



September 21st , 2016

TO: Ontario Energy Board
2300 Yonge St
Toronto, ON M4P 1E4

Attn: Board Secretary
Re: EB-2016-0268

In response to the interim order sent from the OEB to wpd White Pines Wind on September 20th 2016, attached please find supporting documentation that provides the ongoing status of the ERT. Essentially we are providing the email of the PDF order issued on (August 24th 2016) containing schedule, said pdf, and an email clarifying that the final date for reply submissions is November 4th not November 5th. Wpd White Pines believes the attached is sufficient information for the Board, However if the Board requires any additional supporting documentation to assist in granting wpd White Pines request please don't hesitate to ask.

Kind Regards,

A handwritten signature in blue ink, appearing to be 'A. J. e'.

wpd White Pines Wind Incorporated

Jaclyn D'Angelo

From: Cosentino, Yazzie (MAG) <Yazzie.Cosentino@ontario.ca>
Sent: Wednesday, August 24, 2016 2:37 PM
To: jg.hirsch@xplornet.com; appecappec@outlook.com; egillespie@gillespielaw.ca; pvittal@gillespielaw.ca; Davis, Sylvia (MOECC); Crangle, Rebecca (MOECC); Jesse Long; pduffy@stikeman.com; jsfwilson@stikeman.com; rcuervolorens@blaney.com; wfairbrother@tmlegal.ca; commissioner@eco.on.ca; pecounty.1@gmail.com; cherylanderson23@sympatico.ca; otterlakecanoes@gmail.com; roxanmk@gmail.com; jimandnora@kos.net; douglas_a_murphy@hotmail.com; norm@normanhardie.com; hardie.norman@gmail.com; cu2rie@yahoo.ca; j.soorsma@hotmail.com; james.barkman@yahoo.ca; annedumbrille@fastrackconsulting.com; gary.mooney@actel.ca; wwrightman@gmail.com; cathyatkinson@hotmail.com; dianemilan@sympatico.ca; hgarand@xplornet.ca; bluepoodle@sympatico.ca; gailforcht@gmail.com; cl.arsenault@gmail.com; hemetcalfe@rogers.com; walmsleyk0k@gmail.com; paula.c.peel@alumni.utoronto.ca; don.farrington@kos.net; everafter@kos.net; ehowes@hpedsb.on.ca; stewartcolvin@gmail.com; ctaylorhuff@sympatico.ca; parkerne@gmail.com; billscott528@hotmail.com; bleonard333@hotmail.com; klingenberg.ms@gmail.com; carol-ann.mcneil@bell.blackberry.net; tomstarkey@live.ca; tashbourne@rogers.com; barry@rooftops.ca; wallace3389@gmail.com; info@sophiadefrancesca.com; rdl@ddhb.com; b.wyatt@bell.net; warunkiw@gmail.com; sacha@gosacha.com; maurkapral@gmail.com; vidvar@kos.net; ambrosejohn3@gmail.com; christopherkkeen@hotmail.com; mlarrattsmith@gmail.com; twighollow@gmail.com; dougm McGr@gmail.com; elizabeth.crombie@sympatico.ca; reneewheeler63@hotmail.com; carlynmoulton@gmail.com; jcmleewis@kos.net; Kodais@rogers.com; sgoranson@istar.ca; jamesvince@kos.net; eetue@winih.com; johnjill@kos.net; carriage@kos.net; joggins@kos.net; ddsr@sympatico.ca; karenmouck@gmail.com; sanmcm@gmail.com; mkotherone@gmail.com; rnewsome@cogeco.ca; vqj1@kos.net; Bivfins@gmail.com; ecosfholtz@gmail.com; Valleypine.hudson@gmail.com; Jason_nst@yahoo.com; harrypasternak@sympatico.ca; lpickering@kos.net; walshoj@yahoo.ca; gord.gibbins@optimumre.com

Subject: Case No.: 15-068 Hirsch v. Ontario (Environment and Climate Change) - Issued Order
Attachments: ERT15068o13.pdf

To all recipients:

Attached is an order issued with respect to the above noted file.

