

***To the Editor:***

*This is an article from a series of monthly columns by Environmental Law Specialist Dianne Saxe, one of the top 25 environmental lawyers in the world, and Ms. Jackie Campbell. These articles are available for publishing at no charge, provided Dr. Saxe and Ms. Campbell are cited as the authors. Dr. Saxe can be contacted at (416) 962-5882 or [admin@envirolaw.com](mailto:admin@envirolaw.com). For more information, visit <http://envirolaw.com>.*



**News Article**

**Erickson decision: wind turbines can be built in Ontario**

Wind turbines can be built in Ontario, despite opponents' claims of adverse health effects. But more studies are warranted about how far they should be set back. That's the bottom line of today's Erickson decision of the [Environmental Review Tribunal](#) under the [Environmental Protection Act](#). Here are some key quotes:

“This case is a reminder that energy facilities can generate more than electricity; they can also generate conflict. Though this case involves appeals of Suncor’s Kent Breeze Wind Farm Project, the Appellants’ approach to this proceeding has largely been **a test of whether turbines in Ontario will cause serious harm to human health**. The Parties called experts from all over the world to speak to the issue of whether this Project, which was approved according to Ontario’s Ministry of the Environment Noise Guidelines for Wind Farms and Ontario Regulation 359/09 made under the Environmental Protection Act, will seriously harm humans living nearby. It is clear that this case is a novel case that not only involves new legislation but also new scientific research.

For the reasons that follow, the Environmental Review Tribunal finds that **the Appellants have failed to show that Suncor’s Kent Breeze Project, as approved, will cause serious harm to human health. However, the evidence shows that there are some risks and uncertainties associated with wind turbines that merit further research**. In that regard, the Tribunal hopes that future debate focuses on the most appropriate standards rather than “yes or no” arguments about whether turbines can cause harm. According to the evidence in this Hearing, where an impressive array of leading experts from around the world testified on cutting

edge areas of scientific inquiry, the Tribunal cannot find that the Kent Breeze Project operated according to the current Ontario standards “will cause serious harm to human health”. That is the test in the statute, but the evidence presented in this Hearing is insufficient to meet it. What the Tribunal can state is that the need for more research came up several times during this Hearing. Time will tell as to what that research will ultimately demonstrate. The Tribunal is hopeful that, whatever the results, further research will help answer some of the concerns and uncertainties raised during this Hearing....

To summarize, the evidence in this Hearing on serious indirect harm was largely exploratory. The evidence on a lack of serious indirect harm was also limited (the evidence on a lack of serious direct harm is much stronger, however). The Tribunal is not giving significant weight to the latter and little to the former in reaching its conclusion. That is because the legal test itself tilts the balance in one direction. The onus is on one side (in this case, the Appellants). That side has provided evidence that the Tribunal finds to be exploratory in nature, even if given significant weight. Put another way (using the wording of Dr. Mundt), the present situation is closer to the hypothesis generating phase of scientific research than it is to the point where conclusions can be made on causation (with respect to the sound levels expected at the Project’s receptors). Or, using the approach of Dr. Shepherd, it is clear that we are not yet at the third stage of research on a new condition where intensive research has been completed so as to determine causation. We are at a much earlier stage, where there have been adverse event reports and some exploratory studies, such as the Nissenbaum Study. It is, therefore, no surprise that the legal test, which requires proof of harm, has not been satisfied when the applicable scientific evidence is in such an early stage of development.... **Noise levels are not high enough to cause serious harm....** the Tribunal finds that there is insufficient evidence to establish that noise predicted to be produced at the Kent Breeze Project will cause indirect harm to such a serious degree that will cause serious harm to human health. However, as noted above, the science in this area is evolving and it is hoped that future studies will shed additional light as to possible impacts on human health....

attitude towards turbines (which could be different as between participants and non-participants) can affect the situation. For example, those who benefit from a project may not have the same reaction to the presence of a wind turbine as similarly situated persons who do not benefit.... the predictions of noise levels will not be completely accurate and that measurements and assessments will be hampered by the technology available and the very nature of sound and noise. However, it is a large leap to state that these challenges and uncertainties mean that the Project will cause serious harm....

The Director testified about the role of precaution in his decisionmaking process. Based on that testimony, the Tribunal has some concerns about the Director’s understanding of the role and applicability of the principle. The impression left by some of the Director’s comments is that more work should be done within the MOE on putting the precautionary principle into practice. Care should be taken in putting into place effective Environmental Review Tribunal Decision: 10-121/10-122 Erickson v. Director, Ministry of the Environment 205 precautionary measures rather than simply painting standard measures with a precautionary brush...

the Appellants have not proven that serious harm will be caused with reference to the approval’s alleged non-compliance with the SEV. Rather, they have simply raised valid concerns about the

process by which the application was assessed in light of the SEV. This is not enough to satisfy the section 145.2.1 test and provide jurisdiction to the Tribunal to make changes to the approval decision....

Even though the Tribunal allowed the SEV issue to be raised by the Appellants in this case (see Erickson 2), now that the full evidence and submissions on the SEV has been heard, it has become more apparent that it will be difficult for section 142.1 appellants to successfully use procedural arguments to satisfy the section 145.2.1(2) test. Section 145.2.1(2) is more direct in nature than the tests that may be applicable in other types of proceedings. Under the new REA provisions, it is clear that any argument about a procedural failing has to also prove that the harm listed in section 145.2.1(2) will result. If the chain of reasoning is not complete, then the argument will fail....

It is hoped that Ministry decision-makers will nonetheless continue to make progress in their efforts to further enhance the role of the SEV, including the precautionary principle, in their work. Precautionary measures should be taken to minimize the risk that renewable energy projects in some locations will simply sacrifice one value (e.g., an environmental amenity or public health) for another (e.g., reduction in the use of fossil fuels)....

**This case has served as a reminder that all types of energy projects (including renewable or “green” projects) can generate significant concerns and conflict. The precautionary principle’s focus on “preventing” the causes of environmental degradation calls upon all of us to take significant steps to reduce energy demands and encourage conservation.** In this way, the precautionary principle serves as a modern reminder of the old adage that “an ounce of prevention is worth a pound of cure”.....

**While there are certainly legitimate concerns and uncertainties about the effects of wind turbines on human health, the Tribunal cannot conclude that engaging in the Kent Breeze Project as approved will cause serious harm to human health** according to the evidence tendered in this Hearing. The Tribunal notes that the research in this area is at quite an early stage and that our collective understanding of the impacts of wind turbines on human health will likely progress as further research and analysis is undertaken.... While the Appellants were not successful in their appeals, the Tribunal notes that their involvement and that of the Respondents, has served to advance the state of the debate about wind turbines and human health. This case has successfully shown that **the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree. The question that should be asked is: What protections, such as permissible noise levels or setback distances, are appropriate to protect human health?** In Ontario, recent regulations have provided guidance in that regard. In cases such as this, where the Appellants have not sought to demonstrate any type of unique harm associated with the design of this Project and have not attempted to demonstrate the sensitivity of a particular receptor, it was essentially up to the Appellants to prove that the Ontario standards are wrong in the context of the specific Project under appeal (leaving aside the related question about possible non-compliance with the standards). Just because the Appellants have not succeeded in their appeals, that is no excuse to close the book on further research. On the contrary, further research should help resolve some of the significant questions that the Appellants have raised....”