

## ONTARIO ISSUES DRAFT ABORIGINAL CONSULTATION REQUIREMENTS FOR CERTAIN RENEWABLE PROJECTS

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The Ontario Ministry of the Environment (MOE) recently released the *Draft Aboriginal Consultation Guide for preparing a Renewable Energy Approval Application* (the Guide). This long anticipated guidance document (which has been posted on the Ontario Environmental Registry for a 90 day public comment period) provides direction for consultation with Aboriginal communities during the Renewable Energy Approval (REA) process, pursuant to the *Environmental Protection Act*, and Ontario Regulation 359/09.

The consultation requirements prescribed by the Regulation and further described in the Guide create mandatory obligations for project proponents of certain renewable energy projects in order to ensure that Aboriginal (First Nation and Métis) communities are consulted in keeping with the Crown's Duty to Consult.

It should be noted that the Guide does not apply to waterpower projects or to class 2 wind and class 1 and 2 solar facilities. Additionally, the Guide is silent regarding its effective date and it is unclear whether or not it will be retroactive in its application.

### UNDERSTANDING CONSULTATION

Aboriginal and treaty rights in Canada are protected under the *Constitution Act, 1982*. This protection has been interpreted in numerous

Supreme Court of Canada decisions that have provided increasing clarity, especially in recent years. The Crown, in this instance the Government of Ontario, owes a Duty to Consult Aboriginal communities when it has knowledge of an existing or asserted Aboriginal or treaty right and there is potential for that right to be impacted. The Crown may delegate certain procedural aspects of the consultation process to proponents but remains ultimately responsible to uphold its Duty to Consult.

Before granting an REA, it is the MOE's responsibility to ensure the Crown's Duty to Consult is fulfilled. The Guide is intended to assist project proponents to understand the aspects of consultation that are being delegated by the Crown. The Guide also describes that the MOE will monitor the proponent's efforts in this regard to help facilitate consultation, where appropriate.

## CONSULTATION CONSIDERATIONS

The Guide discusses the fact that conducting consultation is a dialogue with the community aimed at finding mutually beneficial solutions. The Guide also makes it clear that information a proponent is seeking from a community is part of the history and livelihood of the community and must be treated respectfully and with sensitivity. Communities may be able to provide information to proponents about their territory that can assist in developing a robust proposal.

Learning about communities' cultural and world views, events (such as elections or celebrations), socio-economic aspects and particular concerns may allow proponents to better relate to the communities. For example, First Nation and Métis communities are diverse in culture and linguistic heritage. The Guide states that it is important to consider that English or French may not be a first language to many in a given community and translators may be required in certain circumstances. Additionally, learning about communities' previous experience with renewable energy projects may help an proponent deepen its understanding of the community with which it is consulting.

Some communities have established protocols for consultation and it will be important to consider how these protocols fit with the requirements established in the Guide. Such assessments will need to be undertaken by proponents on a case by case basis as contemplated in the Guide.

## REA ABORIGINAL CONSULTATION REQUIREMENTS

Consultation with Aboriginal communities is a pre-submission activity required for applicable renewable energy projects. The Guide states that it is the proponent's responsibility to design and conduct consultation with Aboriginal communities in order to successfully prepare an REA application and that it is the proponent's responsibility to pay for the reasonable costs of the consultation process. The MOE will review and approve consultation plans prepared by the proponent and has the discretion to require further consultation by the proponent or may undertake additional consultation itself.

The first step in the process described by the Guide is the submission by the proponent of a Project Description Report and a request for an Aboriginal consultation list to the MOE. The MOE will provide the proponent a consultation list that includes Aboriginal communities that have, or have asserted, Aboriginal or treaty rights which may be adversely impacted by the proposed project and/or identifies a community as having an interest in any negative

environmental effects of the proposed project. The Guide requirements apply to all communities identified on the Aboriginal consultation list. The Aboriginal consultation list will also include contact information for each of the communities on the list and the MOE will make initial contact with the Aboriginal communities on the consultation list to allow the community to prepare to begin discussions with the proponent.

The consultation list may be revised only if new information is made available, necessitating, for example, clarification of a project's scope. It is notable that there is no provision for revision of the list in other circumstances, such as where the proponent is of the view that the list is inconsistent with lists provided for other projects.

