to determine which reports are "applicable" and "relate" to the grounds of appeal, even though the Director is an interested party to the proceedings. In our experience, this discretion is likely to lead to time-consuming disputes in situations where the appellant believes that the Director has excluded reports that are relevant to the matters in dispute.

Third, it appears to CELA that there is no compelling reason to depart from the usual practice of requiring the parties to exchange expert reports among themselves prior to the hearing, and to only provide such reports to the Tribunal in the form of witness statements (or appended thereto) if it becomes necessary to call the authors to testify at the hearing. In essence, the Tribunal member should only receive and rely upon evidence that has been properly adduced at the main hearing, rather than privately review one-sided reports provided in advance by an interested party to the proceeding.

For these and other reasons, CELA recommends that the Tribunal should reconsider and/or delete Rule 28d. At the same time, however, CELA recognizes the need for early discovery in the fast-paced REA appeal process. Therefore, the Tribunal should consider re-casting proposed Rule 28d so as to require the Director, within 14 days of service of the Notice of Appeal, to provide the appellant with copies of any Table 1 reports requested in writing by the appellant within 7 days of service of the Notice of Appeal. At the outset of the REA appeal process, it is likely that the appellant may have some – but not all – of the Table 1 reports (or addenda), and early production of any missing reports to the appellant will undoubtedly facilitate the drafting of issues lists and other documents to be addressed at the first preliminary hearing. If this suggestion is adopted by the Tribunal, then it may be necessary to modify the "schedule" contents contemplated by proposed Rule 28e, as discussed below.

CELA RECOMMENDATION #3: Proposed Rule 28d should be reconsidered and/or deleted. In the alternative, proposed Rule 28d should be re-cast to impose a positive obligation upon the Director to immediately provide the appellant with copies of requested Table 1 reports filed under O.Reg.359/09.

(d) Schedule of Proceedings

Proposed Rule 28e sets out the chronology of various pre-hearing steps that are to be undertaken in the REA appeal process. However, this Rule is unclear as to when such a schedule will be provided by the Tribunal to the parties (i.e., at the outset of the appeal process, or after the preliminary hearing?), or whether the prescribed list is intended to be exhaustive in nature (or whether additional matters may be set out in the schedule).

In any event, CELA presumes that the schedule would be subsumed within procedural orders issued by the Tribunal, which typically follow preliminary hearings held by the Tribunal. We

further presume that before the Tribunal determines the schedule, it will solicit and consider input from the parties, especially in relation to hearing dates, production/disclosure deadlines, and other key matters. In addition, we anticipate that the Tribunal would encourage the parties to discuss and, if possible, agree upon schedule deadlines before the first preliminary hearing is held. Of course, any such agreements are not binding on the Tribunal if it appears that the agreed upon schedule may not provide the Tribunal with sufficient time to render a decision within the 6 month deadline.

For the reasons outlined above, CELA is also concerned about the requirement in proposed Rule 28e(a) for all parties to exchange and file with the Tribunal copies of all relevant documents in their possession, control or power even before the first preliminary hearing is held. We see no particular utility or purpose in burying the Tribunal with reams of paper prior to the preliminary hearing, particularly in situations where the parties may subsequently enter into a negotiated settlement of some or all of the issues in dispute, thereby obviating the need to file the entire paper trail with the Tribunal. We would also point out that prior to the preliminary hearing, other potential interveners will not yet have received party status, but would be immune to the pre-filing requirements set out in proposed Rule 28e.

In addition, prior to the preliminary hearing (but before production/disclosure has been fully completed), we are unclear how the parties can realistically exchange and file witness lists, written summaries of evidence, issues lists, statements of material facts, or submissions. While it is reasonable to expect the parties to come to the preliminary hearing prepared to speak to such matters, CELA submits that such matters should be dealt with at or soon after the first preliminary hearing, rather than before the preliminary hearing. If the Tribunal agrees with this approach, then perhaps the first preliminary hearing should be held sooner than the four week timeframe currently contemplated by the Tribunal.

Accordingly, in light of the uncertainty and practical problems arising from the wording of proposed Rule 28e, CELA recommends that this Rule should be substantially amended to provide clarity and direction regarding the above-noted matters.

CELA RECOMMENDATION #4: Proposed Rule 28e should be amended to clarify: (a) when the schedule will be provided by the Tribunal to the parties; (b) whether additional matters may be addressed in the schedule; (c) whether the Tribunal will receive the parties' input on the schedule; (d) whether the schedule will be determined at or after the first preliminary hearing; and (e) whether the Tribunal expects the parties to discuss or negotiate prospective schedule deadlines prior to the first preliminary hearing. Proposed Rule 28e(a) should be reconsidered or deleted.

(e) Participation by other Interested Persons

Proposed Rules 28f to 28h establish procedural and timing requirements in relation to persons wishing to become parties, participants or presenters at the REA appeal hearing. CELA does not object in principle to these proposed provisions, but we have three specific concerns about certain clauses.

