

Ministry of the Environment,
Conservation and Parks

Ministère de l'Environnement,
de la Protection de la nature et des
Parcs



Office of the Minister

Bureau du ministre

777 Bay Street, 5th Floor
Toronto ON M7A 2J3
Tel.: 416-314-6790

777, rue Bay, 5^e étage
Toronto (Ontario) M7A 2J3
Tél. : 416.314.6790

Ms. Margaret Benke
macbenke@aol.com

December 4, 2019

RE: Appeal to the Minister of the Environment, Conservation and Parks in CCNS v.
Director, Nation Rise Wind Farm GP Inc., ERT Case No. 18-028

Dear Ms. Benke:

The appeal before me is of a January 4, 2019 decision of the Environmental Review Tribunal confirming a decision of the Director to issue a Renewable Energy Approval to Nation Rise Wind Farm GP Inc. (the Approval Holder). The Tribunal held a hearing on the approval over nine days in the fall of 2018. The Tribunal's decision was appealed to me on February 4, 2019, within the window of the 30-day appeal period provided for under the Environment Protection Act (EPA). The appellant has also asked for a stay of the Tribunal's decision in order to halt the construction of the project.

The appellant in the appeal is a local residents group named the Concerned Citizens of North Stormont. The respondents are the Director who issued the approval under the EPA and the Approval Holder.

The proposed project is a Class 4 Wind Facility with a proposed electricity generating capacity of up to 100 megawatts, with up to 33 turbines to be located at various locations within the municipality of United Counties of Stormont, Dundas and Glengarry. I understand that the project is currently under construction.

I thank the parties and everyone who participated in the hearing before the Tribunal and this appeal for their time in addressing these issues in a thoughtful way. This was not an

easy decision to make. While I agree with most of the decisions of the Tribunal, I disagree with the Tribunal's conclusions with respect to the degree of harm that will be caused to local bat species by the project. I am therefore altering the Tribunal's decision based on my conclusion that the project will cause serious and irreversible harm to bats and I revoke the approval. My reasons for doing so are set out below.

On the stay issue, I am not granting the stay requested because it is now unnecessary to do so given that I have decided the main issues. I do point out, however, that even if I had granted the stay, the stay would have been of the Tribunal's decision and not the approval itself. The stay, therefore, would have had no effect on whether the ongoing construction of the project could continue and would not have been responsive to the appellant's request.

My Responsibility for the EPA and the Environmental Review Tribunal

The issues before me in the main part of the appeal relate to an environmental protection issue in Ontario.

The purpose of the EPA is to provide for the protection and conservation of the natural environment.

As Minister responsible for the EPA I have been given a broad mandate by the legislature to administer the Act and general environmental policies in a way that provides for the protection and conservation of the natural environment. For the purposes of considerations related to renewable energy approvals, the meaning of "environment" not only includes air, land, water, plants and animal life, but also human life and the social, economic and cultural conditions that influence the life of humans or a community, and the interrelationships between all of these things.

The scope of my mandate includes such diverse powers and responsibilities such as appointing statutory decision makers, including Directors and Provincial officers who issue regulatory instruments and conduct regulatory enforcement, issuing certain regulatory orders directly, making regulations, setting regulatory charges, investigating

problems of pollution, conducting research and studies, making grants, disseminating information, appointing committees, establishing and operating waste management systems, waste disposal sites, and waste reduction systems.

These powers and responsibilities include overseeing decisions of the Environmental Review Tribunal through appeals, which is how this decision came before me.

Scope of the Appeal

In this appeal of the Tribunal's decision I am to assess the decision from the perspective of whether engaging in the proposed renewable project in accordance with its renewable energy approval will cause: (i) serious harm to human health; or (ii) serious and irreversible harm to plant life, animal life or the natural environment. This test is commonly referred to as the "harms test" and is the test that the Tribunal must apply when considering an appeal of a renewable energy approval. If I find that one or more of the concerns raised meets the harms test, then I can consider broader issues related to the public interest in deciding whether to confirm, alter, or revoke the decision of the Tribunal.

As an aside, I note that neither the Tribunal, nor myself on appeal of a decision of the Tribunal, are so narrowly confined in other matters. The harms test only applies in the context of a third-party appeal of a renewable energy approval.

My assessment of the Tribunal's decision also requires me to assume that the terms and conditions of the renewable energy approval will be complied with. Questions related to enforcement of the approval or the EPA more broadly are to be addressed by the Ministry through its compliance and enforcement tools. That said, if the harms test is met, it is open to me to revise the terms and conditions of the approval.

In its appeal, the appellant raised several issues that in its view the Tribunal failed to consider appropriately. These issues related to the impact of turbine noise on human health, impacts to public safety from ice throw and turbine failure, and potential impacts to soil stability and well water.

The appellant also raised several issues that were not before the Tribunal and that I am regrettably not able to deal with in assessing the Tribunal's application of the harms test because of the limitations imposed both on the Tribunal on appeal and on me in considering a decision of the Tribunal on appeal under Parts V.0.1 (Renewable Energy) and XIII (Appeals to Tribunal) of the EPA. The issues can be summarized as relating to provincial electricity needs and costs, policies related to carbon emissions, economic issues and the renewable energy approval application process, including applicable laws and guidelines.

