Environmental Review Tribunal

Case No.: 12-071

Chatham-Kent Wind Action Inc. v. Director, Ministry of the Environment

In the matter of an appeal by Chatham-Kent Wind Action Incorporated filed on July 3, 2012, for a hearing before the Environmental Review Tribunal pursuant to section 142.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended with respect to Renewable Energy Approval Number 2871-8UKGPC issued by the Director, Ministry of the Environment, on June 15, 2012, to South Kent Wind LP under section 47 of the *Environmental Protection Act*, regarding the construction, installation, operation, use and retiring of a Class 4 wind facility with a total name plate capacity of 270 megawatts located south of Highway 401 between Tilbury and Ridgetown, Municipality of Chatham-Kent;

In the matter of a teleconference held on August 24, 2012; and

In the matter of a hearing held on September 5, 2012 at 10 a.m. at the Council Chambers, Municipal Building, 315 King Street West, Chatham, Ontario.

Before: Paul Muldoon, Panel Chair
Maureen Carter-Whitney, Member

Appearances:

Monica Elmes	-	Representative for the Appellant, Chatham-Kent Wind Action Inc.
Eric Gillespie	-	Counsel for the Appellant, Chatham-Kent Wind Action Inc.
Danielle Meuleman and Justin Jacob	-	Counsel for the Director, Ministry of the Environment
Alexandria Pike and Sarah Powell	-	Counsel for the Approval Holder, South Kent Wind LP
Ken Ternoey	-	Participant, on his own behalf
Eric Erhard	-	Presenter, on his own behalf

Dated this **5th** day of **December, 2012.**

REASONS FOR DECISION

Background

[1] On June 15, 2012, the Director, Ministry of the Environment issued a Renewable Energy Approval ("REA") under s. 47.5 of the *Environmental Protection Act* ("*EPA*") to South Kent Wind LP (the "Approval Holder") to engage in a renewable energy project (the "Project") in respect of a Class 4 Wind facility located south of Highway 401 between Tilbury and Ridgetown, Municipality of Chatham-Kent. The Project consists of the construction, installation, operation, use and retiring of a Class 4 wind facility with a total name plate capacity of 270 megawatts. The proposal for the Project was posted by the Ministry of the Environment ("MOE") on the Environmental Registry, established under the *Environmental Bill of Rights, 1993* ("*EBR* Registry"), for 30 days. The REA decision notice was posted on the *EBR* Registry on June 15, 2012.

[2] On June 28, 2012, Mr. D. O'Neill filed appeals with the Environmental Review Tribunal (the "Tribunal") pursuant to s. 142.1 of the *EPA*, on behalf of himself and other individuals, all of which were subsequently dismissed for lack of jurisdiction, as set out in the Tribunal's Order dated August 7, 2012.

[3] Also on June 28, 2012, Chatham Kent Wind Action Group Inc. ("CKWA" or the "Appellant") filed a notice of appeal with the Tribunal.

[4] A preliminary hearing was held on August 10, 2012 at which time Mr. K. Ternoey was granted participant status and Mr. E. Erhard was granted presenter status. In both cases, the Tribunal deferred the issue to the hearing as to whether Mr. Ternoey and Mr. Erhard were qualified to give expert evidence in their respective fields of expertise. Mr. R. Wilken requested presenter status. The Tribunal reserved its decision with respect to his request. Further background is set out in the Tribunal's order dated August 20, 2012.

[5] In a subsequent telephone conference call on August 22, 2012, the Tribunal denied Mr. Wilken's request for presenter status. Reasons for this disposition are set out in the Tribunal's order dated September 28, 2012. The Tribunal also heard submissions by the parties with respect to whether Mr. Erhard would be qualified to give expert evidence on ISO 9613-2 (Acoustics – Attenuation of sound during propagation outdoors) ("ISO 9613-2") and the application of that industry standard to wind turbine noise. The Tribunal found that Mr. Erhard could give expert evidence with respect to the ISO standard, but deferred the question as to whether he could give evidence on its application to wind turbine noise until he gave his evidence at the hearing. Mr. Ternoey informed the Tribunal and the parties that he would not be seeking to be qualified as an

expert with respect to his submissions to the Tribunal. Also, the Appellant informed the Tribunal and the parties that it would not be calling any witnesses at the hearing, but would not be withdrawing its appeal.

[6] The Tribunal held the hearing on this matter on September 5, 2012 in Chatham, Ontario, at which time the Tribunal heard the evidence of the participant and the presenter, followed by the submissions of the Approval Holder and the Director. Ms. M. Elmes appeared as a representative of the Appellant and made no submissions.

[7] On September 24, 2012, Mr. E Gillespie, counsel for the Appellant, wrote to the Tribunal requesting an opportunity to make final submissions, based on his understanding that he had informed both the Tribunal and the other parties that he would not be attending the hearing and that he had no knowledge that final submissions would be made on that date.

