



Wind Farms vs Blanding's Turtles – A Final Decision At Last?

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On June 6, 2016 the Environmental Review Tribunal (“ERT”) released its decision determining the appropriate statutory remedy respecting the Director’s approval of the construction and operation of a nine turbine wind farm at Ostrander Point. The remedy hearing decision takes account of proposed mitigation measures for preventing serious and irreversible harm to the Blanding’s turtle population.

Introduction

Summer is here. Trips and cottage time are being planned. Summer camps will be in full swing shortly. And, Canada Day is fast approaching.

As people prepare to spend a little less time in front of computers, iPads, and cell phones, it may be easy to miss an important date – at least in the context of the three and a half year battle over a renewable energy approval (the “REA”) issued by the Director, Ministry of the Environment and Climate Change (the “Director” and “MOECC”) on December 20, 2012, to Ostrander Point GP Inc. as general partner for and on behalf of Ostrander Point Wind Energy LP (“Ostrander”). The REA would permit Ostrander to install nine wind turbine generators (the “Project”) at Ostrander Point near Picton, Ontario.

July 6, 2016 is the last date on which Ostrander can appeal a decision rendered by the ERT to once again revoke the Director’s decision to issue the REA. This is the first REA appeal proceeding where an appellant has met the environmental harm test in s. 145.2.1(2)(b) of the *Environmental Protection Act* (the “EPA”) – namely a renewable energy project that will cause “serious and irreversible harm to plant life, animal life or to the natural environment”. It is also the first hearing solely on the matter of remedy in the history of renewable energy approval appeals in Ontario.

Background

The ERT has described the area for the proposed wind farm as follows:

“The Ostrander Point Crown Land Block is 324 hectares of provincial Crown land located about 15 kilometres (‘km’) south of Picton on the south shore of Prince Edward County, and is one of the least developed areas of the County. It is bordered by three roads and Lake Ontario to the south. It contains a provincially significant wetland in the southeast corner and is known for its alvar vegetation. It is used for recreational purposes such as camping, hiking, “birding”, and all-terrain vehicles.

The Project would require the construction of approximately 5.4 km of gravel access roads on the Site that would be approximately 6 metres ('m') wide with larger turnarounds. The access roads would be used to construct the wind turbines, for their ongoing maintenance, and are to be removed after decommissioning." (paras 4 and 5)

As we have reported previously, (click here), following an appeal by the Prince Edward County Field Naturalists ("PECFN") and the Alliance to Protect Prince Edward County ("APPEC"), the ERT revoked the REA in July 2013 on the grounds that the Project would cause serious and irreversible harm to a population of Blanding's turtles, a threatened species in Ontario. The Divisional Court subsequently set aside the ERT decision as being "unreasonable" due to four errors of law. On further appeal, the Court of Appeal reversed the Divisional Court's findings save for the remedy imposed by the ERT of revoking the Director's decision to issue a REA. The Court concluded that the ERT should have given the parties the opportunity to address the appropriate remedy to be adopted by the ERT. As a consequence, the Court of Appeal remitted the matter back to the ERT for a hearing to address the issue of the remedy. It also held that Ostrander could provide fresh evidence at the hearing of the steps that would be taken to prevent public access to the gravel roads leading to Project's turbines thus preventing or mitigating "serious and irreversible harm" to the Blanding's turtles.

ERT's Analysis and Findings

ERT's Remedy Powers are Discretionary - Under section 145.2.1(4), once the ERT determines that there will be "serious and irreversible harm" to animal life, the ERT may do one of the following:

- (a) revoke the decision of the Director;
- (b) by order direct the Director to take such action as the ERT considers the Director should take in accordance with this Act and the regulations; or
- (c) alter the decision of the Director, and, for that purpose, the ERT may substitute its opinion for that of the Director.

Based on the wording of section 145.2.1(4), the ERT confirmed that its statutory remedial power is discretionary. In exercising this power, the ERT went on to state there is a "balancing of factors" that must be accounted for including the purpose of the *EPA* to provide for the protection and conservation of the environment, including animal life. The ERT also noted that the legislative objective of promoting renewable energy approvals under the *EPA* must also be considered but that this factor cannot be presumed to take priority over other all other factors.

Precautionary Principle Applied - The ERT also canvassed the application of the precautionary principle in the context of the *EPA* renewable energy approval scheme. Reference was made to the Supreme Court of Canada case *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 that defined the precautionary principle at para. 31 to mean:

"Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

The ERT concluded that the principle should be applied not only in its decision-making but also in decisions taken by the Director respecting REAs:

“The Tribunal finds that the precautionary principle, a principle of international law incorporated into domestic law in *Spraytech* and a key principle of the MOECC’s [Statement of Environmental Values], applies to decisions of the Director and to the [ERT’s] choice of the appropriate remedy. On the same basis, the [ERT] further finds that the principle of an ecosystem approach to environmental protection is also a relevant consideration to the Tribunal’s s. 145.2.1(4) remedial powers.” (para. 61)

Proposed Mitigation Measures Not Effective – In assessing Ostrander’s evidence, (presented at the 2013 appeal hearing as well as at the remedy hearing), the ERT determined that there are two types of mitigation measures proposed to reduce the road mortality of Blanding’s turtles: measures to keep the turtles off the roads, and measures to keep traffic off the roads where turtles are present.

