

**Ministry of the Environment
and Climate Change**

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Michele Le Lay, President
Association to Protect Amherst Island
PO Box 6, 5695 Front Road
Stella, ON
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Dear Ms. Le Lay:

**Re: Appeal to the Minister of the Environment and Climate Change – ERT Case No. 15-084 -
Amherst Island**

On August 24, 2015, Ian Greason, Director, Ministry of the Environment and Climate Change (the "Director"), issued a renewable energy approval ("REA") to Windlectric Inc. ("Windlectric") approving the construction, installation and operation of a Class 4 wind facility (the "Project") in accordance with the Environmental Protection Act ("EPA"). The Project comprises 26 wind turbine generators with a total name plate capacity of 74.3 MW, along with a transformer substation and a temporary ready-mix Concrete Batching Plant. The Project is to be located on Amherst Island, with additional components on the mainland. The Association to Protect Amherst Island ("APAI" or the Appellant) appealed to the Environmental Review Tribunal ("ERT") challenging the Director's decision to issue the REA in accordance with s. 142.1 of the EPA (the "REA Hearing").

On August 3, 2016, the ERT released its decision and confirmed the Director's decision to issue the REA. APAI has appealed to me as the Minister of the Environment and Climate Change (the "Minister" or "I") in accordance with s. 145.6(2) of the EPA seeking to have the decision of the ERT revoked or altered (the "Appeal"). The Appeal was held in abeyance pending the determination of a related appeal to the Divisional Court by APAI in accordance with s. 145.6(1) of the EPA. The court proceedings have concluded.

I confirm the decision of the ERT for the reasons that follow.

Scope of the Minister's jurisdiction in respect of the Appeal

The Appellant seeks to have the REA revoked and also raises many concerns about Windlectric's operational compliance with the REA. It is therefore important to note at the outset the scope of the task given to me by the EPA in the event of an appeal under s. 145.6(2) of the EPA.

The starting point for the scope of an appeal to the Minister is the task given to the ERT in the context of the REA hearing. The ERT's task is outlined in s. 145.2.1 of the EPA. Section 145.2.1 provides that the ERT must consider only whether engaging in the Project in accordance with the REA will cause (a) serious harm to human health or (b) serious and irreversible harm to plant life, animal life or the natural environment. If the ERT determines that such harm will be caused, the ERT may revoke or alter the Director's decision in respect of the REA, or order the Director to take other action that the ERT considers appropriate.

A subsequent appeal to the Minister is governed by 145.6(2) of the EPA. This section provides that on appeal, the Minister may "confirm, alter or revoke the decision of the [ERT] as to the matter in appeal as the Minister considers in the public interest". In these circumstances, the decision under appeal is the ERT's limited review of the Director's issuance of the REA. Accordingly, the Minister's task on appeal is to ask the same questions as could have been considered by the ERT in the REA Hearing. If I were to determine that engaging in the Project in accordance with the REA would cause the requisite degree of harm to human health or the environment, I could alter or revoke the ERT's decision as I considered in the public interest.

I note that, like the ERT, I am considering whether "engaging in the [Project] *in accordance with the REA*" will cause either of the listed harms (emphasis added). This means that my review should assume that the terms of conditions of the REA will be met, and examine it on that basis. That is the extent of my role on appeal. Operational issues concerning whether the terms and conditions of the REA are in fact being met are to be dealt with through other processes. In that regard, MOECC is tasked with ensuring compliance with these terms and has a suite of compliance and enforcement tools available at its disposal. Further, the Director retains discretion under s. 47.5(3) of the EPA to amend the terms and conditions of the REA as circumstances change.

In sum, I can only interfere with the Tribunal decision if I believe that one of the harms is met. In addition, like the Tribunal, I am reviewing the REA as issued – questions about compliance with it are for the Ministry's Provincial Officers in their compliance and enforcement role, and for the Director to review as part of the Director's ongoing supervisory role.

Analysis of the issues raised by the Appellant

The Appellant raises numerous issues in its Appeal. I thank all of the parties for taking the time to address these issues in their thoughtful written submissions. There are four distinct categories of issues, which I shall address in turn.

1. Issues within the ERT's jurisdiction that were raised in the REA Hearing

The Appellant raises certain issues concerning harm to human health and environmental harm that were considered in the REA Hearing, including the following issues:

- Harm to bats, birds and Blanding's turtles;
- Harm to school children from the location of the cement batch plant; and
- Harm to human health caused by turbine noise.

