

APPEC Report on Jan 22, 2014 Ostrander Point ERT Appeal Hearing

Day Two of the 3-day hearing before the Divisional Court focused on the finding of the Environmental Review Tribunal that if allowed to proceed Gilead Power's wind project at Ostrander Point in Prince Edward County will cause serious and irreversible harm to Blanding's Turtles.

Counter-Appeal by Gilead Power and the Ministry of the Environment (MOE)

Gilead and the MOE have been collaborating closely in the months leading up to this hearing just as they did for the ERT hearing. Lawyers for both parties argue that the Tribunal:

- failed to give the proper weight to conditions set out in the Overall Benefit permit. For example the Tribunal only considered the Overall Benefit permit from a narrow perspective, i.e., the local population of Blanding's Turtles. This approach frustrates the intent of the permit to provide a benefit to Blanding's Turtles province-wide.
- lacked critical information on the Blanding's Turtle population at Ostrander Point and on traffic volumes on the new access roads. Without information on these issues there is no basis for the Tribunal's finding that the access roads required for this project will cause serious and irreversible harm to Blanding's Turtles.
- failed to consider alternatives. It was well within the Tribunal's purview to order that the access roads be closed to the public. The Tribunal revoked the Renewable Energy Approval when other options were available.

Sylvia Davis, lawyer for the MOE, identified numerous errors relating to the Tribunals' approach to the Overall Benefit permit. According to Davis the Tribunal misunderstood the rationale of the Overall Benefit permit to provide an overall benefit to Blanding's Turtles province-wide. In failing to understand this rationale the Tribunal in effect frustrated the intent of the permit. The only rationale that could ever be given for protecting a local population of Blanding's Turtles is if these turtles had a unique strand of DNA that set them apart from Blanding's Turtles everywhere else.

Ms. Davis observed that the Tribunal chose to defer to, in her words, "speculation on the part of the experts" brought forward by the Prince Edward Field Naturalists (PECFN) of serious and irreversible harm rather than rely on the expertise of witnesses testifying for the Ministry of Natural Resources (MNR).

Indeed, according to Ms. Davis, the Tribunal misinterpreted its jurisdiction. The MNR is the appropriate body to deal with issues concerning species at risk. The Tribunal is not as well-informed as the MNR and therefore should be supporting decisions made by the MNR, not nay-saying them.

Ms. Davis is clearly looking for ways to hamstring any Tribunal going forward that presumes, as this one did, to question the efficacy of the Overall Benefit permit and MNR's judgment in issuing it.

Gilead lawyer Doug Hamilton observed that every possible issue was raised at the ERT including birds, bats, turtles and alvar and that there are many ways to address each of these issues. In fact dozens of mitigations had been proposed. How could Gilead have possibly anticipated where the Tribunal was going to go in the end? Justice Nordheim did not find that argument compelling. As he pointed out that might well have been the case. But none of this would have prevented Gilead from proposing during the hearing that the access roads be closed to the public.

CanWEA's presentation for the most part dealt with issues already raised. The presenter did suggest that the Tribunal erred in looking at serious and irreversible harm to Blanding's Turtles in the area of the project site when it should have been looking at the biologically significant area. But the argument was a non-starter in the absence of any information on where this biologically significant area the Tribunal should have been looking at actually is or why that scope would have been preferable.

Response by Prince Edward County Field Naturalist (PECFN)

PECFN's lawyer Eric Gillespie began by noting that Ostrander Point has long been recognized as an environmentally sensitive area. Mr. Gillespie noted the nationally and globally significant Important Bird Area and a peninsula that has brought with it a migratory corridor, endangered species, over-wintering habitat and globally-imperiled alvar. If Gilead's legal team is that hard-pressed to explain why so many issues were raised at the ERT hearing and why Gilead was forced to propose "dozens and dozens" of mitigations this may help them to understand.

Mr. Gillespie went on to address criticisms of the Tribunal and its decision point by point. As noted by Mr. Gillespie:

> Any decision-maker needs only look at evidence before them. If any intervention was needed it was up to parties to supply that information.

> Criticisms about scale are unfounded. Gilead's own consultant focused on this site. Experts called by the proponent focused on the site. This is the scale the Tribunal is being asked to base its decision on and that is what the Tribunal quite appropriately did.

> The Tribunal received substantial evidence to support a finding of serious and irreversible harm. The Tribunal accepted Dr. Beaudry's testimony into evidence. It did not rely on speculation as suggested this morning by the MOE.

> Contrary to what has been said, traffic volume has been addressed. The project will be located in undisturbed areas. Gilead's own consultant says that there is going to be an increase in traffic at the project site. The Tribunal had evidence before it submitted by Gilead's own consultant that there will be an increase in traffic volume. There was no requirement for PECFN to conduct traffic studies.

> Closing the roads to the public would do nothing to reduce road mortality from maintenance workers, nest predation and poaching.

> The submission has been made that the MNR had experts helping to develop the Overall Benefit permit. That is not evident and has not been entered into evidence. Two MNR employees, Melissa Laplante and Andy Baxter were the only witnesses called by the MOE and neither qualified at the hearing as experts in Blandings Turtles.

> The Tribunal looked at the compensation property and did not find any conclusive evidence that it was going to provide suitable habitat.

> If you don't put a remedy forward you don't get relief. If there were other alternatives available it's not the Tribunal's fault that they were not considered. The tribunal can only consider evidence before it.

> It has been argued that the ERT is not an expert body in deciding these matters. The Tribunal is a specialized body with expertise in the environment. After several years and hearing from many experts It is even more specialized.

> We are not here to rehash the expertise of the ERT. We have a very specialized Tribunal with expertise but they've got to do it in 6 months. This means that at ERT's you're doing things up front in a summary manner. Gilead knew in 2010 about radar, alvar management, and had discussed the closing of the access roads with MNR. At an ERT you have to make your case and that includes all parties.

As noted in PECFN's report on today's proceedings Justice Nordheim put a little wrinkle in the proceedings when he asked Mr. Gillespie to show where in the decision the Tribunal analysed the difference between "serious" and "irreversible". He wanted to be able to follow the Tribunals' reasons for coming to the decision that the Gilead project would cause irreversible damage to the Blanding's Turtles at Ostrander Point.

Mr. Gillespie argued that it is ultimately in the Tribunals' purview to determine serious and irreversible harm and Judge Nordheim agreed. But Judge Nordheim noted that he did not regard this as an independent issue either. Mr. Gillespie was able to find several instances

in the decision that show that the Tribunal was very alive to their legal responsibility to analyze the issue of serious and irreversible harm with respect to Blanding's Turtles.