



Endangered Blanding's Turtle Fight Continues: Ontario's Court of Appeal Sends Wind Farm Case Back to the Environmental Review Tribunal (ERT)

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On April 20, 2015, the Ontario Court of Appeal released its decision restoring the ERT's conclusion that a nine turbine wind energy project at Ostrander Point near Picton, Ontario would cause serious and irreversible harm to the Blanding's turtle. The Court sent the matter back to the ERT to hear further submissions and determine the appropriate remedy.

As we have reported previously (click [here](#)), in July 2013, the ERT revoked the renewable energy approval issued by the Ontario Ministry of the Environment and Climate Change (MOECC) to Ostrander Point GP (Ostrander) 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 ERT concluded that traffic on 5.4 km of access roads to the project, together with an increase in poaching and predators, would cause this sort of harm to the turtles located on the project site and surrounding area. As a result, the ERT revoked the approval pursuant to section 145.2.1(4) of the *Environmental Protection Act* (EPA).

The ERT decision was appealed by Ostrander and the MOECC. The Prince Edward County Field Naturalists (PECFN) also appealed claiming that the ERT had erred in not finding that the project also posed same threat of serious and irreversible harm to migratory birds and alvar plant life. The Alliance to Protect Prince Edward County (APPEC) appealed on the grounds that the project would cause serious harm to human health pursuant to section 145.2.1(2) of the EPA.

The Divisional Court denied the appeals made by the PECFN and APPEC. However, it did set aside the ERT decision as "unreasonable" on the basis of the following errors of law that, both individually and collectively, were fatal to the ERT's conclusions:

1. The ERT failed to separately identify and explain its reasons for concluding that, if serious harm would result from the project, that serious harm was irreversible.
2. Without knowing the size of the Blanding's turtle population in the surrounding area, Prince Edward County, and Ontario as well as the magnitude of the mortality rate for the species, the evidence of "irreversibility" did not rise to the EPA standard. The Divisional Court also found that it would have been difficult for the ERT to arrive at a determination of irreversible harm without having any data as to the existing or projected vehicular traffic at the site.

3. In considering the issue of irreversible harm, the ERT failed to take account of the fact that Ostrander had obtained a permit from the Ministry of Natural Resources under the *Endangered Species Act* (ESA) allowing it to harm the Blanding's turtle (and its critical habitat) in the course of constructing and operating the wind farm. The ERT was obliged to apply its statutory mandate in a manner that would seek to avoid any conflict with the ESA regime.
4. After determining that the Blanding's turtle population would be subject to serious and irreversible harm, the ERT (for reasons of natural justice and procedural fairness) should have given the parties an opportunity to address the appropriate remedy to be adopted by the ERT.

The Court of Appeal reversed the Divisional Court's findings on the first three grounds as follows:

1. *The ERT's "Serious and Irreversible Harm" Analysis* - All parties agreed that the harm to Blanding's turtles would be serious. As a consequence, there was no need for the ERT to separately analyze what was evident and not in dispute.

With respect to the issue of irreversibility, the Court of Appeal found that the ERT did focus on this part of the test relying on the expert testimony of Dr. Beaudry that the local population of Blanding's turtle would be faced with extinction.

2. *Lack of Numerical Data re Population Size & Traffic Flow* - The Court of Appeal found that the ERT did have expert evidence that showed that numerical data of the Blanding's turtle population levels and of the increase in vehicular traffic was not needed to support the conclusion that there would be serious and irreversible harm. Further, the ERT did have some evidence of the magnitude of population, mortality rate and traffic volume. While the evidence was not expressed in numbers, there was no dispute that the Blanding's turtle is classified as "threatened" under the ESA and as "endangered" by the International Union for Conservation of Nature. Given Dr. Beaudry's evidence that the population is not large and that the volume of traffic on the access roads would be "low", but lead to an increase in vehicular traffic in the project area, these qualitative indications of magnitude provided the experts with an adequate base for their conclusions. Moreover, the ERT gave reasons for accepting the opinions of the experts that were intelligible and led to a conclusion respecting serious and irreversible harm that falls within the range of reasonable outcomes.

3. *Taking Account of the ESA Permit* - The Court of Appeal found that the issuance of the ESA permit was not binding on the ERT's decision-making.

The Court also determined that the ERT had carefully considered the mitigation measures required by the ESA permit and had concluded that they were incomplete and would not be effective. The Court went on to state:

“The [ERT] exercised its independent judgment and found that the evidentiary value of the permit was outweighed by the expert evidence introduced. In doing so, the [ERT] was carrying out its distinct statutory mandate under section 145.2.1(2) of the EPA.”

The Court of Appeal did agree with the Divisional Court's finding that once the ERT concluded that the Blanding's turtle population would be subject to serious and irreversible harm, it should have given the parties an opportunity to address the appropriate remedy to be adopted by the ERT. The Court of Appeal stated that it was unable to understand the ERT's reasons for choosing the remedy of revoking the renewable energy approval and therefore could not conclude that the ERT's choice of remedy was reasonable.

As a consequence, the Court of Appeal has remitted the matter back to the ERT to address the issue of remedy after giving the parties the opportunity to be heard. The Court of Appeal also stated that at that time of the ERT hearing, Ostrander could provide fresh evidence of the steps it is proposing to take to close the access roads to the public.

It remains to be seen whether the ERT will provide clearer reasons for its decision to revoke the renewable energy approval or whether the ERT will decide to alter the approval of the Director of the MOECC pursuant to section 145.2.1(4) of the EPA.

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