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Justice for the Blanding's Turtle at the Ontario Environmental Review Tribunal

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Case commented on:

Prince Edward (County) v Ontario (Ministry of the Environment), [\[2013\] OERTD No 40](#).

Sometimes an exploration into what is missing will reveal more than a study of what is. An examination of how differently things are done elsewhere can tell us a lot about our own ways. Okay, perhaps it is just easier for me to say this comment looks at a recent decision of Ontario's Environmental Review Tribunal to explore what it reveals about Alberta law governing energy projects and endangered species. In this case, Ontario's Environmental Review Tribunal (the Tribunal) revokes an approval issued by the Director (Ministry of the Environment) under the *Green Energy Act*, [SO 2009, c 12](#) for the construction of a wind turbine project on a peninsula of Crown land bordering Lake Ontario. The Tribunal's decision is based on its finding that the project would cause serious and irreversible harm to the Blanding's turtle - a species listed as threatened under Ontario's *Endangered Species Act*, [RSO 2007, c 6](#).

The decision is of interest to me for several reasons. First, reading it was a chance to revisit much of what I learned about the socio-ecological impacts of wind turbines during this past academic year as part of the Environmental Law Clinic's work to represent a coalition of Cochrane residents who oppose the construction of a wind turbine in their neighborhood. Second, the applicants in this case are public interest groups seeking to challenge a land use decision on Crown lands and there is no standing issue. Third, the manner in which this case hinges on the impacts to a listed species at risk decision is reminiscent of the sprague's pipit case I [posted](#) in December 2012 but far more significant in that here the impact on the threatened Blanding's turtle is the basis for revoking an energy project approval.

In December 2012 the Director approved a wind turbine project to be located on 324 hectares of Crown land bordering Lake Ontario. The project would include 9 turbines, each being 135 metres tall (including the 100 metre span of the rotor blades), and associated substations, roads, and related facilities. This was no doubt an energy project with a large footprint. The approval was issued pursuant to an application under section 47.3 of Ontario's *Environmental Protection Act*, [RSO 1990, c E.19](#) [the *Ontario EPA*].

In January 2013 two public interest groups filed an appeal of this approval with the Tribunal pursuant to section 142.1 of the *Ontario EPA*. The Alliance to Protect Prince Edward County (APPEC) sought an appeal on grounds the wind turbine project would cause serious harm to human health. The Prince Edward County Field Naturalists (the PECFN) sought an appeal on grounds the wind turbine project would cause serious and irreversible ecological harm to the area and the species within it. The Tribunal denied the appeal by APPEC on human health concerns

(note that Health Canada is studying the alleged human health impacts of wind turbine projects such as this one and readers interested can view the terms of reference [here](#)) and granted the PECFN appeal as it relates to the Blanding's turtle. Most noteworthy to me was the absence of any public interest standing issue for either applicant. This is because section 142.1 of the *Ontario EPA* provides that any resident of Ontario can appeal a renewable energy project approval on either of the two grounds noted above. There is no reference to "directly affected" and the other restrictive appeal provisions found in similar Alberta legislation. What does this tell us? It demonstrates that the inability of public interest groups to get tribunal standing to appeal energy and resource project approvals in Alberta is wholly the result of a policy decision to exclude public participation. Shameful really. Alberta can and should be better than this.

The Blanding's turtle is known to have Canadian populations in Ontario and Nova Scotia. The Ontario Ministry of Natural Resources describes it as a medium-sized turtle with a yellow throat and chin and a distinctive dome-shaped shell (see [here](#)). The turtle lives near shallow wetlands. It hibernates in the mud of wetlands from mid-October to April. Like most species at risk, the turtle is especially vulnerable to human impacts caused by encroachment by roads and the like. Another complication for the turtle is that females do not lay eggs until around 20 years old, which magnifies the impacts to the species when adults are lost due to human activity. A Blanding's turtle may live as long as 75 years.

The Blanding's turtle is listed as threatened under Ontario's *Endangered Species Act* and the Great Lakes population is also listed as threatened under the federal *Species at Risk Act*. Because this case concerns provincial lands and there is no recovery strategy prepared pursuant to the federal legislation, the provincial legislation has far more application here. Most noteworthy are sections 9 and 10 of the *Endangered Species Act*, which prohibit a person from harming a Blanding's turtle or damaging its habitat.

