



ERT's Bornish Wind Farm Decision Requires Sufficient Evidence of Serious and Irreversible Harm

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To prove that a wind energy project will cause serious and irreversible environmental harm, you will need an expert and a scientifically solid case.

In a decision released November 12, the Environmental Review Tribunal (ERT) said it will not overturn the approval of a large wind energy facility in southwestern Ontario that, potentially, could pose a threat to a pair of bald eagles nesting in the immediate vicinity. This case underscores the requirement that the evidence must show, on a balance to probabilities, that there *will be* – versus potential – “serious and irreversible harm.”

In adjudicating *Lewis v. Director, Ministry of the Environment* (ERT Case No. 13-044), the Tribunal found the appellants had not met the statutory test set out in section 145.2.1(2)(b) of the *Environmental Protection Act* (EPA) and failed to prove that the project “will cause serious and irreversible harm to plant life, animal life or the natural environment.”

Opponents of the Bornish Wind Energy Centre did not present any expert evidence, but relied on lay testimony and written submissions about the project’s potential harm to the eagles, as well as mass bird kills, habitat loss and damage to other species. The Tribunal was looking for evidence demonstrating that there would be serious and irreversible harm caused to the bald eagles. To that end, it pointed to an earlier case where the ERT rejected the approval of the Ostrander Point Wind Energy Park south of Picton, Ontario, over concerns that road traffic through the site would likely cause “serious and irreversible harm” to a population of the endangered Blanding’s turtles found on the project site.

On April 26, 2013, the Ministry of the Environment (MOE) issued a Renewable Energy Approval (REA) to Bornish Wind LP on behalf of the Bornish Wind Energy Centre for the construction, installation, operation and retiring of 45 wind turbine generators in the Municipality of North Middlesex, in southwestern Ontario. The REA was appealed to the ERT by the municipality, on the basis of potential harm to human health, and in a separate appeal by Robert Lewis, on the basis of possible harm to an active bald eagle nest in the area. North Middlesex’s appeal was disposed of in a separate decision of the ERT dated August 6, 2013.

During the hearing of evidence, Lewis and other parties focused on potential harm to two bald eagles that have an active nest adjacent to the project. Bornish stated that it would not be removing the nest, but indicated that no turbines would be erected with 800 metres of an active eagle nest. The Ministry of Natural Resources had worked with the MOE in developing and adopting several mitigation and monitoring conditions in the REA.

In determining whether the REA would cause serious and irreversible harm to the bald eagles, the Tribunal noted that the bird is considered to be in the “special concern” category under the Endangered Species Act and this would be an important factor in its assessment. The Tribunal also said that its decision would be based on local circumstances – versus a province-wide assessment – since the “death or displacement of this pair would constitute a loss of bald eagles from the immediate area, as there was no evidence of any other documented nest near this site.”

Notwithstanding these factors, the Tribunal found that Mr. Lewis had not provided sufficient evidence to meet the test of serious and irreversible harm

Given the limited evidence offered by Mr. Lewis on this question, it cannot be said that there has been any proof that there will be harm to these eagles or their habitat, regardless of whether the two proposed turbines nearest the nest are in fact built. Taken at its highest, the evidence brought forward by Mr. Lewis (largely through cross-examination) is that there is some potential for harm to the eagle pair’s habitat. It does not rise to the level of proof required by the statute ... an appellant must bring sufficient evidence to convince the Tribunal that the appeal test has been satisfied on a balance of probabilities. The test is not drafted in as precautionary a manner as many other provisions in environmental statutes.

The ERT also concluded that direct bald eagle mortality – including collision with turbines, electrocution from the substation, or other contact with project infrastructure – is not likely based on the evidence provided. Nor did it find sufficient evidence to meet the EPA test with respect to other birds and bats, as well as with respect to the project lands and the adjacent lands.

Interestingly, even though the Tribunal found that the test for “serious and irreversible harm” does not capture the concept of the precautionary approach, it nevertheless went on to recommend its application

Given the wording of the Bald Eagle Guidelines (and especially the reference to an up to 800 m tertiary zone if there is a direct line of sight), the most precautionary approach would be to ensure that the turbines are located outside the 800 m radius [from the nest]. The Tribunal recommends that the Approval Holder examine all available options in this regard.

If you have questions about a pending or on-going case before the Environmental Review Tribunal regarding a renewable energy project or other issue, please contact Charles Birchall at (613) 761-2424 / cbirchall@willmsshier.com or Carl McKay at (416) 862-4831 / cmckay@willmsshier.com.