NOTE: Due to the possible Canada Post service disruption the attached decision is issued by this email. A hard copy will not be sent.

This email address cannot process any correspondence related to this case. Should you require further information/assistance concerning this matter, please contact the ERT Case Coordinator, at 416-[insert number bold] or

- By emailing to: ertribunalsecretary@ontario.ca
- By telephoning: Toronto: 416-212-6349 Toll Free: 1-866-448-2248

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: August 24, 2016

CASE NO.:

15-068

PROCEEDING COMMENCED UNDER section 142.1(2) of the *Environmental Protection Act*, R.S.O. 1990, c.E.19, as amended

Appellant: John Hirsch (File No.15-068)
Appellant: Alliance to Protect Prince Edward County (File No.15-069)
Approval Holder: wpd White Pines Wind Incorporated
Respondent: Director, Ministry of the Environment and Climate Change
Subject of appeal: Renewable Energy Approval for White Pines Wind Project
Reference No.: 2344-9R6RWR
Municipality: County of Prince Edward
ERT Case No.: 15-068
ERT Case Name: Hirsch v. Ontario (Environment and Climate Change)

Heard: By telephone conference call on July 27, 2016 and in writing

APPEARANCES:

Parties

Counsel

John Hirsch

Self-represented

Alliance to Protect Prince Edward County

Eric Gillespie and Priya Vittal

Director, Ministry of the Environment and Climate Change

Sylvia Davis and Rebecca Crangle

wpd White Pines Wind Incorporated

Patrick Duffy and James Wilson

ORDER DELIVERED BY MARCIA VALIANTE AND HUGH S. WILKINS

REASONS**Background**

[1] This order addresses the form and timing of the continuation of the hearing in this proceeding. This proceeding relates to appeals brought by John Hirsch and the Alliance to Protect Prince Edward County ("APPEC") (collectively, the "Appellants") of Renewable Energy Approval No. 2344-9R6RWR (the "REA").

[2] The REA was issued on July 16, 2015 by Mohsen Keyvani, Director, Ministry of the Environment and Climate Change (the "MOECC") to wpd White Pines Wind Incorporated (the "Approval Holder"). It authorizes the construction, installation, operation, use and retiring of a Class 4 wind facility consisting of 27 wind turbines, two transformer substations, underground electrical cabling, distribution lines and associated infrastructure (the "Project"). The Project is located near the south shore of Prince Edward County in an area bounded by Brummell Road and Bond Road to the north, Lighthall Road to the west, Gravelly Bay Road to the east, and Lake Ontario to the south.

[3] On July 29, 2015, Mr. Hirsch filed a notice of appeal of the REA with the Environmental Review Tribunal (the "Tribunal"), pursuant to s. 142.1 of the *Environmental Protection Act* (the "EPA"), seeking revocation of the REA on the grounds that the Project will cause serious and irreversible harm to plant life, animal life and the natural environment. On July 31, 2015, APPEC filed a notice of appeal with the Tribunal seeking revocation of the REA on the grounds that the Project will cause serious and irreversible harm to plant life, animal life and the natural environment, and will cause serious harm to human health. A third appeal, by the Prince Edward County South Shore Conservancy, was withdrawn and dismissed by the Tribunal by an order dated September 30, 2015.

[4] The hearing was held in November and December 2015 in Wellington and Picton in Prince Edward County, and at the Tribunal's offices in Toronto, Ontario. On February 26, 2016, the Tribunal issued an order allowing the appeal in part. The Tribunal found that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment under s. 145.2.1(2) of the *EPA*. The Tribunal also adjourned the hearing and gave procedural directions for the continuation of the proceeding with respect to the appropriate "remedy", pursuant to s. 145.2.1(4) of the *EPA*.

