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**RE: Environmental Registry of Ontario # [013-3832](#) *Repeal of the Green Energy Act***  
and  
**Environmental Registry of Ontario # [013-3800](#) *Amendments to the Renewable Energy Approvals (REA) Regulation (Ontario Regulation 359/09)***

The Canadian Solar Industries Association (CanSIA) has developed this submission in response to Environmental Registry of Ontario (ERO) #**013-3832** and ERO #**013-3800**. As the subject matter of both postings are interrelated, this submission serves as CanSIA's comments for both ERO postings.

CanSIA is a national trade association that represents the solar energy industry throughout Canada. CanSIA's vision for Canada's solar energy industry is for solar electricity to be a mainstream energy source and an integral part of Canada's diversified electricity mix. CanSIA is also targeting the solar energy industry to be sustainable, with no direct subsidies, and operating in a supportive and stable policy and regulatory environment.

CanSIA's five main recommendations related to both Bill 34 and the Proposed Amendment to O.Reg 359/09 are highlighted here and are further outlined below:

**Recommendation 1: Eliminate retroactive effect** - Include additional language within Bill 34 related to the transitional regulations contemplated under section 7(1) of the Bill, that specifies that every renewable energy project that has obtained a REA as of the date Bill 34 comes into force shall continue to be able to rely on the Planning Act as it read immediately before that date.

**Recommendation 2: Removal of term "renewal"**- Use of the term "renewal" in section 4(2) should be removed.

**Recommendation 3: Remedies** – Maintain investor confidence by honouring contractual remedies.

**CanSIA Recommendation 4: Equitable treatment for all electricity resource types** - To ensure fair and equitable treatment among all resource types, legislation governing the permitting of ALL electricity generation

projects should be amended to require the demonstration of a need or demand for the electricity to be generated.

**Recommendation 5: Demonstrating Demand** - Release full drafts of the proposed regulatory language for the O.Reg. 359/09 Amendments and the transitional regulations under the Planning Act for public review and comment.

**CanSIA Commentary on Recommendations 1-5:**

**Recommendation 1:** Include additional language within Bill 34 related to the transitional regulations contemplated under section 7(1) of the Bill, that specifies that every renewable energy project that has obtained a REA as of the date Bill 34 comes into force shall continue to be able to rely on the Planning Act as it read immediately before that date.

**CanSIA Comments:** Bill 34 would authorize Cabinet to issue regulations that could allow municipalities to apply their planning controls to renewable energy projects retroactively. In particular, section 7(1) of Bill 34 would amend the Planning Act to allow Cabinet to issue regulations dealing with transitional matters that arise from the proposed changes, and to give those regulations retroactive effect.

Bill 34 does not clarify whether Cabinet will, in fact, issue such regulations. However, based on the language in Bill 34, there is a risk that such regulations may be issued. In particular, it is highly unusual for a Bill to specifically authorize retroactive regulations unless government has plans to impose new legal obligations retroactively. Otherwise, if the government only intends new obligations to be imposed going forward, it should clarify the language regarding retroactive effect.

Currently, section 70 of the Planning Act gives Cabinet the authority to issue regulations relating to certain specified matters. Bill 34 would authorize Cabinet to make regulations (including retroactive regulations as addressed above) governing transitional matters dealing with issues arising out of the changes to the Planning Act. The EBR posting for the proposed regulatory amendments relates only to regulatory amendments to O.Reg. 359/09 and not transitional regulations under the *Planning Act*. Therefore, clarity is needed to understand the government's intentions behind the proposed changes to the Planning Act and whether and how those changes and the subsequent new or amended regulations stemming from the Planning Act will have retroactive effect. Thus, we strongly recommend that Bill 34 itself include a transition provision that clarifies that intention and that it not be left for consideration only under the regulations. The provision in Bill 34 itself should state that every renewable energy project that has obtained a renewable energy approval as of the date Bill 34 comes into force shall continue to be able to rely on the *Planning Act* as it read immediately before that date.

**CanSIA Recommendation 2:** Use of the term “renewal” in section 4(2) should be removed.

**CanSIA Comments:** Section 4(2) of Bill 34 states: *...to increase the scope of Cabinet's regulation-making authority, authorizing it to issue regulations prohibiting the issuance or renewal of renewable energy approvals in certain circumstances...*

For several reasons, the use of the term “renewal” in section 4(2) should be removed. First, renewable energy approvals do not expire and do not require renewal. Therefore, the inclusion of the term in section 4(2) seems unnecessary and ambiguous. Moreover, the EBR posting for the Reg. 359 amendments only address a prohibition against the issuance of new renewable energy approvals, again suggesting that the inclusion of the term “renewal” in Bill 34 is unnecessary. CanSIA therefore recommend the term “renewal” be removed from section 4(2) of Bill 34.

**Recommendation 3:** Maintain investor confidence by honouring contractually protected remedies.

**CanSIA Comments:** Bill 34 contains extensive provisions protecting the government and municipalities from any action or proceeding, and removing any remedy, that arises from the repeal of section 62.0.2 of the Planning Act, the issuance of transitional regulations, anything done or not done in relation to these matters and any related by-law or order. Bill 34 also includes very broad provisions protecting the government and municipalities from, among other things, claims and proceedings in relation to these changes and any related amendments or by-laws.

