Environmental Review Tribunal
Tribunal de l'environnement

Ontario

ISSUE DATE: December 23, 2014 **CASE NO.:** 14-048

Fairfield v. Director, Ministry of the Environment

In the matter of an appeal by Anne Fairfield filed July 3, 2014 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 Amended Renewable Energy Approval No. 1590-979LNP issued by the Director, Ministry of the Environment, on June 20, 2014 to Vineland Power Inc., under section 47.5 of the *Environmental Protection Act*, regarding a class 4 wind facility with a total expected generation capacity of 9 megawatts (MW), known as the HAF Wind Energy Project located at 9556 Sixteen Road Lot 20, Concession 6 in the Township of West Lincoln, Regional Municipality of Niagara, Ontario.

Heard : September 8, 9 and 10, 2014 in Smithville, Ontario.

APPEARANCES:

Parties	**Counsel/Representative[+]**
Anne Fairfield	Deborah Murphy[+]
Director, Ministry of the Environment	Andrew Weretelnyk
Vineland Power Inc.	Scott Stoll Jody Johnson Laura Dean (student-at-law)
Presenters	
Loretta Shields	Self-represented
Anne Meinen	Self-represented
Zlata Zoretic	Self-represented

DECISION DELIVERED BY JUSTIN DUNCAN AND HEATHER I. GIBBS

REASONS

Background

[1] On June 20, 2013, Vic Schroter, Director, Ministry of the Environment ("MOE" or the "Ministry") issued Renewable Energy Approval No. 1590-979LNP (the "Original REA") to Vineland Power Inc. (the "Approval Holder") under s. 47.5 of the *Environmental Protection Act*, R.S.O.1990, c. E.19 ("*EPA*"). The Original REA is for a renewable energy project known as the HAF Wind Energy Project, consisting of the construction, installation, operation, use and retiring of a Class 4 wind facility with five wind turbines, with a total nameplate capacity of nine megawatts, located at 9556 Sixteen Road Lot 20, Concession 6, in the Township of West Lincoln, in the Regional Municipality of Niagara, Ontario (the "Project").

[2] After the Project was constructed and the Approval Holder began operating it, on June 20, 2014, the MOE issued amendments to the Original REA for the Project (the "REA Amendments"). The amendments replace the definition of "Application" in the REA to incorporate documentation received from the Approval Holder up to June 16, 2014, including a Property Line Setback Assessment Report ("PLSA Report") that was not included in the application for the Original REA and, additionally, deletes two conditions in the Original REA relating to post-construction monitoring and reporting for woodland raptor nesting habitat.

[3] On July 3, 2014, Anne Fairfield (the "Appellant") filed a Notice of Appeal of the decision of the Director to issue the Amended REA with the Environmental Review Tribunal (the "Tribunal"). Ms. Fairfield appeals under s. 142.1(3) of the *EPA*, on the grounds that engaging in the Project in accordance with the Amended REA will cause serious harm to human health or will cause serious and irreversible harm to plant life, animal life or the natural environment.

[4] On August 5, 2014, the Appellant also filed a Notice of Constitutional Question ("NCQ") alleging that s. 47.5 and s. 142.1 of the *EPA* violate her rights to life, liberty and

security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[5] A preliminary hearing took place on August 6, 2014. At that time, the Tribunal heard and determined requests for participant and presenter status, and dealt with certain scheduling matters. Additionally, the Tribunal heard a motion by the Approval Holder to dismiss the appeal.

[6] On August 8, 2014, the Tribunal gave an oral disposition of the motion via telephone conference call, granting the motion in part by striking certain portions of the Notice of Appeal. The Tribunal issued a written disposition on August 13, 2014. The Tribunal partially granted the motion on the basis that the Appellant had appealed the Original REA, which was settled. (The settlement can be found in the Tribunal decision *Engel v. Ontario (Ministry of the Environment)*, 2013 CarswellOnt 14872). The Tribunal's written reasons on the motion were delivered on September 19, 2014, striking several issues from the Notice of Appeal because they were either part of the settled appeal or otherwise unrelated to the REA Amendments. These matters included contaminated fill, buried electrical cables and gas well safety. An aspect of the constitutional challenge of s. 47.5 of the *EPA* was also struck as being outside the Tribunal's jurisdiction.