[8] On September 24, 2012, the Tribunal wrote to the parties requesting submissions with respect to this request. On September 25, 2012, the Director responded and on September 28, 2012, the Approval Holder responded, both opposing the request. On October 2, 2012, the Tribunal granted Mr. Gillespie's request, and gave directions for serving and filing both the Appellant's submissions, and submissions by other parties in response. On October 10, 2012, the Appellant filed its submissions in this matter. On October 17, 2012, the Approval Holder and the Director filed their submissions in response.

Relevant Legislation and Rules

[9] The relevant legislation and Tribunal Rules are set out in Appendix A to this decision.

Issues

[10] 1. A preliminary issue is whether Mr. Erhard should be qualified as an expert to give evidence on ISO 9613-2 and its application to noise from wind turbines; and

2. The main issue is whether engaging in the Project in accordance with the REA will cause serious harm to human health.

Issue 1: Whether Mr. Erhard should be qualified as an expert to give evidence on ISO 9613-2 and its application to noise from wind turbines.

Discussion and Analysis on Issue 1

[11] Mr. Erhard requests that he be qualified as an expert in order to give expert opinion on both ISO 9613-2 and its application to noise from wind turbines.

[12] Mr. Erhard states that he is a professional engineer with 28 years of experience in chemical engineering. He states that he is concerned with health issues arising from noise from wind turbines. He submits that he can make a contribution to the process through his knowledge of ISO 9613-2, which is a model used to determine noise levels arising from the operation of wind turbines. He states that he has serious concerns regarding how it is used by the MOE and the Approval Holder to predict noise levels from wind turbines.

[13] The Appellant supports Mr. Erhard's request. Both the Director and the Approval Holder initially opposed the granting of presenter status to Mr. Erhard. However, their primary concern is not with the granting of status but was with having Mr. Erhard qualified to give expert evidence on both ISO 9613-2 and its application to noise modeling.

[14] Mr. Erhard submits that he has sufficient experience in the use of the model and its application to allow him to be qualified to give expert evidence on the application of noise modeling from ISO 9613-2. He states that he has long experience with ISO standards, including ISO 9613-2, in the context of his engineering career and that it is a relatively straightforward task to apply ISO 9613-2 to noise from wind turbines. He states that, in his professional career, he has applied ISO 9613-2 with respect to noise to projects such as pipes under pressure in a facility. He states that he knows how to use empirical models. He submits that he is qualified to give expert opinion with respect to the application of ISO 9613-2 to noise from wind turbines in a non-biased, objective manner.

[15] Both the Director and Approval Holder do not object to the request by Mr. Erhard to be qualified to give expert opinion with respect to ISO 9613-2, but submit that Mr. Erhard does not have the necessary experience, education and expertise with respect to the application of ISO 9613-2 to the modeling of wind turbine noise.

[16] The Director emphasizes that Mr. Erhard admits that he has not applied ISO 9613-2 outside the parameters of the model. The Director submits that Mr. Erhard does not have the specialized education, training or experience to be qualified as an expert, as is required by the Tribunal's "Practice Direction for Technical and Opinion Evidence." The Director also submits that Mr. Erhard has stated in the media that he has concerns about wind turbines and, therefore, the Director maintains that he may not be able to express an objective opinion on the topic. The Approval Holder states that Mr. Erhard has not demonstrated he has the specialized expertise necessary to qualify him as an expert to give opinion evidence on applying ISO 9613-2 to noise from wind turbines.

Findings on Issue 1

[17] The Tribunal granted Mr. Erhard presenter status at the preliminary hearing on the basis that, further to Rule 34(c)(i) of the Tribunal's Rules of Practice, he would make a relevant contribution to the Tribunal's determination of whether engaging in the renewable energy project operating in accordance with the renewable energy approval will cause harm to human health. Mr. Erhard resides in the area and has had a keen interest in the issue of wind turbines.

[18] All of the parties agree that Mr. Erhard can be qualified to give expert evidence with respect to ISO 9613-2. The Tribunal agrees that Mr. Erhard's professional background and experience clearly demonstrates his knowledge and understanding of ISO 9613-2. However, both the Approval Holder and Director submit that he does not have the "specialized education, training or experience" to qualify him to give expert evidence with respect to the application of ISO 9613-2 to noise from wind turbines.

[19] As held by the Tribunal in *Erickson v. Ontario (Ministry of the Environment)* (2011), 61 C.E.L.R.(3d) 1, ("*Erickson*") there is no particular bar to a presenter giving expert evidence so long as the person is duly qualified as an expert to give such evidence.