The various renewable energy contract types in Ontario currently include certain protective provisions. For example, most contract types include provisions regarding (i) Force Majeure claims and (ii) discriminatory actions (essentially changes in law that single out a Supplier or group of Suppliers and that materially affect their economics). The provisions in Bill 34 would arguably take away any remedies Suppliers have under their contracts because of the passage of the Bill or the issuance of regulations or other actions pursuant to the Bill.

Such allowances do not consider the fundamental tenets of a developed, stable economy, including rule of law, property rights and contract rights. Jurisdictions known for reversing these protections and stranding investment, are at greater risk of eroding investment and increasing costs. This holds true not just for renewable energy projects, but for the broader electricity sector generally, and other capital-intensive initiatives such as health care facilities, schools or public transportation. CanSIA contends that any such actions resulting from this Bill would be extremely prohibitive for investor confidence in Ontario and would result in adding costs to the electricity system at the expense of the Ontario ratepayer. Potential investors and financial institutions would be acting reasonably to reflect the level of policy risk associated with investments in the province through higher cost of capital and risk premiums.

CanSIA strongly asserts that any new treatment should respect contracts and facilities already permitted, and that grandfathering should be a staple of any new regulations. Any alternative would erode confidence in the market, increase costs for consumers, and hinder the prospect of new investment in Ontario in the future.

**CanSIA Recommendation 4:** To ensure fair and equitable treatment among all resource types, legislation governing the permitting of ALL electricity generation projects should be amended to require the demonstration of a need or demand for the electricity to be generated.

### **CanSIA Comments:**

Section 4(2) of Bill 34 outlines amendments to section 176(4.1) of the *Environmental Protection Act*, which, currently, authorizes the Lieutenant Governor in Council (i.e. Cabinet) to make regulations regarding the application for and issuance of a Renewable Energy Approval (REA).

Bill 34 would amend this section to increase the scope of Cabinet's regulation-making authority, authorizing it to issue regulations prohibiting the issuance or renewal of renewable energy approvals in certain circumstances, including where electricity need has not been demonstrated.

If demonstrating a need or demand for electricity is to be a factor in the issuance of environmental permitting, then the appropriate legislation governing the permitting of all electricity generation resources and projects should be amended to reflect the same conditions to ensure fair and equitable treatment among all resource types.

**Recommendation 5:** Release full drafts of the proposed regulatory language for the O.Reg. 359/09 Amendments and the transitional regulations under the Planning Act for public review and comment.

**CanSIA Comments:** The EBR postings do not include the full regulatory text for the proposed O.Reg. 359/09 Amendments or the transitional regulations under the Planning Act. They do not speak to the metrics that shall be applied in order for a proponent to demonstrate that there is in fact a need for electricity. Therefore, it is unclear how need or demand for electricity will be defined.

CanSIA would also suggest that the requirement to further demonstrate a need for electricity as a condition of permitting a project is well out of scope for the Ministry, as the aim of environmental approvals is to set regulations for these activities in a way that helps protect the natural environment.

The determination of electricity demand is a task best suited to electricity system planners or the market place. Indeed, if a central government agency such as the IESO, or a large electricity consumer such as a larger manufacturer, announce a need for electricity through a request for proposal or some other procurement mechanism, does this not constitute a defined need?

For example, a bi-lateral electricity purchase agreement between a manufacturing facility and a solar electricity generator, may help the manufacturer meet an onsite electricity demand, lower their electricity bill and hedge against future electricity rate increases. Assuming the local municipality approves the siting of the project and all other requirements are met, clearly the open market has signaled a need and demand for this electricity. In this case, will the electricity generator then have to present further evidence of a need for electricity to satisfy Cabinet?

Evidently, demonstrating need or demand for electricity can be proven in a variety of ways. Without seeing the actual text of the regulatory amendments, we are left to interpret the written description of the proposed changes, which may or may not reflect the regulatory amendments themselves. Therefore, CanSIA recommends that the intention of the regulatory amendments, for both the O.Reg. 359/09 Amendments and the transitional

regulations under the Planning Act, should be clarified by releasing full draft regulatory text for public review and comment in order to further elicit appropriate feedback through this or another consultation process.

### **Other Considerations:**

#### **Timing of Permitting:**

Pursuant to the provisions outlined in section 4(2) of the bill, the EBR posting for the Reg. 359 Amendments, states that the proposed changes would require project developers to demonstrate that there is a demand for their electricity BEFORE a REA is issued.

The current provisions do not appear to consider traditional business practises whereby some electricity generation developers may choose to fully permit a project site and then wait until the appropriate market conditions present themselves – for example, when the Independent Electricity System Operator (IESO) has identified a need for electricity and has introduced a procurement process – and then continue to the construction phase. Other times, generation developers may wait until the IESO has introduced an electricity procurement before expending money on permitting. Either course of action can be commercially reasonable and beneficial to the market depending on the development strategy of investors.

The above market conditions are ideal to enable competitiveness in the electricity sector which results in lower rates for consumers. For example, these conditions create a variety of supply options, at various stages of development, to fill future electricity need. This diversity increases competition among various developers and multiple resource types. Therefore, incorporating a restriction on developers as to when they can pursue permitting, limits the competitiveness of the electricity system.

#### **Closing:**

CanSIA thanks the Ministry of Environment, Conservation and Parks for the opportunity to provide comments on the proposed legislation and regulatory amendments. Please contact Wesley Johnston at [wjohnston@cansia.ca](mailto:wjohnston@cansia.ca) if you require further clarity on the contents of this submission.

Sincerely,

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