[5] At the direction of the Tribunal, the parties provided written submissions respecting several aspects of the continuation of the proceeding. On June 30, 2016, the Tribunal issued an order in which it ruled that the parties will be permitted to adduce additional evidence and that the evidence and submissions it will consider in the continuation of the hearing will be limited to specified issues. The Tribunal also directed the parties to provide evidence and submissions by July 29, 2016, and directed them to consult with each other and provide dates for the filing of these materials to the Case Coordinator by July 6, 2016.

[6] The parties were unable to agree to a schedule for meeting the July 29, 2016 date. On July 12, 2016, the Tribunal by email directed that it would receive evidence solely in writing, and provided a schedule for filing this evidence. In accordance with the Tribunal's direction, the Approval Holder and the Director filed witness statements and supporting documents for their proposed witnesses on July 22, 2016.

[7] The Appellants sought clarification with respect to the form of the hearing and asked that they be entitled to provide further submissions on the hearing process and schedule. A telephone conference call ("TCC") was held on July 27, 2016. On July 28, 2016, the Tribunal sent an email to the parties directing, among other things, that any further submissions respecting the process were to be filed by August 5, 2016, with any response to other parties' submissions to be filed by August 9, 2016. Upon the request of the parties, further submissions were made on August 11, 2016.

[8] On August 5, 2016, APPEC filed a notice of motion seeking an order to have the Tribunal receive additional evidence in person, rather than in writing. The other parties provided submissions on this issue, and APPEC responded, by email.

Issues

[9] The issues are:

- 1) whether the continuation of the hearing should be in person or whether evidence and submissions should be received in writing; and,
- 2) the scheduling of the continuation of the hearing.

Relevant Legislation and Rules

[10] *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (“SPPA”):

5.1 A tribunal whose rules made under s. 25.1 deal with written hearings may hold a written hearing in a proceeding.

[11] The *Rules of Practice* of the Tribunal:

162. The Tribunal will schedule the Hearing as close as possible to the site that is the subject of the proceeding. The Parties may agree that the Hearing be scheduled at the Tribunal hearing rooms in Toronto or at another location.

...

189. Where permitted by law, the Tribunal may decide to conduct any part of the proceeding in person or by way of a written or electronic Hearing, and in coming to its decision, may consider any relevant factors, including:

- (a) the suitability of a written or electronic Hearing format considering the subject matter of the Hearing;
- (b) whether the nature of evidence is appropriate for a written or electronic Hearing;

- (c) the extent to which the matters in dispute are questions of law;
- (d) the convenience of the Parties, including any anticipated prejudice to a Party;
- (e) the cost, efficiency and timeliness of the proceeding;
- (f) ensuring a fair and understandable process;
- (g) the desirability or necessity of public participation or public access to the Tribunal's process; and
- (h) the fulfillment of the Tribunal's statutory mandate.

Analysis and Findings

Issue 1: Whether the continuation of the hearing should be in person or whether evidence should be received solely in writing

[12] APPEC submits that Rule 162 of the Tribunal's *Rules of Practice* (the "Rules") requires that a hearing be conducted as close as possible to the site that is the subject of the proceeding, which in this case is in Prince Edward County. APPEC argues that, if the evidence is received solely in writing, the evidence would not be given in Prince Edward County, which would violate the Rules, be prejudicial to the Appellants and preclude public participation.

[13] APPEC submits that the factors in Rule 189 weigh against receiving the evidence in writing. APPEC asserts that conducting cross-examinations before a court reporter will entail large transcript costs. In addition, APPEC submits that an in-person hearing could include time limits on cross-examination, and any objections and procedural concerns could be addressed by the Tribunal immediately, making the hearing more efficient. APPEC further argues that requiring the evidence to be presented at a court reporter's office in Toronto will preclude members of APPEC and interested members of the public from Prince Edward County from observing the proceeding.