The parties were also asked by me in August 2019 to provide additional submissions on three issues that in my view were critical to assessing whether the proposed project would cause harm to human health, animal life or the natural environment. These issues related to harm to birds and bats, harm resulting from stray voltage, and harm to human health resulting from noise as a result of the modeling approach that was applied to the project. While the issue of harm to birds and bats was considered by the Tribunal, it was not part of the appellant's initial submissions. Each of the parties took the opportunity to provide additional submissions on these issues.

For the most part, I agree with the findings of the Tribunal on the issues that it considered. I found its decision thorough and well reasoned. I am also of the view that neither the evidence before me on stray voltage nor the noise modeling approach applied to the project demonstrate that the harms test has been met.

Harm to Bats

On the one issue where my views depart from those of the Tribunal, however, and the position of the Director and Approval Holder, is on the degree of localized harm to bats that will result from the project. In my view, the harm that will result comes within the meaning of serious and irreversible harm to animal life as that term is used in the second part of the harms test.

The Approval Holder studied two of three bat maternity colonies as part of their pre-construction monitoring. The third colony could not be studied due to site access issues. The two studied colonies were considered to contain significant bat habitat and the third was assumed to also contain significant bat habitat.

The evidence before the Tribunal on the bat maternity colonies, including that from the Approval Holder's extensive field research, demonstrates in my view that while not large given the limited availability of beneficial habitat, they include colonies of Big Brown bats and Hoary bats, as well as the Little Brown bat which is listed on the Species at Risk Ontario List. The evidence also shows that project's operation will result in the mortality of bats due to collision with turbine blades, and that this impact is likely to be more significant with non-listed bats.

In my view, this means that there will be localized harm to an already small bat population. The seriousness of this harm is increased because of the relatively small size of the species population. While it is impossible to know with complete certainty the full extent of the harm that the operation of the proposed project will have on the bat species populations before the project has been operating for some years, I choose to exercise precaution in determining the seriousness of this harm and whether it will be irreversible. In my view, the harm will be both serious and irreversible to animal life given the relatively small bat species populations in the local area.

Remedy

Having decided that the operation of the project will result in in a serious and irreversible harm to local bat species I must consider the appropriate remedy. Under the EPA, I can confirm, alter or revoke the decision of the Tribunal as I consider in the public interest.

In some circumstances, the next step in the process would be to hold what is commonly referred to as a "remedy hearing" and take submissions on the parties on what is the appropriate remedy, including amending the terms and conditions of the approval, revoking the approval, or directing the Director to take a specific action. In this case I don't believe that a third round of submissions is necessary in this particular case in

light of the public interest reasons for revocation that I set out below. I am also mindful that a third round of submissions would prolong the appeal process.

Where the public interest lies in this project poses a particular challenge given the expanded definition of the term “environment” in Part V.0.1 of the EPA for the purposes of renewable energy project approvals, which as mentioned above includes “social, economic and cultural conditions that influence the life of humans or a community”. This requires me to balance several things in my considerations of the public interest, including the benefits of renewable energy against the harm to bats, the impact of the project on the local community, and the need for the electricity from the project. In terms of electricity need, while renewable energy is an important component of the province’s electricity grid, the project’s expected output of up to 100 megawatts, as noted on the approval, is obviously only a small fraction of Ontario’s energy usage.

As the Tribunal noted, the “P” conditions of the approval specifically require that the Approval Holder monitor the impacts through the proposed Environmental Effects Monitoring Plan and take steps in some circumstances to limit harm. While these requirements are somewhat helpful, condition P 6 only requires monitoring at “a minimum of ten (10) turbines”, and not at all the thirty-three potential turbines, and condition P 5 only requires monitoring for two of the three significant bat habitats. Condition P 14 only requires the monitoring to continue for three years. Also, the proposed operational mitigation measures required by condition P 8 of the approval only kick in after a significant number of bats, at a rate of ten per turbine per year, are known to have been killed by the operation of the project. These, in my view, create significant gaps in the monitoring and mitigation measures required by the approval.

Even if these conditions could be improved to limit harm to local bats, harm will still occur. Considering this harm together in the context of the minimal contribution the project is likely to have on the electricity supply in Ontario, in my view it is not appropriate to confirm the decision of the Tribunal, but rather amend it to revoke the approval.

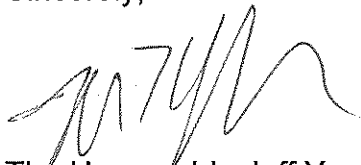
As noted above, it is unfortunate that the process of ensuring the appropriateness of the issuance of a renewable energy approval is such an arduous one. While not directly applicable to this decision, I note that the Ontario Government has taken steps to improve the decision making process as it applies to renewable energy approvals, including amending the Renewable Energy Approvals regulation under the EPA to add eligibility requirements related to electricity demand and return decision making authority under the Planning Act as it relates to renewable energy projects to municipalities.

Finally, I note that I have asked Ministry staff to review how harm to bats is assessed as part of the renewable energy approval process and related guidelines and whether any changes might be necessary.

Decision

I amend the decision of the Tribunal to find serious and irreversible harm to bats and revoke the approval.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeff Yurek', written over a light blue horizontal line.

The Honourable Jeff Yurek
Minister of the Environment, Conservation and Parks