The construction and operation of the wind turbine project, and its associated roads and facilities, would likely harm a turtle at some point and most certainly damage its habitat. Accordingly, the project proponents received a permit under section 17 of the *Endangered Species Act [ESA]* authorizing harm to individual turtles or damage to its habitat. This *ESA* permit contained a number of conditions designed to mitigate harm to the Blanding's turtle. The project proponent and the Director argued the project would not create serious and irreversible harm to the turtle once the implementation of these conditions was taken into account. The Tribunal summarizes the *ESA* permit conditions at para 270, including the following:

- The project proponent is to develop an impact monitoring plan;
- No construction activity between May 1 and October 15 (ie. only work during the turtle's hibernation period);
- Control travel speed on access roads during and after construction;
- Train staff and contractors on measures to prevent harm to the turtle;
- Erect signage to warn about the presence of the threatened turtle species in the area;
- Develop new habitat for the turtle off-site and subject these lands to a 20 year conservation easement;
- Periodic monitoring and reporting on turtle populations in the area.

I've listed these conditions here because they remind me of the same sort of measures imposed by Alberta Sustainable Resource Development on surface access leases to mitigate impacts by energy projects to endangered species in Alberta – such as the grizzly bear in the Castle region.

Conservationists in Alberta have long argued before Alberta tribunals these measures do little to curb the demise of endangered species in Alberta.

The experts called by the PECFN likewise testified these mitigation measures would do little to prevent harm and damage to the Blanding's turtle. The Tribunal agreed, ruling that the wind turbine project would cause serious and irreversible harm to the Blanding's Turtle:

The Tribunal finds that engaging in the Project in accordance with the REA will cause serious and irreversible harm to Blanding's turtle. The Tribunal makes this finding having regard to the biological population that will be impacted by the Project; that is, the population that uses the habitat on the Project Site and the surrounding area.

It appears that the mitigation measures to be employed during the construction phase of the Project, i.e., no construction or maintenance from May 1 to October 15, would be effective to prevent serious and irreversible harm to Blanding's turtle from construction activities of the Project itself. However, such measures do not prevent use of the roads in the post-construction phase. In addition, the Tribunal finds on a balance of probabilities that the fact that this Project is on Crown land and open to public access will reduce the effectiveness of road mortality mitigation measures, including educational signage and reduced speed limits, to the point they will no longer be effective in reducing mortality to a level that would prevent serious and irreversible harm to Blanding's turtle. The one mitigation measure that the evidence indicates would be effective to some degree, i.e., speed bumps, does not nearly outweigh the increased use of the Site that will take place due to maintenance traffic and easier public access, and the measure will have no impact on poaching. ...

The Tribunal finds that mortality due to roads, brought by increased vehicle traffic, poachers and predators, directly in the habitat of Blanding's turtle, a species that is globally endangered and threatened in Ontario, is serious and irreversible harm to Blanding's turtle at Ostrander Point Crown Land Block that will not be effectively mitigated by the conditions in the REA. [at paras 359 – 363]

On the basis of this finding, the Tribunal exercised its authority under section 145.2.1(4) of the *Ontario EPA* to revoke the approval of a renewable energy project issued by the Director.

This decision is remarkable on several fronts. I noted earlier how the *Ontario EPA* provides for public interest standing for Ontario residents to appeal renewable energy project approvals in front of the Ontario Environmental Review Tribunal. The authority of the Tribunal provided by the *Ontario EPA* to revoke a renewable energy project approval is considerable and seems atypical to me. It is also worth noting this Tribunal exercised its considerable power – suggesting this was true adjudicative independence at work.

Finally, the result here effectively rescinds the *ESA* permit granted to the project proponent and the Tribunal overrules the Minister of the Environment on the harm caused by this project to the Blanding's turtle and its habitat. I don't know whether the applicants also considered a judicial review application to challenge the *ESA* permit. Nonetheless, there is no mention in the Tribunal's reasons of arguments by Ontario that this proceeding is a collateral attack on the *ESA* permit or some form of *res judicata* argument. These are the sort of arguments that I would expect from Alberta Environment if a similar case arose here.

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