DAVIES

155 Wellington Street West
Toronto, ON M5V 3J7 Canada

dwpv.com

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VIA ENVIRONMENTAL REGISTRY OF ONTARIO

Species at Risk Protection Policy Section
Ministry of Environment, Conservation and Parks
300 Water Street
5th Floor, North Tower
Peterborough, Ontario
K9J 3C7

To Whom It May Concern:

ERO No. 019-9411 - Regulatory changes under the *Endangered Species Act* (the "ESA") to extend application of conditional exemptions to newly listed species and update the conditional exemption for the operation of wind facilities dated January 12, 2025 (the "Proposal")

We are writing in response to the Ministry of Environment, Conservation and Parks' (the "**MECP**") request for comments on the Proposal.

We represent various wind power project developers, operators, investors and institutional lenders in Ontario. We have discussed the Proposal with our clients, specifically as it relates to the imposition of either a common approach (the "**Common Approach**") or project-specific custom approach (the "**Custom Approach**") to address potential impacts to three newly-listed bat species: Eastern Red Bat; Hoary Bat; and Silver-haired Bat (the "**New Species**").

Suffice to say that there is significant widespread concern amongst such stakeholders regarding the Proposal. Most notably that:

I. the Proposal introduces significant uncertainty for operating projects by changing the regulatory and operational assumptions upon which they were approved, built, financed and are operated;

II. the level of curtailment contemplated in the Proposal would likely have significant negative impacts from an economic and electricity supply perspective;

III. the Proposal may limit the development of new wind power projects, in particular in Northern Ontario (where annual wind speed averages are often lower than in Southern Ontario); and

IV. in light of these significant concerns, additional time and detail is required in order for the MECP to reasonably engage in meaningful consultation with key stakeholders regarding the Proposal.

I. SIGNIFICANT UNCERTAINTY FOR OPERATING PROJECTS

Existing mechanisms to address New Species

The Proposal is not necessary to address potential impacts to the New Species. Many operating wind power projects currently follow the conditional exemption contained in section 20.23 of O. Reg. 242/08 (General Regulation) (the "**Regulation**") (the "**Current Exemption**"), which is well suited to address impacts to the New Species.

Under the Current Exemption, Operational Mitigation Plans (an "**OMP**") guide the implementation of reasonable mitigation measures to minimize impact to species at risk for the life of a project. In our experience, OMPs typically include graduated curtailment measures that allow for adaptive management based on site-specific results, including feathering, adjustments to cut-in-speeds, and the use of deterrents.

Moreover, the Current Exemption contemplates the introduction of new species listed under the ESA and, absent the Proposal, existing operators would already be required to update their OMPs to address the New Species. Therefore, there is an existing, predictable regulatory mechanism to address potential impacts to the New Species already available for both operating and new wind power projects.

In addition, certain operating projects not implementing an OMP pursuant to the Current Exemption are still required to curtail their operations for the life of the project in accordance with the operational mitigation requirements of their respective Renewable Energy Approvals ("**REA**") (e.g., increasing cut-in speed of 5.5 metres per second ("**m/s**") between sunset and sunrise, from July 15 to September 30, etc.). REA-mandated curtailment is triggered where facilities had exceeded 10 bats per turbine per year during post-construction monitoring (i.e., when bat mortality is considered to be significant under current regulatory requirements).[1]

Disregards work already done by operating projects

Under the Current Exemption, three years of annual monitoring and reporting to the MECP following the implementation of an OMP is required, with further monitoring and reporting to be conducted every five years thereafter.[2] An OMP is also required to be updated every five years by a qualified person with expertise in relation to every species that is the subject of the OMP, using the best available information on steps that may help minimize or avoid adverse effects on the species.[3]

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1 See: https://www.ontario.ca/page/bats-and-bat-habitats-guidelines-wind-power-projects.

2 O. Reg. 242/08, ss. 23.20(4), 23.20(13).

3 O. Reg. 242/08, s. 23.20(9).

As we are not aware of any new wind power projects installed in Ontario since 2021,[4] we believe that all operating projects that utilized the Current Exemption have now completed the initial three years of monitoring and reporting. Based on our clients' experiences, the implementation of the Current Exemption has largely been successful in mitigating impacts to bats. This includes with respect to impacts to the New Species, as many of the mitigation measures available to address impacts to the New Species are the same as would be used to address potential impacts to other bat species at risk, like the Little Brown Myotis, and were accounted for in post-construction monitoring.