[20] However, in order to give expert evidence, it is necessary for the person to meet the applicable test to be qualified to give expert evidence. The test is outlined in paragraph five of the Practice Direction for Technical and Opinion Evidence. It states:

> 5. To give opinion evidence, a witness must have specialized education, training or experience that qualified him or her to reliably interpret scientific or technical information or to express opinions about matters for which untrained or inexperienced person cannot provide reliable opinions…

[21] In reviewing Mr. Erhard's submissions, the Tribunal finds that he does not have the specialized education, training or experience to qualify him to give expert evidence with respect to the application of ISO 9613-2 to noise from wind turbines. Mr. Erhard did not specifically submit that he had any specialized education or training with respect to the application of ISO 9613-2 to noise from wind turbines. Instead, he relied on his experience working for a company as an engineer and working with ISO 9613-2. The thrust of his submissions is that, once one has an expertise with respect to ISO 9613-2, its application to a particular source, such as wind turbines, is a straightforward matter and can be done by someone like himself because he knows how to use an empirical model. He did give some examples of how he applied ISO 9613-2 with respect to pipes and related infrastructure during his working career.

[22] None of Mr. Erhard's examples of applying ISO 9613-2 professionally related to noise from wind turbines or any other similar facilities. He stated under cross-examination on his qualifications that he had not worked with ISO 9613-2 regarding external noise or wind turbines in a professional capacity. For the purpose of giving expert opinion evidence, the Tribunal finds that Mr. Erhard has failed to establish that the ISO standard can be applied to evaluate a project as complex as an industrial wind turbine facility by someone who does not have specialized knowledge and experience for this type of application. In this regard, Mr. Erhard did not provide the Tribunal with any objective evidence that such specialized expertise is unnecessary, beyond expressing his position that such expertise is not required. While Mr. Erhard may consider that he can express expert opinion on this issue, based on self-evaluation of his skills as a professional engineer, the Tribunal notes that the test to be applied here is a legal standard. The purpose of qualifying an expert is to allow the expert witness to provide opinion evidence to assist the Tribunal in adjudicating the matter before it. As the Tribunal may rely on such opinion when making its decision, the Tribunal must be satisfied that the proposed expert has both the professional skills and necessary expertise and experience to reliably interpret scientific or technical information so as to provide such expert opinion. Mr. Erhard's argument, in effect, asks the Tribunal to assume that anyone who has general expertise with respect to ISO 9613-2 can be qualified as an expert respecting application of that standard to any type of facility and give expert opinion to that effect. Given the issues raised in this proceeding, the Tribunal is not prepared to make such an assumption with respect to noise from wind turbines.

[23] The Director also submits that Mr. Erhard cannot be qualified as an expert since he has expressed his views of wind turbines in local media. It is unnecessary for the Tribunal to address this issue as the Tribunal is not granting his request to be qualified.

[24] In summary, while the Tribunal finds that Mr. Erhard is qualified to give expert evidence with respect to ISO 9613-2, he is not qualified to give evidence on the application of ISO 9613-2 to wind turbine noise.

Issue 2: Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

Discussion and Analysis on Issue 2

Appellant's Submissions

[25] The Appellant did not call any evidence at the hearing and made no oral submissions. The Appellant states that it has, throughout the appeal, participated to the best of its ability, and that, from the outset, it planned to present its case to the Tribunal, including its submissions regarding expert and lay evidence. The Appellant also states that its key expert witness was not able to attend the hearing due to personal issues, and that it was unable to find an expert to replace its key expert witness. The Appellant also asserts that, due to the stress created by the litigation proceedings, the "post-turbine" witnesses it wanted to call at the hearing "would only be able to testify at one hearing of this nature before the Tribunal."

[26] The Appellant further submits that:

> 8. Every party has the right to present its case in the best way it sees fit. For another to take the position that CKWA should have brought its evidence another way would be to directly restrict this right.
>
> 9. CKWA constructed its presentation of evidence, and when the evidence it sought to adduce through its expert witnesses became unavailable it sought other avenues of presenting this evidence through alternate witnesses.
>
> 10. When it became evident that no other expert witness was available, CKWA sought an adjournment at the earliest possible opportunity, which was ultimately unsuccessful.

[27] The Appellant also states that it has remained as a party to the proceeding in order to allow the participants to have the opportunity to present their evidence. Further, the Appellant also wishes to preserve its rights to appeal the Tribunal's decision should it choose to exercise them in the future. Finally, the Appellant submits that:

> 14. CKWA has made proper efforts to address each issue that has arisen as promptly as possible in order to ensure there were no delays in the proceeding. The Motion to Adjourn brought by CKWA was dismissed and the appeal

> continued without a break according to the scheduled timeline. The Tribunal is well within the statutory timeline for issuing its decision. If anything CKWA has shortened the appeal rather than delaying it by not calling its witnesses as planned.
>
> 15. As a result, CKWA submits that it has participated in the ERT process in a way that has respected the Tribunal, the other parties, and the need to allow participants access to justice so that their issues can properly come before the Tribunal.

