

ERT overturns wind farm's REA

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For the first time, the Environmental Review Tribunal has overturned the renewable energy approval for an Ontario wind farm.

Wind turbines or wind farms have typically won out against arguments based on harm to human health. Turtles, however, have recently created problems for a significant renewable energy project.

Blanding's turtle is considered a vulnerable and endangered species. It inhabits wetlands in Prince Edward County along the shores of Lake Ontario. Ostrander Point GP Inc. ("Ostrander") sought to develop a large wind energy project touching this same area.

Project v. protection

The proceedings that resulted pitted the development of a clean energy project against the protection of Blanding's turtle.

Both the Environmental Review Tribunal (the "ERT") and the Ontario Court of Appeal accepted arguments that the issuance of a renewable energy approval ("REA") may cause damage and/or unreasonable harm to species at risk — in this case, Blanding's turtle.

MOE issues REA

On December 20, 2012, the Director of the Ministry of Environment (together, the "MOE") granted an REA to Ostrander, permitting it to construct and operate nine wind turbines near Picton, Ontario (the "Project"). On July 3, 2013, the ERT allowed (for the first time) an appeal from the MOE's decision to issue such an REA.

ERT revokes REA

Ultimately, the ERT agreed with the Prince Edward County Field

Naturalists (the "PECFN") that the REA be revoked insofar as it was found to negatively impact Blanding's turtles. The ERT agreed with the PECFN: engaging in the Project in accordance with the REA would cause serious and irreversible harm to this particular species.

Conditional REA reinstatement

Ostrander appealed the ERT's decision to the Ontario Divisional Court. The Divisional Court agreed with Ostrander that the decision of the ERT was unreasonable in the circumstances, focusing mainly on the ERT's finding that the REA would result in serious and irreversible harm to animal life.

Ostrander was successful at the Divisional Court in having the REA reinstated by decision dated February 20, 2014. As a condition of the REA being reinstated by the Divisional Court, Ostrander was prohibited from engaging in construction on the wind power site from May to October 15.

This time period is when Blanding's turtles leave ponds and move to terrain that would be compromised by construction related to the Project. The condition gave Ostrander a very short window in which to perform any work.

Appeal and stay of order

The PECFN recently delivered notices of motion seeking leave to appeal the Divisional Court decision, relying on the serious and irreversible harm to the turtles. The PECFN further sought to stay the order of the Divisional Court, pending the disposition of its motions for leave to appeal from that decision.

PECFN's concern, and a primary motivation in applying for the stay of the Divisional Court decision, was that if this work occurred during the permitted time frame, and before the disposition of the motion seeking leave to appeal, the turtles' environment would be irreparably harmed

and any appeal from the Divisional Court decision would be moot.

Test for stay met

The Honourable Mr. Justice Blair of the Court of Appeal agreed with this reasoning and granted the stay by decision dated March 25, 2014. The Court of Appeal found that the test that needed to be met to grant a stay was easily met: a serious issue was raised; irreparable harm would result if the stay was not granted; and the balance of convenience favoured granting the stay.

Nevertheless, the court further justified the decision to grant the stay based on the broader public implications that the case raised for environmental law.

In addition, the court stated that there were issues of first impression since the review by the Divisional Court was the first time that the court had heard an appeal from an REA. If leave to appeal were granted, it would be the first time that the Court of Appeal would hear an appeal from an REA.

Significance

This decision marks the first time that an Ontario wind farm has had its REA overturned by the ERT. As referred to above, while previous cases have made claims that wind turbines or wind farms would cause serious harm to human health, these arguments have not been successful.

These same arguments were also made in the Ostrander case; however, the ERT overturned the REA because it accepted that engaging in the Project in accordance with the REA would cause serious and irreversible harm to Blanding's turtles.

The ERT was satisfied that, in this case, the wind farm — and, specifically, the road that would lead to the wind farm — posed an unreasonable risk to the turtles.

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Uncertainty

These recent proceedings have imported some uncertainty into renewable energy projects dependent upon REAs. At one time, potentially adverse impact on humans was thought to be the major obstacle for

REAs, but that obstacle appears to have been overcome.

Now, however, the protection of local at-risk species appears to be the new obstacle. Whether this new obstacle can be overcome by wind energy projects and developers awaits first the decision on whether Ostrander is granted leave to appeal

to the Court of Appeal and then, should leave be granted, a decision of the Court of Appeal.

REFERENCE: *Prince Edward County Field Naturalists v. Ostrander Point GP Inc.*, 2014 ONCA 227, 2014 CarswellOnt 3547 (Ont. C.A.).