The Appellant's concern for the environment and the health of their communities is commendable. However, the ERT's lengthy and detailed reasons for decision demonstrate that the ERT carefully considered these issues. In respect of each issue, the ERT concluded that the Appellant did not establish that engaging in the Project in accordance with the REA would cause (a) serious harm to human health or (b) serious and irreversible harm to plant life, animal life or the natural environment. I see no basis to interfere with the ERT's conclusions on these issues.

The Appellant also sought to adduce new evidence on Appeal, particularly in relation to publications concerning bat populations. Assuming that the Appellant may adduce such evidence, I find that this new evidence does not provide a basis to interfere with the ERT's conclusions on the issue of harm to harm to plant life, animal life or the natural environment. The new material is not site-specific and the ERT acknowledged that the Operation Mitigation Plan already includes pro-active curtailment measures to be deployed from the outset of the operation of the Project.

Although I see no basis to interfere with the ERT's conclusions on the issue of harm to Blanding's Turtles, I note that Windlectric is currently implementing further mitigation measures to protect Blanding's Turtles in addition to the protective measures contained in the REA.

2. Issues within the ERT's jurisdiction that were not raised in the REA Hearing

The Appellant raises certain issues concerning harm to human health and environmental harm that were not raised in the REA Hearing, including the following issues:

- Harm caused by shadow flicker;
- Harm caused to drinking water wells; and
- General health concerns, including fire risks and marine safety.

Assuming that the Appellant may raise these new issues on appeal, I find that the Appellant, in its submissions on these issues, has not established that engaging in the Project in accordance with the REA will cause (a) serious harm to human health or (b) serious and irreversible harm to plant life, animal life or the natural environment. Although these are important, relevant issues, I find that there is not enough evidence to satisfy either of the harms tests.

To the extent that any of these issues could be framed as a claim that Windlectric is not engaging in the Project in accordance with the REA or the EPA (e.g., whether a wind turbine is too close to a residence), this is a matter to be considered by the Ministry of the Environment and Climate Change as part of its ongoing monitoring of Windlectric's compliance with the REA and the EPA.

3. Issues outside of the ERT's jurisdiction

The Appellant raises several issues that the ERT did not have jurisdiction to consider in the REA Hearing, including the following issues:

- Economic risk;
- Whether Ontario requires the electricity that will be generated by the Project;
- Cultural risk, including historic homes and dry stone walls;

These are all significant considerations which frame the broader public debate on renewable energy projects. Our government takes these considerations very seriously. However, for the reasons set out earlier in this decision concerning the scope of the Minister's jurisdiction in respect of the Appeal, I do not have jurisdiction to consider these issues. Accordingly, I have not considered them. I would note, however, that a Heritage Assessment report was prepared as part of the REA application which includes mitigation and monitoring measures; there are also several conditions in the REA that deal with mitigation and monitoring measures for certain Built Heritage Resources.

4. Issues of law

The Appellant raises certain issues of law, including the following issues:

- The scope of the material the ERT could rely on with respect to mitigation measures; and
- The ERT's decision to refuse to allow new evidence in relation to the 2016 Noise Guidelines for Wind Farms ("Guidelines").

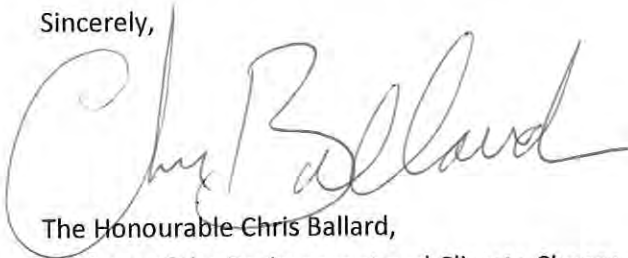
Under s. 145.6(2) of the EPA, the Minister does not have jurisdiction to consider questions of law; the Divisional Court has jurisdiction to consider such questions. Accordingly, I have not considered these issues of law.

I would note, however, with respect to the Noise Guidelines, that the sound level limit has not changed – the sound level limits are based on a 40 decibel noise limit which is the same in both the 2008 and 2016 Guidelines. These stringent sound level limits are consistent with the World Health Organization's recommendation that the outdoor annual average night sound level should not exceed 40 decibels. It remains the case that the Approval Holder must ensure that all wind turbines comply with these unchanged sound level limits for all applicable wind speeds at all points of reception as set out in the REA.

Decision

I confirm the decision of the ERT for the reasons set out above.

Sincerely,

A handwritten signature in cursive script that reads "Chris Ballard". The signature is written in black ink and is positioned above the printed name and title.

The Honourable Chris Ballard,
Minister of the Environment and Climate Change

Date:

April 19/18