Mr. Ternoey's Evidence and Submissions

[28] Mr. Ternoey states that, under the applicable rules, the Approval Holder does not have to establish that wind turbines will not cause to serious harm to human health. Instead, he asserts that it is the Appellant who is "required to argue 'to the cause of' turbine presence as being a serious harm to human health." He submits that these perspectives "serve to infer a range of answers to the relative link(s) between wind turbines and human health", and asserts that if all humans were the same, it is highly probable that it would be possible to determine the relationship between humans and wind turbines. However, he further submits that, from a pragmatic approach, "humans are not like machines and the methodology of science does not apply", maintaining that the "human condition is neither universal nor unchanging as societies, culture and belief system values are often contradictory and always evolving." He also asserts that doubt is created regarding the "applicability of objective observations and conclusions with respect to the vacillating human condition."

[29] Mr. Ternoey also submits that:

> … the physical presence of turbines may not cause serious harm to human health but that the human response to the presence of the turbines will cause serious harm to human health. The participant posits the argument that any negative human response to wind turbines, grounded in imaginary or real beliefs and/or rational or irrational thinking is supported by pragmatic premises grounded in the empirical knowledge of everyday human experience.
>
> The idea of human response to an object, here any wind turbine, as being the cause of serious harm to human health turns the issue on its head. Here the potential cause for harm is internally grounded in the mind, not external as rooted in the object turbine. As such, any premises to establish a relationship between the turbines and human health must be mediated through the human condition of how an individual's internal representation of turbines influences actions, attitudes and the resulting impact on mental as well as physical health.

[30] He further submits that if a person has an emotional response to an object, it would fall outside the "logical and rational scope of science to confirm or deny any tangible quality of the response", and, hence, the health effect from an emotional response is subjective. In the case of wind turbines, he maintains that "the belief and

truths of the person with respect to their mental or physical health is again acquired through response to the object, not as caused by the object", also asserting that the science of sound is grossly inadequate with respect to the variance of the human condition in response to sound. He submits that, while science may predict that the turbine noise qualities of loudness, pitch, intensity and rhythm should not cause serious harm to human health, "science does not consider the whole of the human condition and specific qualities such as response to scratching finger nails on a chalk board or an A minor chord with an F sharp overlay."

[31] Mr. Ternoey also asserts that "mental health effects from turbines are linked to the perceived personal acceptance or rejection of the presence of turbines" and that mental stress can negatively affect physical health. He submits that what is "serious" is necessarily subjective "since different people set their interpretation of serious harm at vastly different levels." Hence, he submits that the "qualification of 'will cause serious harm to human health', at least in the mental health category, is the belief and truth of the individual." As argued in his oral submissions, he maintains that the level of noise is not as important as the attitude or reaction to the noise, further asserting that the fear and anxiety arising from the presence of wind turbines can lead to physical illness, and thus, indirect human health problems. He submits that the Tribunal should make decisions that take the human condition into account.

Mr. Erhard's Evidence and Submissions

[32] Mr. Erhard presented his submission, "South Kent Wind – Noise Impact Assessment Gone Wrong." He states that there are four areas where the Director misapplied or erroneously applied ISO 9613-2.

[33] First, Mr. Erhard notes that s. 6.4.7 of the MOE's "Noise Guidelines for Wind Farms", dated October 2008 ("MOE Guidelines") states that predictions of the total sound level at a Point of Reception or a Participating Receptor must be carried out according to the method described in ISO 9613-2 and the calculations are subject to the specific parameters set out in s. 6.4.10 of the MOE Guidelines. He submits that the noise prediction is not being carried out in accordance with the methods outlined in ISO 9613-2, and cannot be done as required by the MOE Guidelines. He also submits that the Approval Holder has "violated" ISO 9613-2 and s. 6.4.10 of the MOE Guidelines. Mr. Erhard states that the range of acceptable calculation parameters for the accurate use of ISO 9613-2 are described in clause 9 of ISO 9613-2 and range from 0 to 30 metres (m). He submits, however, that the Director has allowed heights for noise

calculation to be 99.5 m for hub height so that the noise predictions beyond 1000 m are of unknown accuracy.

[34] Second, Mr. Erhard argues that there is a violation of ISO 9613-2 by s. 6.4.2 of the MOE Guidelines, which states that the assessment must not be limited to a 1500 m radius from a receptor, but must consider the impact of the whole wind farm subject to the limitations relating to very large distances described in s. 6.4.9. Mr. Erhard submits that:

> ISO 9613-2 clearly states that the accuracy limits for predictions only extends to 1000 meters from the noise source (table 5). So then the "Noise Guidelines for Wind Farms" requires the improper use of ISO 9613-2 outside of its published accuracy range. Therefore the results generated for distances greater than 1000 meters must be discarded as wrong.

