



BY MAIL AND FACSIMILE

September 24, 2009

Ministry of the Environment
Director, Environmental Assessment and Approvals Branch
2 St. Clair Avenue West, Floor 12A
Toronto, ON M4V 1L5

CC: The Honourable John Gerretsen
Minister of the Environment
135 St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1P5

Aaron Peters, Central Regional Project Director
SkyPower Corporation
250 Yonge Street, 16th Floor
Toronto, ON M5B 2L7

Peter Templin, Project Manager
Jacques Whitford Stantec Limited
300-675 Cochrane Drive
West Tower, Markham, ON L3R 0B8

Dear Director:

**Re: SkyPower Corporation's Proposed Byran Wind Project
Request for Elevation to an Individual Environmental Assessment**

Please find enclosed Lake Ontario Waterkeeper's comments on the above-mentioned matter.

Yours truly,

Mark Mattson
Waterkeeper & President

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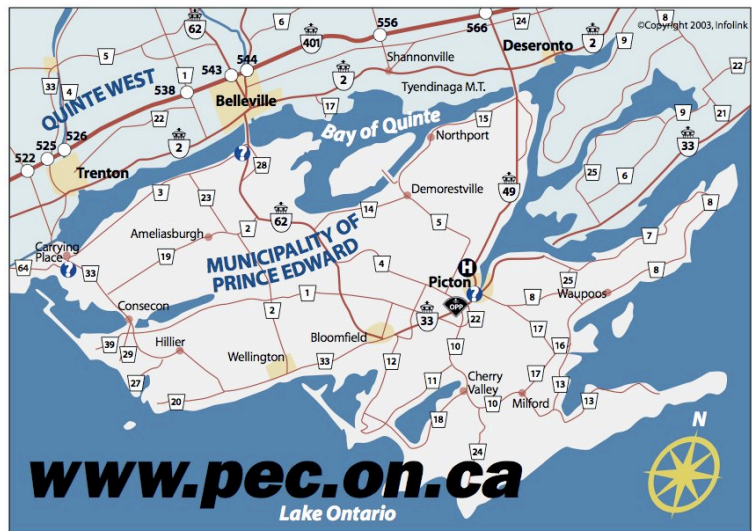
PROUD MEMBER OF WATERKEEPER ALLIANCE

BACKGROUND

SkyPower Corporation has prepared an Environmental Review Report (ERR) for a proposed wind plant in Prince Edward County called the Byran Wind Project (the Project). The company plans to build up to 43 wind turbines that could each produce up to a maximum of 1.5 MW, for a combined total maximum of 64.5 MW.

Prince Edward County is located on land that extends into Lake Ontario from the northeast shore, just west of Kingston and the mouth of the St. Lawrence River. The Project is proposed for an area in the Sophiasburgh and Hallowell Wards of Prince Edward County, north of the Town of Picton and south of the Bay of Quinte.

[Image: Map of Prince Edward County.
Source: Prince Edward County Tourism and
Community Site, <www.pec.on.ca>].



In addition to 43 turbines, the Project would necessitate the installation of an above and below ground 34.5 kV collection system, pad-mounted transformers at the base of each turbine, a fenced and graveled substation, a 230 kV transmission line between the substation and Picton, crane pads and other staging areas for construction, twelve meteorological towers, and a series of both temporary and permanent access roads, eleven or more metres wide, to accommodate large trucks,

In addition to being surrounded by Lake Ontario, there are multiple water features within the proposed wind turbine development site. These include three Provincially Significant Wetlands (PSWs): Fish Lake Wetland Complex; Big Swamp Coastal Wetland; and Big Island Coastal Wetland.

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COMMENTARY

The proposed Byran Wind Project requires further review to protect the environment and should be elevated to an Individual Environmental Assessment.

In accordance with the Ministry of the Environment's, "Guide to Environmental Assessment Requirements for Electricity Projects", Lake Ontario Waterkeeper submits that the Director and/or the Minister must elevate this Project to an Individual Environmental Assessment (EA).¹ LOW submits that there are outstanding environmental and procedural concerns that merit the most comprehensive level of review possible, an Individual EA.