[14] The Approval Holder and the Director submit that the provision of additional evidence in writing, with final submissions possibly being heard in person, would be a prudent use of the parties' and the Tribunal's limited resources, particularly in light of

previous delays and uncertainty over the number of witnesses to be called by APPEC. They submit that this would strike the appropriate balance between access and efficiency.

[15] Rule 162 provides that Tribunal hearings will be held close to the site of the subject matter of the appeal; however, this Rule only applies when an in-person hearing is held. In this proceeding, the bulk of the hearing to date has been conducted in Prince Edward County. When circumstances required that certain witnesses be examined in Toronto, a telephone conference line was provided so that any member of the public could audit the proceedings. Also, other parts of this proceeding have been held by TCC and in writing.

[16] The *SPPA* permits the Tribunal to receive evidence in writing if its rules so permit. In making that determination, the Tribunal may consider any relevant factors, including those listed in Rule 189. Some of the listed factors highlighted by the parties that are relevant here are: convenience and prejudice to the parties; cost, efficiency and timeliness of the proceeding; and public participation and access to the process.

[17] The Tribunal considers it relevant that the context for this determination is a renewable energy approval appeal, which by s. 145.2.1(6) of the *EPA* and s. 59(1) of Ontario Regulation ("O. Reg.") 359/09, must be disposed of by the Tribunal within six months of service of the notice of appeal. According to s. 59(2) of O. Reg. 359/09, adjournments that are necessary, in the opinion of the Tribunal, to secure a fair and just determination of the proceeding are not counted in the calculation of the six-month period and thus, effectively "stop the clock". This proceeding is adjourned and, as the Tribunal pointed out in its June 30, 2016 Order, earlier delays in this proceeding resulted in only limited hearing time remaining available. The Tribunal accepts that there may be some efficiencies in an in-person oral hearing and that there is sufficient time to hold an in-person hearing with the remaining time available in this proceeding. However, because of the limited time available and the uncertain number of expert witnesses, if an oral hearing were held, it would be necessary to impose restrictive limits

on the time allowed for examinations-in-chief and cross-examinations, which could potentially be unfair to the parties. The Tribunal finds that, on balance, receiving evidence in writing rather than through an in-person hearing would provide the Tribunal with the best evidence on which to base its decision and, thereby, fulfill its statutory mandate.

[18] The Tribunal also notes that given its limited availability over the upcoming months, the scheduling of sufficient time for an in-person hearing would likely delay the proceeding longer than the alternative of receiving evidence on remedy in writing.

[19] APPEC argues that public participation would be precluded if the evidence is received in writing rather than in person, and that the Appellants would be prejudiced if an oral hearing is not held in Prince Edward County. However, the Tribunal notes that cross-examinations of witnesses before a court reporter can be conducted in any location convenient to the parties and the witnesses. If the parties determine that it is not convenient for them and their witnesses to conduct the cross-examinations in Prince Edward County, a similar arrangement to that used earlier in the hearing, i.e., using a telephone or internet connection, would enable members of the public to listen to or observe the cross-examinations. In addition, the transcripts will become part of the public record of this proceeding and available for review by the public, once they are filed with the Tribunal,

[20] APPEC also raises the issue of transcript costs, yet it has not demonstrated that the costs will be significant or prejudicial. APPEC has retained a court reporter to attend hearing events throughout the course of this proceeding. For this phase of the proceeding, the Approval Holder and the Director have committed to sharing the cost of the transcripts equally with APPEC.

[21] The Tribunal finds that it is appropriate and fair in the circumstances to receive evidence in writing, that is, to have expert witnesses file written witness statements and be cross-examined on those statements before a court reporter, and to have the

witness statements and transcripts filed with the Tribunal. Receiving additional evidence in writing is fair to all the parties, given the limited time remaining, will result in less delay in completing the proceeding, and will provide the best evidence to allow the Tribunal to fulfill its statutory mandate. No evidence of prejudice has been provided. The Tribunal observes that any submissions on the admissibility of evidence may be made in final written submissions and finds that any associated inefficiencies incurred by receiving evidence in writing would not be prejudicial to any party.