[35] Third, Mr. Erhard argues that ISO 9613-2 is violated by the MOE Guidelines in that ISO 9613-2 states that one of the conditions for noise measurement is "wind speed between approximately 1 m/s and 5 m/s measured at a height of 3 m to 11 m above the ground." He submits, however, that the MOE Guidelines mistakenly ask for predictions up to 10 metres per second (m/s) wind speeds. He asserts that these are not covered by ISO 9613-2 and thus violate the MOE Guidelines' own requirements that predictions use ISO 9613-2. Because the noise predictions are provided at wind speeds above 5 m/s, Mr. Erhard submits that ISO 9613-2 requirements are violated.

[36] Fourth, Mr. Erhard asserts that the manual calculation using ISO 9613-2 is in error, in that the manual calculation does not recognize the limited height of the noise sources, as stipulated in ISO 9613-2. He states that the manual calculation backs up the computer CadnaA model. Hence, he concludes that the CadnaA model calculation and manual calculation "both violate ISO 9613-2 limits of applicability for accuracy of noise predictions."

[37] In conclusion, Mr. Erhard submits that the Director approved the Project even though the MOE Guidelines "purposely required the proponent to exceed the application range of ISO 9613-2 for accuracy." He states that the Approval Holder performed the required noise predictions knowing that the predictions made were outside the range of ISO 9613-2 accuracy. He submits that the MOE Noise Impact Assessment process "is flawed in that it requires proponents to use ISO 9613-2 for noise predictions, yet then requires the proponent to make calculations of predicted noise outside the applicable range of ISO 9613-2 accuracy." Mr. Erhard maintains that the Approval Holder provided a "manual calculation in Appendix D of the Noise Impact Assessment, which is in error." Finally, he submits that the Director should have not approved the Project because the

Noise Impact Assessment is “not capable of predicting noise levels at sensitive receptors as it violates ISO 9613-2 limits of applicability for accuracy."

[38] Mr. Erhard asks that the Tribunal overturn the Director’s approval.

Approval Holder’s Submissions

[39] The Approval Holder submits that the Tribunal does not have sufficient evidence to find that the test in the legislation has been met. The Approval Holder states that the Appellant has the onus of proving that the legislative test is met and, “without advancing any evidence before the Tribunal, the Appellant has not met the statutory test and the Tribunal lacks jurisdiction to do anything other than dismiss the appeal.”

[40] The Approval Holder further states that neither the participant nor the presenter submissions provided any basis on which a dismissal of the appeal might be avoided. It alleges that, despite Mr. Erhard’s evidence, ISO 9613-2 is applied appropriately and is applied to wind turbines in a similar way throughout the world. At any rate, the Approval Holder states that Mr. Erhard is not qualified to give expert evidence on the application of ISO 9613-2 to noise from wind turbines. The Approval Holder states that it is necessary to meet the 40 db standard and that there are monitoring requirements to ensure that the standard is met.

[41] The Approval Holder also states that there is no evidence before the Tribunal that errors in predicting noise levels for the Project will cause serious harm to human health, and without such evidence, the statutory test will not be met.

[42] The Approval Holder notes that Mr. Ternoey, the participant, suggested in his submission that noise levels may not be the most critical factors causing harm to health but instead emotion and attitude toward wind turbines. However, the Approval Holder submits that no evidence has been submitted with respect to the nature of such harm and the means to assess whether it is serious. The Approval Holder states that Mr. Ternoey can only provide a lay person’s view since he has no medical, acoustical or epidemiological expertise.

[43] The Approval Holder further submits that:

> 15. It is the position of the Approval Holder that alleged harm arising from individuals’ negative perceptions of wind turbine development, independent of the operation of the Project, are not relevant to the statutory test and would render it meaningless.
>
> 16. In summary, Mr. Ternoey’s submissions can be reduced to a tautology: if negative perceptions automatically constitute serious harm to human health, then any renewable energy project could be defeated by the simple presence of opposition to it.

[44] The Approval Holder made comments on the conduct of the Appellant, stating that CKWA is not new to the REA process and that this proceeding is similar to the *Erickson* proceeding. The Approval Holder submits that, since that case, the only variation on the Appellant's approach is to propose putting forth individuals who purportedly have suffered harm from living in the vicinity of wind turbines, which the Appellant calls the "post-turbine witnesses."

[45] The Approval Holder maintains that, in a number of REA cases, as in this case, there have been various attempts to adjourn the proceeding because of the unavailability of certain expert witnesses. The Approval Holder states that the Appellant has not been successful in being granted adjournments. As such, the Approval Holder submits that the Appellant should have been able to find alternatives rather than prolong the hearing processes. In this case, the Approval Holder submits that the Tribunal has no alternative but to dismiss the appeal.