The second step for the proponent is to provide a Notice of Proposal to Engage in the Project and Notices of Public Meetings. Notices have to be published in certain locations depending on the nature of the project, generally including publication in any local and/or community newspapers and on any community website. The proponent should include with the notice:

- a description of the nature and scope of the project, including whether the project is on privately owned or Crown controlled land;
- the potential negative environmental effects of the project;
- any other federal or provincial approvals that may be required for the project to proceed;
- the timeframe for the intended application; and
- contact information and the proponent's availability to discuss the project.

The Guide states that proponents should contact the MOE before making contact with a community not on their consultation list.

The third step of the consultation process involves holding a minimum of two public meetings. At least 30 days before the first public meeting, the draft Project Description Report must be given to applicable Aboriginal communities. At least 60 days before the final public meeting, proponents must make the revised draft Project Description Report available to those Aboriginal communities. The meetings are noted in the Guide as an opportunity to meaningfully engage with the community with respect given to its members ideas and concerns about the project.

Interestingly, the Guide speaks mostly to public meetings and to the information and consultation with Aboriginal communities to be undertaken prior to the public meetings. There is not a great deal of guidance, however, regarding the precise

nature of the consultation to be undertaken. It is also worth noting that Aboriginal communities will normally require separate meetings from the public meetings as they normally consider themselves to be members of separate nations and not “public” stakeholders.

The Guide notes that the purpose of the consultation process is to make Aboriginal communities fully aware of the project, understand any concerns and find means to avoid, minimize or mitigate any potential adverse effects. In doing so, the Guide notes a number of ways this can be accomplished, including:

- modifying the project design to reduce or prevent the adverse effects on the exercise of the right;
- conducting further studies or committing to establishing ongoing monitoring of environmental effects;
- developing a contingency plan in the event the adverse effects are greater than anticipated; or
- committing to a long-term relationship, which may involve regular community meetings.

Despite good faith efforts, it can be difficult to agree upon a solution in some situations. When that is the case, either the Aboriginal community or the proponent can contact the MOE to express their concerns.

As noted above the Guide provides that, in some situations, the MOE may determine that further consultation is required. This is likely to occur in projects where there is a significant adverse impact on the exercise of Aboriginal or treaty rights. An example might be if a facility is proposed on Crown land where Aboriginal communities exercise treaty rights to hunt. The additional requirements in such a situation might include:

- working with the Ministry of the Environment to develop an Aboriginal consultation plan;
- providing consultation progress updates to the Ministry; or
- following Ministry direction.

It is possible that a proponent will become aware of a rights assertion in the process of the consultation. If that is the case, the Guide suggests contacting the MOE for further guidance.

It is important to note that there may be additional requirements depending on the nature of the project, imposed by either the Ministry of Natural Resources, the Ministry of Infrastructure or possibly other branches of Government. The Guide requires that all such requirements be discussed with the Aboriginal communities in the consultation.

As was mentioned earlier, the Guide is silent on the issue of its possible retroactivity. As such, one concern could be whether the MOE intends this Guide to apply to all projects, no matter their current position in the REA process. This issue could have significant implications for some proponents. It will be interesting to see if it is addressed during the comment period.

Finally, the Guide requires a Consultation Report be prepared and provided by the proponent to the MOE, in order to allow the MOE to determine if the REA application has met the regulatory requirements and provide a record of the consultation that took place. The Aboriginal consultation section of the Consultation Report must outline the following:

- evidence that the required information was distributed to communities;
- any information provided by Aboriginal communities in response to the request for information to be considered in the project documentation or for avoiding, minimizing or mitigating adverse impacts on Aboriginal and treaty rights;
- how the information was considered and alterations to the REA that were made as a result; and
- further details concerning any mitigation that took place.

The MOE will screen the REA submission to ensure it meets the applicable requirements. If the submission is complete, it will be accepted for a technical review and public notice will be given. After technical review, the Ministry’s REA Director, if it is in the public interest to do so, will issue or refuse the REA. It is also possible that the REA could be granted with certain further consultation conditions.

## CONCLUSION

While the Guide provides additional detail to project proponents of renewable energy projects regarding the nature of their obligation to consult with Aboriginal communities, the precise nature of the consultation to be undertaken will need to be assessed and implemented on a case by case basis. Knowledge and experience in consultation processes will be essential in order to ensure that consultation pursuant to the REA process is undertaken and completed in as efficient manner as possible.

For further information regarding the Duty to Consult Aboriginal communities and other requirements imposed by the Renewable Energy Approval process, please contact **Adam Chamberlain** at 416.367.6172 or by email at [achamberlain@blg.com](mailto:achamberlain@blg.com).

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