

Ontario Tribunal Upholds Endangered Species Challenge to Wind Project's Approval



Certain energy projects, such as wind turbine farms, are generally considered more environmentally friendly than traditional oil- and gas-based energy facilities. But such projects can still negatively impact the environment. For example, in a recent case from Ontario, the approval for a wind turbine project was challenged on that grounds that it could harm two species. Here's a look at the Environmental Review Tribunal's decision in that case.

THE CASE

What Happened: A 27 turbine wind energy project received a Renewable Energy Approval (REA). An individual and an environmental group appealed the REA on that grounds that the project would cause serious and irreversible harm to plant life, animal life and the natural environment. Specifically, they raised issues regarding the project's potential impact on several species, including the little brown bat, which is endangered, and the Blanding's turtle, which is considered threatened.

What the Tribunal Decided: The Ontario Environmental Review Tribunal upheld the appeal in part, ruling that allowing the project to proceed in accordance with the REA would cause serious and irreversible harm to animal life, plant life or the natural environment.

The Tribunal's Reasoning: The Tribunal explained that the standard of proof to satisfy the so-called 'Environment Test' under the Ontario *Environmental Protection Act* is the balance of probabilities and that evidence proving only the *potential* for harm doesn't meet the test. In addition, the harm must be both 'serious' and 'irreversible.' Here, although there was no specific evidence of little brown bats in the project's vicinity, there was evidence the species was historically present in the county and the project area did contain potential foraging habitat. The Tribunal criticized the project's proponent for failing to carry out surveys, especially when there's 'evidence of the historic presence of

what is now an endangered species.’ On the balance of probabilities, the Tribunal found that the bats would likely be present. In addition, despite evidence that ‘few’ bats would be impacted by turbines, the Tribunal found that an increase in mortality ‘of even small numbers of little brown bats constitutes a serious impact’ and that even small scale impacts would lessen the species’ chances of recovery and thus represent ‘irreversible harm.’ The Tribunal also found that the upgrades to municipal roads required for the project and increased predation would cause serious and irreversible harm to the local population of Blanding’s Turtle [*Hirsch v. Ontario (Environment and Climate Change)*, [2016] CanLII 10116 (ON ERT), Feb. 26, 2016].

ANALYSIS

In *Hirsch*, the Tribunal concluded that the ‘irreversible harm’ aspect of the Environment Test would be meaningless if, in situations where species population numbers are low enough to be subject to irreversible harm, it were to find that project impacts are irrelevant because such species are likely to be completely destroyed in any event. Thus, the Tribunal’s interpretation of that language has raised the bar very high for the proponents of projects that may cause any mortality to a species at risk. Note, however, that the Tribunal did invite submissions on appropriate measures to mitigate the wind turbine project’s impact on the little brown bat and Blanding’s turtle. So if appropriate measures are found, this project could still proceed.