The Common Approach and Custom Approach would essentially require operating projects to reset their mitigation programs and start from scratch. We respectfully submit that this is unreasonable. Many of our clients have made significant financial investments and done good work to minimize their impacts to bats under their existing OMPs and REAs, which is evident in the monitoring reports that have been submitted to the MECP.

The Proposal does not allow for sufficient flexibility to account for the results of this work. Even under the Custom Approach, existing projects would still be required to either implement: (i) a 7 m/s cut-in-speed at certain times of the year; or (ii) smart curtailment technology, and in either case, complete an additional three years of monitoring and reporting. There is no ability to implement other mitigation measures, such as deterrents, that have been proven to reduce bat impacts at operational wind power projects in Ontario. Moreover, our clients' technical advisors have advised that they are not aware of any credible scientific studies that support the proposed 7 m/s cut-in speed (compared to lower curtailment levels) and that the benefit to bat conservation would be minimal. We respectfully submit that for the Proposal to be reasonably defensible, the MECP should be transparent and disclose its advice that reasonably supports the proposed level of curtailment.

There should be some recognition by the MECP for work that has been done under the Current Exemption and flexibility for operating wind power projects to continue implementing their current mitigation strategies if impacts to the New Species are already being effectively managed. Such an approach would be consistent with the best science and proponent-led spirit of the Current Exemption. As part of this, the MECP should also consider reduced monitoring for operating projects that have already collected multiple years of operational mortality data.

II. ECONOMIC IMPACTS OF CURTAILMENT

According to the Independent Electricity System Operator (the "**IESO**"), Ontario's installed generation capacity as of December 2024 is comprised of approximately 14% of wind power projects, responsible for generating nearly 5,000 MW of electricity.[5]

After discussing with several of our clients, we believe the MECP has likely significantly underestimated the impact of the Proposal to Ontario from an economic and electricity supply perspective. Several of

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4 According to the Canadian Renewable Energy Association, there are 94 wind power projects in commercial operation in Ontario. These existing projects were all installed prior to 2021. See: https://renewablesassociation.ca/wp-content/uploads/2025/01/New-Project-List.pdf.

5 See: https://ieso.ca/Power-Data/Supply-Overview/Transmission-Connected-Generation.

our clients' have existing wind power projects in Ontario with average wind speeds below the proposed 7 m/s threshold between May to September. If such operators were required to use a cut-in speed of 7 m/s (for 10 hours per day during the specified period) under either the Common Approach or the Custom Approach, this could result in little to no generation at these sites during the hours where the increased cut-in speed is required. This would account for approximately 17% of the hours in a year.

Further, to the extent that the MECP is relying on the study *Economic Impacts of Curtailing Wind Turbine Operations for the Protection of Bat Populations in Ontario (2023)*[6] to support the reasonableness of the Proposal, clients have advised that such study severely and unreasonably underestimates the actual financial impact of curtailing turbine operations to mitigate for bat mortality. For example, at one Ontario project that curtails for bats in accordance with its REA (i.e., cut-in speed of 5.5 m/s between sunset and sunrise, from July 15 to September 30), we understand that the financial impact is over four times the theoretical financial impact predicted by the study. As a result, we respectfully submit that for the Proposal to be reasonably defensible, the Ontario government requires credible evidence regarding the actual economic impacts of curtailing wind turbine operations.

This would especially be the case for projects located in Northern Ontario, where the wind profile is generally lower than in southern parts of the province. Even for projects in the near-North, we understand that a change in cut-in-speed from 5.5 m/s (which is a curtailment level currently utilized in many other North American jurisdictions) to 7 m/s would have a significant impact, particularly in the summer months given the Proposal would expand the curtailment window to months and times when the New Species are not likely present at a number of Ontario sites.

Given Ontario is already facing an electricity supply deficit, the provincial grid cannot afford to lose generation of clean power from projects that have already secured a Power Purchase Agreement ("**PPA**") and are accounted for in the IESO's supply forecasts. It is unclear to us from the public information sessions and ERO posting whether the IESO and Ministry of Energy have engaged with the MECP on the Proposal in enough detail to understand the potential negative impact that would follow from its implementation.

In addition, many operating wind power projects have some form of project financing in place. Financing would have been provided based on various assumptions about the operation of the project, including a certain level of mitigation to address potential impacts to species at risk based on the existing regulatory environment. Requiring existing projects to substantively modify their approach to mitigation risks putting projects in default under the terms of their loans if, as noted above, little to no electricity – and therefore no revenue – is being generated for approximately 17% of the hours in a year. These projects could also face difficulties renewing financing, and may be facing significantly higher rates or more stringent operating covenants if seeking to repower or extend their PPAs. The IESO could also face claims from generators under "change of law" or "force majeure" provisions in their PPAs.