Further, the ERR is premature as decisions about the Project that could significantly impact the environment have not yet been made. For instance, it has not yet been decided whether concrete for the turbine platforms will be brought in by trucks or whether a "portable batch plant" will be established to make cement on site. The ramifications for the environment of these two options are very different. Without the opportunity to participate after these decisions are made, the public is effectively denied the right to comment on significant parts of the proposal. An Individual EA should be conducted to allow for a more detailed review of these aspects of the proposal.

The Project area includes sensitive habitat and populations that necessitate the highest level of environmental scrutiny.

The project requires an elevated level of scrutiny because it is a major project with anticipated significant environmental effects and there is a high level of public concern, both of which are reflected in the ERR. An Individual EA is required to address the unique environment of the proposed project, which includes three Provincially Significant Wetlands, a designated Important Bird Area, and numerous species of vulnerable plants and animals, including: two types of fish of conservation concern; three plant species of conservation concern; four reptiles of Special Concern, four Threatened reptiles, and a Threatened mammal, the Common Gray Fox. The area is also part of a major migration route for birds and bats, and used extensively for waterfowl staging.

¹ Ontario Ministry of the Environment, Guide to Environmental Assessment Requirements for Electricity Projects" (March 2001), Accessed online at:

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One major potential impact of the Project arises from the construction of access roads. When Canadian Hydro Developers built 86 turbines on Wolfe Island, just east of the proposed Byran Project, the company built and widened roads to allow for truck and crane access. In the process, they allowed gravel to be dumped in Big Sandy Bay Wetland, destroying wildlife habitat. The SkyPower proposal also includes the construction of gravel access roads and widening of intersections. Roads eleven or more metres wide are planned to accommodate the large trucks and cranes needed to move heavy equipment. The ERR asserts that, “access roads and interconnection cables are not planned to cross any wetlands”.² However, the Report also says that, “wetlands and water courses will be avoided *to the extent practical* in designing access roads”³ and refers to “unavoidable wetlands” [emphasis added].

LOW submits that there are no “unavoidable wetlands”, as all wetlands are avoidable before a project is built. There are only wetlands that could require different siting or a reduction in the number of turbines. Given the potential for serious ramifications on wildlife, wetlands and water courses in Prince Edward County must be completely avoided during the construction of roads, not just avoided to the extent practical.

A similar statement is made in the ERR with regard to nesting birds: “any clearing and disturbance within 50 metres of identified nesting or breeding areas should be avoided, *if feasible*”.⁴ No parameters are described for how SkyPower will determine whether it is feasible to avoid clearing a vegetated nesting area. Nesting areas should not be disturbed or cleared for the purpose of constructing the Project. If this option is available to SkyPower, clear criteria for “feasibility” that do not include economic reasons should be established as part of an Individual EA.

The protection of nesting birds and nesting sites is particularly important because 75% of the Project area encompasses an Important Bird Area (IBA) as designated by Birdlife International. This is an internationally recognized designation that identifies a key site for conservation. An IBA: holds significant numbers of one or more globally threatened species; is one of a set of sites that together hold a suite of restricted-range species or biome-restricted species; or has exceptionally large numbers of migratory or congregatory species.⁵ The Napanee Limestone Plain IBA has been designated by Birdlife because it is home to nationally significant

² ERR, Section 2.6.1.2 “Land Clearing”, at 2-6.

³ ERR, Table 2-3, “Typical Project Construction Activities”, at 2-2, 2-4.

⁴ ERR, Section 5.1.6 “Hydrology”, at 5-7.

⁵ Birdlife International, “Important Bird Areas (IBAs)”. Online at: <www.birdlife.org/action/science/sites>.

congregatory and threatened bird species.⁶ The ERR states that at least 16 species at risk are found in the Project area. According to the criteria in Environment Canada's *Wind Turbines and Birds: A Guidance Document for Environmental Assessment* (April 2007), the Byran Wind Project is a Category 4, or "Very High", Level of Concern due to the sensitive bird communities that use the area as habitat or for migration.