With respect to the first set of measures to keep turtles off roads the ERT concluded that evidence of the use of culverts, fencing, and the creation of artificial nesting sites in safe locations had not proven in other cases to be successful.

With respect to the second set of measures to keep traffic off the access roads, Ostrander proposed the following:

- (i) One gated point of access to all access roads together with gates on the three trails in the Project area;
- (ii) Signs indicating not access;
- (iii) On-site Project maintenance staff to monitor and enforce access restrictions; and
- (iv) Immediate reporting of unauthorized trespassing to the Ontario Provincial Police.

However, the ERT was not persuaded on a balance of probabilities that such efforts over time would prove successful enough to prevent serious and irreversible harm to the Blanding’s turtle population:

“The Tribunal accepts, on a balance of probabilities, that the gates will deter some public road users, and it is likely that there will be less public traffic on Project access roads with the gates, than without them... however, the Tribunal concludes that the success of the gates in preventing public access over the time period of relevance to this species depends almost entirely on well-intentioned visitors not to use the access roads because they are gated and signed. It is unlikely poachers will be deterred at all, and in fact easier access to the Site via better roads will likely facilitate poaching. The Tribunal received insufficient evidence on which it can reliably find, on a balance of probabilities, that the elements of the Road Access Control Plan will effectively deter members of the public from driving vehicles on access roads. “ (para. 129)

The ERT preferred and accept the evidence of the experts but forward by PECFN and APPEC that,

“despite the proposed gates on the access roads, the various threats to the local population of Blanding’s turtle [would] still represent a risk, although it may be moderate in any particular year, that [would] cumulatively over the life of the Project cause serious harm to the population of Blanding’s turtle on the Project Site and surrounding area.” (para. 130)

Appropriate Remedy – In exercising its discretionary statutory power and taking account of various factors, the ERT concluded that the Project should not proceed:

“The Tribunal finds that to proceed with the Project, when it will cause serious and irreversible harm to animal life, a species at risk and its habitat, is not consistent with the general and renewable energy approval purposes of the *EPA* in s. 3(1), protection and conservation of the natural environment, and s. 47.2(1), protection and conservation of the environment, nor does it serve the public interest under s. 47.5. In this particular case, preventing such harm outweighs the policy of promoting renewable energy through this nine wind turbine project in this location.” (para. 138)

The ERT also took the step of applying the precautionary principle in the following fashion:

“In regards to the general application of the precautionary principle (see *Spraytech*), Blanding’s turtle has not been the subject of extensive scientific study generally, and in this location in particular. This is evident from the disagreements among the expert biologists at both the 2013 hearing and in this remedy hearing. Proceeding with the Project where there is the threat of serious and irreversible harm to a species at risk, including its habitat, and a lack of full scientific certainty regarding the species, would not be consistent with the precautionary principle.” (para. 142)

On this basis, the Tribunal determined that “in the unique circumstances of this case” the appropriate remedy under section 145.2.1(4) of the *EPA* would be to revoke the Director’s decision to issue the REA.

Conclusion

It has been three and a half years since the Director issued the REA to Ostrander. Is this the last step in the appeal process? Will Ostrander appeal the remedy decision to Divisional Court?

Even if there is no appeal, one should not forget that the ERT’s decision was determined “in the unique circumstances of this case”. For the following reasons, it is unlikely that there will be many instances where a renewable energy project will be turned down for failing to meet the statutory environmental harm test concerning plant life, animal life or the natural environment.

The environmental harm test in section 145.2.1(2)(b) of the *EPA* has a very high standard. A party such as PECFN or APPEC must establish on a balance of probabilities that the renewable energy project that will in fact cause “serious and irreversible harm.” This standard involving “will cause” and “irreversible” components must also be met after taking into account various proposed mitigation measures.

In Ostrander case, the Project site would be entirely composed of high quality Blanding's turtle habitat, which the ERT found in the 2013 decision to fall within the definition of "critical habitat" under the Ontario *Endangered Species Act*. Further, the ERT adopted the expert's opinion that even a low loss of life would lead to the extinction of the "threatened" Blanding's turtle. The proposed mitigation measures, in one of the least developed parts of the south shore of Prince Edward County, were determined to be not effective enough to prevent such a fate for the Blanding's turtle population on the Project Site and in the surrounding area.

Enjoy the summer of 2016. We will let you know if the Ostrander saga has come to an end.

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