[46] The Approval Holder notes that, rather than withdrawing the appeal, the Appellant advised the Tribunal that it would continue the appeal since it wished to preserve its rights to appeal the decision of the Tribunal in this matter and to provide the opportunity for Mr. Erhard and Mr. Ternoey to make their presentations. The Approval Holder submits that the Appellant's basis for maintaining the appeal is inappropriate. The Approval Holder submits that any appeal by the Appellant, given that it advanced no evidence, would be a collateral attack on the adjournment refusal, and that it is not the role of an appellant to facilitate public participation in an appeal.

[47] The Approval Holder states that the conduct of the Appellant has caused prejudice to the Approval Holder in terms of cost and time. If the appeal is dismissed, the Approval Holder requests that the Tribunal consider whether it is appropriate to provide the responding parties with an opportunity to make written submissions with respect to cost consequences against the Appellant.

Director's Submissions

[48] The Director states that it is not only necessary to understand ISO 9613-2, but also how it is applied through the MOE Guidelines (and in particular, the calculations outlined in s. 6.4.10). The Director submits that the MOE directs the Approval Holder to apply ISO 9613-2 as modified through O.Reg. 359 made under the *EPA*.

[49] The Director states that Mr. Erhard is not qualified to provide an expert opinion related to acoustic issues respecting industrial wind turbines. Also, the Director submits that Mr. Erhard did not provide any evidence of harm related to the operation of the wind project in accordance with the REA.

[50] In response to Mr. Ternoey's submissions, the Director also notes that Mr. Ternoey is not qualified as an expert and did not provide any evidence to which the legal test may be applied. At any rate, the Director submits that the Tribunal in *Erickson* has essentially addressed the issues raised by Mr. Ternoey.

[51] The Director notes that the Appellant alleged in its notice of appeal that engaging in the renewable energy project in accordance with the REA will cause serious harm to human health. However, the Director states that the Appellant has provided no evidence in support of this position. Hence, the Director submits that the Appellant has "fundamentally failed to meet their onus of proof under s. 145.2.1(3) of the *EPA*." The Director submits that the Appellant has failed to provide any submissions in support of the decision or order they request of the Tribunal, contrary to Rule 188 of the Tribunal's Rules of Practice. The Director notes that Rule 188 allows a party to make submissions "in support of the decision or order they wish the Tribunal to make." The Director notes that the Appellant's notice of appeal requests an order revoking the decision to approve the Project. However, the Director submits that the Appellant's submissions focus on portraying its conduct in the hearing in a favourable light rather than focusing on the relief originally sought. The Director also submits that the Appellant appears to be re-litigating issues related to its adjournment motion which was dealt with in the Tribunal's decision dated September 25, 2012. The Director states:

> 12. By disregarding the purpose of closing submissions as set out in Rule 188 of the ERT Rules and focusing solely on issues that have already been decided, the Director submits that CKWA's submissions are frivolous, vexatious and undermine the integrity of the Tribunal and its process.

[52] The Director requests that the Tribunal dismiss the appeal on the basis that there is no evidence that engaging in the renewable energy project in accordance with the REA will cause serious harm to human health.

Findings on Issue 2

[53] In this proceeding, the Appellant did not call any evidence and did not make submissions at the hearing. The Appellant did provide written submissions explaining why it took certain actions during the proceeding.

[54] Under s. 145.2.1(3) of the *EPA*, the onus is on the appellant to prove that engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment. It is obvious that this onus cannot be met where there are no substantive submissions and no evidence adduced to support the submissions.

[55] The only evidence before the Tribunal is the testimony and written submissions of Mr. Ternoey, a participant, and Mr. Erhard, a presenter. Mr. Ternoey was not qualified to give expert testimony. Mr. Erhard was qualified to give expert evidence with respect to ISO 9613-2, but not to the application of that standard to noise from wind turbines.

[56] In his submissions, Mr. Ternoey gave the Tribunal his perspective on the test with respect to the approval of REAs for wind turbines. The thrust of his submission is that "any premises to establish a relationship between the turbines and human health must be mediated through the human condition of how an individual's representation of turbines influences actions, attitudes and the resulting impact on mental as well as physical health." He goes on to state that, in the case of wind turbines, "the belief and truths of the person with respect to their mental or physical health is again acquired through response to the object, not caused by the object."

[57] As the Tribunal understands it, the essence of Mr. Ternoey's submission relates to his disapproval of the test, and the nature of evidence required to meet that test, as outlined in s. 142.1 of the *EPA*. The Tribunal has discussed this issue at length in *Erickson*. For example, the Tribunal noted at paragraphs 629 to 631:

> With regard to the "will cause" arguments of the Parties, the Tribunal finds that there are some aspects of the case law cited by the Parties which are applicable here. For example, there is a distinction between medical (or scientific) causation and legal causation. The Tribunal is to determine whether specified harms will be caused according to the applicable legal standard, which is a balance of probabilities. That standard is not the exact same standard used by scientists, statisticians or medical experts. The Tribunal will take its direction on determining whether the Appellants have proven that harm will be caused according to the legal concepts of proof and causation. In doing so, it will assess the scientific evidence and consider which approaches to causation and proof were used in that evidence.