The designation of the proposed site as an IBA should exclude it from consideration as a viable wind power location. In March 2006, the Ontario Power Authority released a document entitled, "Analysis of Future Wind Farm Development in Ontario," which clarifies the methodology used to locate wind farms in Ontario. This document, prepared by Helimax Energy Inc., identifies the Important Bird Area designation as a constraint which eliminates an area from further consideration.

In addition to providing habitat and migration routes for birds and bats, the Project area is surrounded on two sides by Lake Ontario, includes three Provincially Significant Wetlands, and is crisscrossed by a multitude of small streams and water courses. The survey of fish habitat conducted by Jacques Whitford Stantec is a starting point for investigation, but cannot be considered a complete assessment. Water courses and wetlands were surveyed for only three days, during a time of year when many were dry. Two fish species of conservation concern by the Ontario Ministry of Natural Resources (MNR), the Bigmouth Buffalo and the Lake Sturgeon, were not surveyed and therefore deemed not present in the Project area. LOW submits that the review must be elevated to an Individual EA in order to provide a complete fish habitat survey and assess the impacts of water course and wetland crossings.

If a Federal EA is required, it must occur before construction begins.

The ERR notes that Federal approvals for the Project may be required. The watercourses in the area are habitat for fish, so that impacts could require approval from the Department of Fisheries and Oceans (DFO) under section 35(2) of the *Fisheries Act*. The flashing red beacons that might sit atop the wind turbines would require approval from Transport Canada and Environment Canada. Under section 5(d) of the *Canadian Environmental Assessment Act (CEAA)*, if a federal authority issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part, a Federal EA is required.

The recent wind development on Wolfe Island provides a cautionary example of a failure to abide by the letter or the spirit of the *CEAA*. In that case, Federal approvals were required and Federal

⁶ IBA Canada, Site Summary, Napanee Limestone Plain, Ontario. Online at: <<http://www.bsc-eoc.org/iba/site.jsp?siteID=ON152>>.

land was used, so that an EA was required under section 5 of the *CEAA*. However, construction of the wind turbines began before the Federal EA was complete. Commencing construction of a project before the completion of an EA renders the EA process meaningless, which puts the environment at risk, nullifies the benefits of public participation in the EA process, and is not economically prudent.

If a Federal EA is required for the Byran project, no construction should commence, either in preparation for the Project or on the Project itself, before that EA is completed.

An Individual EA is required to fully consider cumulative impacts and a site specific review.

According to the Ministry's Statement of Environmental Values (SEV):

The Ministry adopts an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them.

The Ministry considers the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society.

The SEV requires the Ministry to apply an ecosystem approach to decisions, consider potential cumulative effects, and use a precautionary, science-based approach. Among other things, the SEV means the Ministry must consider existing or planned environmental degradation in the area, sensitive local populations and species, and unique geographic or meteorological characteristics. For instance, a proposed wind project cannot be approved without first considering the unique ecological or geographical features of the area and the cumulative effects of multiple wind projects in close proximity.

In *Lafarge Canada v. Ontario (Environmental Review Tribunal)*, the Ontario Superior Court of Justice found that a failure to explicitly consider and apply the SEV when the Ministry makes a decision on approvals and permits is grounds for review by the Environmental Review Tribunal.⁷ At paragraph 60, the court explained:

Under an ecosystem approach, decisions are made by measuring the effects on the system as a whole, rather than on their constituent parts in isolation from each other. Therefore, it was reasonable for the Tribunal to have concluded that without assessing the specific potential cumulative ecological consequences of approving the Lafarge applications, and given the concern that the CofAs were made in the face of

⁷ *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* [2008] O.J. No. 2460 [QL] [*Lafarge*].

uncertainty about environmental risk from the adverse effects of [the proposal], the Directors' decision was unreasonable because of the failure to take into account SEV principles.⁸

The Ministry must explicitly address these considerations at two stages: first, when deciding how to respond to each individual elevation request, and second, when deciding whether to approve, deny approval, or approve a project with conditions.