[22] None of the parties objected to filing final submissions in writing but all requested an opportunity to make supplementary oral submissions before the Tribunal. The Tribunal finds that it is appropriate and fair in the circumstances to have the parties file their final submissions in writing. This finding does not preclude the parties from requesting an opportunity to make supplementary oral submissions before the Tribunal in addition to filing written submissions. The Tribunal directs the parties to consult one another and then forthwith request in writing a date in November 2016 on which the Tribunal would hear supplementary oral submissions.

Issue 2: The scheduling of continuation of the hearing

[23] The parties and the Tribunal have struggled to reach consensus on the scheduling of the continuation of the hearing in this proceeding. The most recent schedule proposed by the Approval Holder and the Director is one that APPEC considers to be reasonable, subject to some adjustments. The Tribunal adopts this schedule as adjusted. Further adjustments to the schedule may be made as needed, at the direction of the Tribunal.

[24] With respect to the Approval Holder's request to place a deadline on the filing of motions, the Tribunal reiterates its direction of July 28, 2016, that if a party intends to bring a motion, it should do so promptly and in accordance with the Rules.

ORDER

[25] The Tribunal orders that additional evidence regarding remedy will be received in writing. The parties shall serve and file written witness statements, conduct cross-examinations of all witnesses before a court reporter, file the transcripts with the Tribunal, and serve and file final written submissions on remedy in accordance with the schedule provided, subject to any further direction from the Tribunal regarding supplementary oral submissions.

[26] The Tribunal directs the following schedule for filing evidence and submissions on remedy, to be adjusted at the direction of the Tribunal as needed:

August 26, 2016	Appellants to serve the other parties, and file with the Tribunal, a list of proposed witnesses and their qualifications Approval Holder to serve the other parties, and file with the Tribunal, proposed wording for amendments to the REA
September 2, 2016	Appellants to serve the other parties, and file with the Tribunal, all witness statements and supporting documents
September 16, 2016	Approval Holder and Director to serve the other parties, and file with the Tribunal, reply witness statements and supporting documents
September 30, 2016	Parties to complete cross-examinations of all witnesses
October 14, 2016	Approval Holder and Director to serve the other parties, and file with the Tribunal, written submissions
October 28, 2016	Appellants to serve the other parties, and file with the Tribunal, written submissions
November 5, 2016	Approval Holder and Director to serve the other parties, and file with the Tribunal, any written reply submissions

*Motion for In-person Hearing Denied
Procedural Directions Issued*

"Marcia Valiante"

MARCIA VALIANTE
MEMBER

"Hugh S. Wilkins"

HUGH S. WILKINS
MEMBER

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.

Environmental Review Tribunal

A constituent tribunal of Environment and Land Tribunals Ontario

Website: www.elto.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

Jaclyn D'Angelo

From: Pietrzyk, Eva (MAG) <Eva.Pietrzyk@ontario.ca>
Sent: Monday, August 29, 2016 4:38 PM
To: jg.hirsch@explornet.com; Priya Vittal; Davis, Sylvia (MOECC); James Wilson; Eric Gillespie; Patrick Duffy; Jesse Long
Subject: 15-068 Hirsch v. Ontario (MOECC)
Importance: High

Good Afternoon Counsel,

I am writing to reply to your inquiry where you advised that page 9 of the Tribunal's Order issued August 24, 2016 states that the Approval Holder and the Director are to serve the other parties, and file with the Tribunal, any written reply submissions by November 5, 2016.

As you have noted, this is a Saturday and the Order should instead read that the due date to is **Friday November 4, 2016**.

Sincerely,

Eva Pietrzyk

Case Coordinator | Planner

Environment and Land Tribunals Ontario

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