[7] As a result of the motion, what remains at issue in this appeal are the REA amendments made on June 20, 2014 to incorporate the PLSA Report into the definition of "Application", and the deletion of the monitoring conditions for woodland raptor nesting habitat in the Project's post-construction phase. A constitutional challenge relating to s. 142.1 of the *EPA* also remains at issue.

[8] Pursuant to s. 145.2.1 of the *EPA*, the onus is on the Appellant to establish that engaging in the Project in accordance with the REA Amendments will cause serious harm to human health (the "Health Test") and/or serious and irreversible harm to plant life, animal life or the natural environment (the "Environment Test").

[9] For the reasons that follow, the Tribunal finds that the Appellant has failed to meet either the Health Test or the Environment Test and has not established the necessary elements of a s. 7 *Charter* violation and, therefore, the appeal is dismissed.

Relevant Legislation

[10] The Amended REA was issued by the Director under the authority of s. 47.5 of the *EPA* which provides that the Director may alter the terms and conditions of a REA if he or she is of the opinion that it is in the public interest to do so, as follows:

> 47.5 (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so,
>
> (a) issue or renew a renewable energy approval; or
>
> (b) refuse to issue or renew a renewable energy approval.
>
> (2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so.
>
> (3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,
>
> (a) alter the terms and conditions of a renewable energy approval after it is issued;
>
> (b) impose new terms and conditions on a renewable energy approval; or
>
> (c) suspend or revoke a renewable energy approval.
>
> (4) A renewable energy approval is subject to any terms and conditions prescribed by the regulations.

[11] The test applicable to appeals such as this one can be found in s. 145.2.1 of the *EPA* which provides that the Tribunal shall consider only whether engaging in the Project in accordance with the REA meets the Health Test or the Environment Test:

> 145.2.1 (2) The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,
>
> (a) serious harm to human health; or

> (b) serious and irreversible harm to plant life, animal life or the natural environment.
>
> (3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).
>
> (4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,
>
> (a) revoke the decision of the Director;
>
> (b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
>
> (c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.
>
> (5) The Tribunal shall confirm the decision of the Director if the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will not cause harm described in clause (2) (a) or (b).
>
> (6) The decision of the Director shall be deemed to be confirmed by the Tribunal if the Tribunal has not disposed of the hearing in respect of the decision within the period of time prescribed by the regulations.

[12] Also relevant to this appeal are provisions of *Ontario Regulation* ("*O. Reg.*") *359/09* of the *EPA*. Section 53(1)(b) of *O. Reg. 359/09* stipulates that turbines must be set back from property lines at a minimum distance that is equivalent to the height of the turbine excluding its blades, while s. 53(2) and s. 53(3) set out where this property line setback requirement does not apply, including where a proponent submits a written assessment demonstrating that adverse impacts will not result and setting out any preventative measures that are required to address the possibility of any adverse impacts:

> 53.(1) No person shall construct, install or expand a wind turbine that is to form part of a Class 3, 4 or 5 wind facility unless,
>
> (b) the distance between the centre of the base of the wind turbine and all boundaries of the parcel of land on which the wind turbine is constructed, installed or expanded is equivalent to, at a minimum, the height of the wind turbine, excluding the length of any blades.

(2) Clause (1) (b) does not apply in respect of a boundary of the parcel of land on which the wind turbine is constructed, installed or expanded if the abutting parcel of land on that boundary is,

(a) owned by the person who proposes to engage in the renewable energy project in respect of the wind turbine; or

(b) owned by a person who has entered into an agreement with the person mentioned in clause (a) to permit the wind turbine to be located closer than the distance specified in clause (1) (b).