The ERR prepared for the Byran proposal refers to cumulative effects, but limits its analysis to five pages of the more than 300 page report. The ERR lists other planned and potential wind projects in Prince Edward County, including:

- Royal Road Wind Power Project on Point Petre, 12 turbines, 18 MW;
- Ostrander Point Wind Energy Park, 12 turbines, 20 MW;
- White Pines Wind Farm in South Marysburgh and Athol Townships, 75 turbines;
- Magenn Power Air Rotor System in Sandbanks Provincial Park, 100 MW; and
- Trillium Power Wind Corporation TW1 at Main Duck Island in Lake Ontario, 142 turbines, 710 MW.

If each planned project is built, there will be at least 285 wind turbines in Prince Edward County, an area of just over 1000 km². While the ERR asserts that no cumulative impacts are expected, there is no evidence or detailed analysis provided. Assessing cumulative impacts means science-based analysis of the impacts specific to the site in question. A review like the one provided in the ERR is meaningless unless conducted in the context of the potential cumulative impacts *throughout* the review. Cumulative effects cannot be considered separately from the potential environmental impacts. An Individual EA is required to properly consider the cumulative effects of the multiple projects throughout the assessment.

The Director must consider this request and address LOW's concerns.

LOW was an active participant in the public consultation for the Wolfe Island Wind Project. We submitted comments to the Ministry of the Environment and the proponent based on sound science and legal research. We worked directly with community members to root our comments in local knowledge and experience. We supported and drew from the independent scientific

⁸ Ibid. at 60.

reports commissioned by community members and submitted to the Ministry regarding bird and bat habitat and mortality. When LOW's review of the ERR revealed that important scientific evidence had not been addressed, we requested an elevation to Individual EA, as we now submit for the Byran Project. LOW submitted that request in good faith, on the basis of the requirement that the Minister review and consider each elevation request before making a decision.

It has subsequently become clear that the Minister did not consider LOW's elevation request or the expert evidence that supported it. A subsequent request under the *Freedom of Information and Protection of Privacy Act* has revealed no evidence that the expert reports submitted by the community and endorsed by LOW were considered. Neither was there evidence that the Ministry considered the cumulative or site specific impacts arising from our elevation request.

Transparency is particularly important for a proposed wind project, as an increasing number of these installations are proposed and built in communities around Ontario. While the Integrated Power System Plan (IPSP) prepared by the Ontario Power Authority (OPA) might have provided an extra level of review for this projects, the IPSP was exempted from the *Environmental Assessment Act* and was therefore never the subject of an EA. Further, the Ontario Energy Board has not yet had the opportunity to approve, reject, or improve the IPSP because of delay in preparing the Plan. The lack of planning and review on the provincial scale means that Individual EAs at the project level are essential.

Despite the importance of project-level review and the potential for environmental degradation when industrial power projects are built in residential and farming communities, the Ministry of the Environment has repeatedly denied requests for elevation to Individual EAs. This pattern of denying public requests for elevation raises a reasonable apprehension of bias and diminishes the substantive right to participate to a mere procedural hurdle.

In fulfillment of the Director's obligation to consider elevation requests, and in the interest of transparency, LOW asks that the Director respond to the concerns raised in this elevation request directly, showing how they were considered.

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RECOMMENDATIONS

In summary, Lake Ontario Waterkeeper submits the following specific recommendations to the Ministry, to be considered in the context of our comments expressed above:

- 1. The proposed Byran Wind Project requires further review to protect the environment and should be elevated to an Individual Environmental Assessment.**
- 2. Wetlands and water courses in Prince Edward County must be completely avoided during the construction of the Project, including roads built or widened to accommodate construction.**
- 3. Nesting areas should not be disturbed or cleared for the purpose of constructing the Project.**
- 4. The review must be elevated to an Individual EA in order to provide a complete fish habitat survey and assess the impacts of water course and wetland crossings.**
- 5. If a Federal EA is required for the Byran project, no construction should commence, either in preparation for the Project or on the Project itself, before that EA is completed.**
- 6. An Individual EA is required to properly consider the cumulative effects of the multiple projects throughout the assessment, in accordance with the Ministry's Statement of Environmental Values.**
- 7. In fulfillment of the Director's obligation to consider elevation requests, and in the interest of transparency, LOW asks that the Director respond to the concerns raised in this elevation request directly, showing how they were considered.**

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