> The Tribunal is aware that "causation" in many areas of scientific and legal inquiry is a complex issue. In epidemiology, for example, an outcome may be associated with an exposure without there being a causal link. Also, outcomes can be generated by multiple causes (as is the case with several of the effects spoken to during this Hearing). It can also be the case that two exposures acting independently will have no serious effect, but together they will (as in cumulative and synergistic effects). Further, there can be situations where a specific effect is already present but its incidence increases with a new exposure. As well, sometimes a causal link can be established, even if the specific mechanism responsible for that link has not been identified with certainty within a suite of plausible pathways.
>
> It is the Tribunal's task to determine if the Project will cause the specified harm. In this case, the nature of the evidence has not necessitated specific findings on all aspects of the "will cause" submissions of the Parties.

[58] In terms of "indirect" effects, the Tribunal noted at paragraph 631:

> For this case, the Tribunal has examined the evidence about projected effects with a view to determining whether such effects will be caused by the Project. It should be noted that some effects, such as stress-related impacts that are allegedly caused by wind turbines, are also present in the general population due to the presence of other stressors. For those effects that already exist in the receiving population, the Tribunal needs to examine the evidence to determine whether an increase in the rate or magnitude of such effects will be caused by the Project. The Tribunal finds that it can consider what the Parties call "direct" and "indirect" effects. Regardless of whether an alleged harm is considered direct (e.g., a passer-by being injured by a falling turbine blade or a person losing hearing) or indirect (e.g., a person being exposed to noise and then exhibiting stress and developing other related symptoms), the Tribunal will consider whether they "will" be caused by the Project.

[59] At this point, it is important to note that Mr. Ternoey did not present any evidence with respect to health issues and no evidence that the human health issues are related to wind turbines in the area. Even if the Tribunal accepted Mr. Ternoey's submission as to how to interpret and apply the statutory test, which it does not, there is no evidentiary basis whatsoever for the Tribunal to find that there will be serious harm to human health from the operation of the Project.

[60] Mr. Erhard's submissions focussed on four issues in the application of ISO 9613-2 to noise from wind turbines. In general terms, he submits that: (1) the noise prediction is not being carried out in accordance with the methods outlined in ISO 9613-2, and cannot be done as required by the MOE Guidelines; (2) ISO 9613-2 states that the accuracy limits for predictions only extends to 1000 m from the noise source and hence results generated for greater distances are wrong; (3) ISO 9613-2 states that calculations are not accurate for wind speeds above 5 m/s, although MOE Guidelines ask for predictions up to 10 m/s; and (4) the manual calculation using ISO 9613-2 is in error. He concludes that the accuracy of noise predictions for the Project is "unknown and unknowable."

[61] Neither the Director nor the Approval Holder adduced evidence to challenge Mr. Erhard's submissions. Hence, the Tribunal is left with a number of specific criticisms by Mr. Erhard of the manner in which ISO 9613-2 is incorporated into the MOE Guidelines and the manner in which both ISO 9613-2 and the MOE Guidelines are applied to calculate noise levels for wind turbines. These criticisms are made by a witness who has not been qualified as an expert in the application of ISO 9613-2 to noise from wind turbines.

[62] The Tribunal is not in a position to make any specific findings in this regard for one reason: Mr. Erhard did not provide any evidence that the alleged inaccuracy in noise predictions arising from his concerns respecting the methodology used will result in serious harm to human health. Simply put, he alleges that noise levels are "unknown and unknowable," but he did not adduce any evidence to indicate what the noise impact could possibly be. In this regard, he also did not adduce any evidence to establish there would be harm to human health.

[63] The Tribunal has the duty to apply the statutory test. The onus is on those challenging the REA to establish how engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health. Although Mr. Erhard raises concerns with respect to the accuracy of noise prediction, evidence is needed to establish that the alleged inaccuracies with noise predictions will cause serious harm to human health. No evidence and no submissions were made to connect the alleged inaccuracies with respect to the noise predictions with harm to human health or the environment.

[64] In conclusion, the Tribunal finds that the Appellant, the participant and the presenter have not shown that engaging in the Project in accordance with the REA will cause serious harm to human health as required by s. 145.2.1(2)(a) of the *EPA*. The Tribunal, therefore, dismisses the appeal.

[65] The Approval Holder made submissions with respect to costs. However, neither the Approval Holder nor the Director expressly requested costs or brought a motion to that effect. Hence, it is not necessary for the Tribunal to respond to these submissions.

DECISION

[66] The appeal is dismissed. Pursuant to s. 145.2.1(5) of the *EPA*, the Director's decision is confirmed.