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6 Thurber, B.G.; Kilpatrick, R.J.; Tang, G.H.; Wakim, C.; Zimmerling, J.R. Economic Impacts of Curtailing Wind Turbine Operations for the Protection of Bat Populations in Ontario. Wind 2023, 3, 291–301. See: https://doi.org/10.3390/wind3030017.

III. MAY LIMIT NEW WIND PROJECTS

Changing the regulatory requirements in such a significant way – and without providing the actual regulatory language of the proposed changes for review and comment – risks developers, investors and lenders choosing not to invest in wind power projects in Ontario in the future. The potential for changes to key assumptions underlying such investments brings about uncertainty that is likely to erode investor confidence in the province. This has the corollary effect of putting at risk the achievement of Ontario's renewable energy goals and greenhouse gas emissions reduction targets.

Since 2022, the IESO has been seeking to add more than 5,000 MW of capacity to Ontario's grid (raised in December 2024 to 7,500 MW[7]), including a significant portion from renewable energy. There are several active IESO procurements underway, including the Long-Term 1 RFP (LT1) and Expedited Process, Long-Term 2 RFP (LT2) and Medium-Term RFP (the "**IESO Procurements**"). In addition to the impacts described above to existing grid capacity, it is likely that the introduction of the Proposal will reduce the number of wind power projects that are economically competitive in the IESO Procurements. Unlike other renewable energy technologies, only wind power projects will be required to budget the necessary capital and operating expenditures to address impacts to the New Species, which will be reflected in higher electricity prices. Even if selected, these higher wind power prices will ultimately be borne by ratepayers.

Further, the requirement to curtail at 7 m/s under the Common Approach or Custom Approach is likely to present challenges to developing wind energy in Northern Ontario. As noted above, we understand from clients that wind speed averages are generally lower in the northern part of the province and that the implementation of a 7 m/s cut-in speed could potentially render wind development in this region of the province uneconomical. It is unclear how this outcome reconciles with other publicly-stated government objectives to foster economic development in the north. For example, as part of LT2, the Minister of Energy recently directed the IESO to award additional rated criteria points to projects developed in northern Ontario.[8] Ontario has also been working to expand transmission capability in the north, which risks being underutilized should the region be foreclosed to wind energy development.

IV. ADDITIONAL TIME AND DETAIL REQUIRED FOR MEANINGFUL CONSULTATION

Given the potential impact of the proposed changes on both operating and new wind power projects, it is unclear to us how the MECP could reasonably expect key stakeholders to respond to the Proposal in any meaningful way without fully and clearly providing the specifics of what each of the Common Approach and Custom Approach would entail. For example, there are several new terms being used in the Proposal, such as "impact to bats" and "smart curtailment technology", that are not defined but will

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7 See press released entitled "Ontario Expands Largest Competitive Energy Procurement in Province's History" (December 11, 2024): https://news.ontario.ca/en/release/1005479/ontario-expands-largest-competitive-energy-procurement-in-provinces-history

8 See the Minister of Energy's Letter to the IESO dated August 28, 2024: https://ieso.ca/-/media/Files/IESO/Document-Library/corporate/ministerial-directives/Letter-from-the-Minister-of-Energy-20240828-LT2-letter.pdf.

significantly impact such projects and their ability (economically and technically) to implement either approach.

If the MECP wishes to go forward with the Proposal, we respectfully request that it publish the draft regulations for further public consultation and comment.

In addition, as you are aware, we are in the midst of a provincial election. During election periods, provincial ministries are generally in caretaker mode and significant regulatory changes are often put on hold. We are cognizant that this will likely limit Ontario's ability to substantively engage with key stakeholders regarding their concerns about the Proposal. It would be unfair to such stakeholders for the MECP to move forward without an opportunity to meaningfully discuss their concerns about, and reasonable alternatives to, the Proposal.

CONCLUSION

Given the importance of the concerns being raised regarding the Proposal, we respectfully encourage the MECP to release the draft regulatory amendments for further public consultation prior to moving forward with any changes to the Current Exemption.

Additional time would also allow the MECP to review the Proposal with the IESO and other key ministries in detail after the provincial election, in order to develop a whole-of-government understanding of the potential implications of the Proposal.

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The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

Yours truly,

Sarah Powell
Partner
spowell@dwpv.com

Robyn Barabash
Associate
rbarabash@dwpv.com

DAVIES WARD PHILLIPS & VINEBERG LLP