First, proposed Rule 28(f) only requires the prospective intervener to file his/her request with the Tribunal, but does not appear to require service upon the parties. If the parties are expected to respond to such requests before the preliminary hearing (see proposed Rule 28g), then this Rule will have to be amended to require persons to serve intervention requests upon the parties.

Second, if it is unrealistic to expect parties to prepare definitive statements of issues, material facts or submissions prior to the preliminary hearing, then it is even more unrealistic to expect prospective interveners to do so, as required by proposed Rule 28f(b). This is particularly true since prospective interveners will not yet have received disclosure from the other parties prior to the preliminary hearing. Accordingly, CELA recommends that proposed Rule 28f(b) should be deleted.

Third, it is unclear to CELA whether proposed Rule 28f(c) is attempting to create an intervention test that is different from the Tribunal's regular Rules in respect of such matters (i.e., Rules 53 to 63). In our view, these general Rules more than adequately address requests by persons for party, participant, or presenter status, and we see no compelling need for the Tribunal to promulgate a new or special Rule for such requests if made in the context of third-party appeals of REAs. Therefore, CELA recommends that proposed Rule 28f(b) and (c) should be deleted.

CELA RECOMMENDATION #5: Proposed Rule 28f should be amended to require persons seeking party, participant or presenter status to serve their requests upon the parties. Proposed Rules 28f(b) and (c) should be deleted.

(f) Effect of Adjournments and Judicial Review Applications

Proposed Rule 28(i) states that the 6 month timeframe for the Tribunal's decision will exclude periods of time during which adjournments were granted or ordered by the Tribunal, or during which judicial review applications were commenced and maintained.

In our view, this proposed Rule simply duplicates section 59 of O.Reg.359/09, and adds nothing new to the calculation of the 6 month deadline. Accordingly, CELA recommends that Rule 28(i) should be deleted.

CELA RECOMMENDATION #6: Proposed Rule 28(i) should be deleted.

(g) Other Miscellaneous Rule Changes

CELA has reviewed the Tribunal's other proposed amendments to the Rules, which are largely limited to editorial updates or other housekeeping matters. Accordingly, we have no comments on these various changes.

PART IV - CELA COMMENTS ON DRAFT GUIDE

CELA supports the creation of a "plain language" overview of the REA appeal process, and we are generally satisfied with the content and structure of the Guide as proposed by the Tribunal.

However, we suggest that in order to make the Guide more concise, user-friendly and informative, the Tribunal should give consideration to the following matters:

- when summarizing various REA-related items (i.e. timelines, grounds for appeal, etc.), it would be helpful for the Guide to include a cross-reference to O.Reg.359/09 itself;
- under the heading “What can an Appeal Deal With?” (page 2), the Guide correctly notes that the burden of proof lies with the appellant, but fails to specify the applicable standard of proof in such proceedings. Given the long-standing controversy among some parties over the appropriate standard of proof in third-party appeals under the *Environmental Bill of Rights* (at least prior to the *Lafarge* litigation), CELA submits that it would be helpful for the Guide to identify the relevant standard of proof (i.e., balance of probabilities). Such revisions should also be made to the text under the heading “What Decisions can the Tribunal make on the Appeal?” (page 5);
- for similar reasons, CELA submits that it would be helpful for the Guide to note (and explain) that the Tribunal holds a *de novo* hearing, and that the Tribunal is not limited to simply reviewing the information, reports or studies that were submitted by the proponent or accepted by the Director;
- in order to shorten the Guide (which is 15 pages in length), it may be advisable to reduce or eliminate the paragraphs which deal with generic procedural matters (i.e., What is the Tribunal? What is a party, participant, or presenter? What is a preliminary hearing? What is a witness statement? etc.). In our view, it would be preferable to focus the REA Guide on REA-specific matters, and interested readers can be referred to other Tribunal materials for further information on these other generic matters; and
- if the Guide retains a discussion of the principles governing Tribunal hearings (page 13), then it would be helpful to include a cross-reference to the SPPA.

PART V - CONCLUSIONS

For the foregoing reasons, CELA submits that certain proposed Rules should be revised, reconsidered or deleted by the Tribunal. While we understand the Tribunal’s desire to expedite third-party appeals of REAs, it is our opinion that several of the proposed Rules place impractical or inappropriate constraints on the parties (especially appellants), particularly at the very outset of the REA appeal process.

In closing, we thank the Tribunal for this opportunity to review and comment upon the proposed Rule amendments and the draft Guide, and we trust that the foregoing submissions will be taken into account as the Tribunal moves forward with these initiatives.

If you have any questions arising from these submissions, please contact the undersigned at your convenience.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

A handwritten signature in black ink, appearing to read 'R. Lindgren', with a long horizontal stroke extending to the right.

Richard D. Lindgren
Counsel

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