Appeal Dismissed

"Paul Muldoon"

Paul Muldoon, Panel Chair

"Maureen Carter-Whitney"

Maureen Carter-Whitney, Member

Appendix A – Relevant Legislation and Rules
Appendix B – Exhibits

Appendix A

Relevant Legislation and Rules

Environmental Protection Act

142.2 (1) An applicant for a hearing required under section 142.1 shall state in the notice requiring the hearing,

(a) a description of how engaging in the renewable energy project in accordance with the 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;

(b) the portion of the renewable energy approval in respect of which the hearing is required; and

(c) the relief sought.

Rules of Practice of the Environmental Review Tribunal

Appeals of Renewable Energy Approvals under section 142.1 of the Environmental Protection Act

29. A Notice of Appeal respecting a renewable energy approval filed under section 142.1 of the Environmental Protection Act shall include:

(a) the Appellant's name, address, telephone number, facsimile number and email address and the name and contact information of anyone representing the Appellant;

(b) a copy of the renewable energy approval being appealed;

(c) identification of the portions of the renewable energy approval that the Appellant is appealing;

(d) a description of how engaging in the renewable energy project in accordance with the 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;

(e) a statement of the issues and material facts relevant to the subject matter of the appeal that the Appellant intends to present at the main Hearing;

(f) a description of the relief requested; and

(g) an indication of whether the Appellant will seek a stay of the renewable energy approval.

A Notice of Appeal respecting a renewable energy approval is accepted by the Tribunal when it meets all the requirements for filing an appeal under the Environmental Protection Act.

34. No later than four days before the Preliminary Hearing, any person seeking to be named as a Party, Participant or Presenter shall file with the Tribunal a written request setting out,

(a) whether the person is seeking Party, Participant or Presenter status;

(b) a statement of the issues and material facts relevant to the subject matter of the appeal that the person intends to present at the main Hearing.

(c) whether

(i) the person's participation is likely to make a relevant contribution to the Tribunal's determination of whether engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health, or serious and irreversible harm to plant life, animal life or the natural environment;

(ii) the person's interests may be directly and substantially affected by the Hearing or its result;

(iii) the person has a genuine interest, whether public or private, in the subject matter of the proceeding.

Naming of a Participant

66. The Tribunal may name persons to be Participants in all or part of a proceeding on such conditions as the Tribunal considers appropriate. A Participant to a proceeding is not a Party to the proceeding. In deciding whether to name a person as a Participant, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's would be. A person who may otherwise qualify as a Party may request Participant status.

Role of a Participant

67. A Participant in a Hearing may:

(a) be a witness at the Hearing;

(b) be questioned by the Parties;

(c) make oral and written submissions to the Tribunal at the commencement and at the end of the Hearing;

(d) upon request, receive a copy of documents exchanged by the Parties that are relevant to the Participant's interests; and

(e) attend site visits.

68. A Participant in a Hearing may not:

(a) raise issues that have not already been raised by a Party;

(b) call witnesses;

(c) cross-examine witnesses;

(d) bring motions;

(e) participate in a mediation, unless permitted to do so by the Tribunal; and

(f) claim costs or be liable for costs

Naming of a Presenter

69. The Tribunal may name persons to be Presenters in all or part of a proceeding on such conditions as the Tribunal considers appropriate. A Presenter to a proceeding is not a Party to the proceeding. In deciding whether to name a person as a Presenter, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's or Participant's would be. A person who may otherwise qualify as a Party or Participant may request Presenter status.

Role of a Presenter

70. A Presenter in a Hearing may:

(a) be a witness and present his or her relevant evidence at a pre-arranged time, either during a Hearing's regular day-time session or at a special evening session;

(b) be questioned by the Parties;

(c) provide the Tribunal with a written statement as a supplement to oral testimony; and

(d) upon request, receive a copy of documents exchanged by the Parties that are relevant to the Presenter's interests.

71. A Presenter in a Hearing may not:

(a) raise issues that have not already been raised by a Party;

(b) call witnesses;

(c) cross-examine witnesses;

(d) bring motions;

(e) make oral and written submissions to the Tribunal at the commencement and at the end of the Hearing;

(f) participate in a mediation, unless permitted to do so by the Tribunal;

(g) attend site visits unless permitted to do so by the Tribunal; and

(h) claim costs or be liable for costs.

Appendix B

Exhibits

1. Statement of Ken Ternoey to the ERT Board, “The Third Perspective in the Syllogism of the Appeal of Ball vs. MOE 12-049 to 072, August 23, 2012.

2. Witness Statement of Dr. Geoff Leventhall, dated August 13, 2012.

3. Submission by Eric M. Erhard, “South Kent Wind – Noise Impact Assessment Gone Wrong” dated August 22, 2012.

4. Article: Tom Evans and Jonathan Cooper, “Comparison of Predicted and Measured Wind Farm Noise levels and Implications for Assessments of New Wind Farms” Acoustics Australia, Vol. 40, No. 1, April 2012, pp. 28-36.