(3) Clause (1) (b) does not apply if,

(a) the distance between the centre of the base of the wind turbine and all boundaries of the parcel of land on which it is constructed, installed or expanded is equivalent to, at a minimum, the length of any blades plus 10 metres; and

(b) as part of an application for the issue of a renewable energy approval or an environmental compliance approval in respect of the construction, installation or expansion of the wind turbine, the person who is constructing, installing or expanding the wind turbine submits a written assessment,

(i) demonstrating that the proposed location of the wind turbine will not result in adverse impacts on nearby business, infrastructure, properties or land use activities, and

(ii) describing any preventative measures that are required to be implemented to address the possibility of any adverse impacts mentioned in subclause (i).

[13] Finally, s. 1 and s. 7 of the *Charter* state:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Issues

[14] The three issues on this appeal are:

Issue No. 1: Whether engaging in the Project in accordance with the REA Amendments will cause serious harm to human health.

Issue No. 2: Whether engaging in the Project in accordance with the REA Amendments will cause serious and irreversible harm to plant life, animal life or the natural environment.

Issue No. 3: Whether the Appellant's s. 7 *Charter* rights have been violated.

Issue No. 1: Whether Engaging in the Project in Accordance with the REA Amendments will Cause Serious Harm to Human Health

Discussion

[15] Section 145.2.1(3) of the *EPA* mandates that the person who required the hearing has the onus to prove that engaging in the Project in accordance with the approval will cause the harm under the Health Test. In order for the Appellant to satisfy her onus under the Health Test, on this appeal she must satisfy the Tribunal that the operation of the Project in accordance with the REA Amendments will cause serious harm to human health.

[16] The definition of "Application" in the Original REA was replaced in the REA Amendments to allow for the inclusion of a PLSA Report as follows:

> 11. "Application" means the application for a Renewable Energy Approval dated July 30, 2012 and signed by Thomas A. Rankin, President, Vineland Power Inc., and all supporting documentation submitted with the application, including amended documentation submitted up to June 20, 2013, and as further amended by the application for a Renewable Energy Approval amendment dated March 24, 2014 and signed by Thomas A. Rankin, and all supporting documentation submitted with the application including amended documentation submitted up to June 16, 2014.

[17] The PLSA Report was submitted to the Director in March 2014. The Appellant argues that the acceptance of this PLSA Report after the Original REA was approved has resulted in serious harm to human health in the nature of psychological impacts on her and other members of the public.

[18] The Director and the Approval Holder take the position that the Appellant has failed to lead any evidence necessary to meet the Health Test.

Evidence

[19] The Appellant and two presenters, Zlata Zoretic and Anne Meinen, testified in support of the Appellant's case on Issue No. 1. Additionally, Vic Schroter, the Director, testified under summons obtained by the Appellant. Jordan Beekhuis, a project engineer working with the Approval Holder, testified on behalf of the Approval Holder in relation to the process leading to the Amended REA. The Director did not call any witnesses specifically to testify in relation to health issues.

[20] The Approval Holder objected to paragraphs contained in the witness statements of Ms. Zoretic and Ms. Meinen as being outside of the scope of the appeal, and submitted that the Appellant's witness statement was incomplete and that she ought to not testify as a result. The Tribunal allowed the Appellant to testify to her concerns she raised in various documents leading up to the hearing that were relevant to the appeal. The Tribunal has considered the Approval Holder's submissions in determining the relevance and weight to be afforded to the evidence of Ms. Zoretic and Ms. Meinen, discussed below.

[21] During the first day of hearing, the Appellant made a request that the Tribunal conduct a site visit. This request was denied orally by the Tribunal at the hearing on the basis that site visits are used primarily to assist the Tribunal in understanding evidence and the issues presented at the hearing, as outlined in the Tribunal's Practice Direction for Site Visits. The Tribunal found it had sufficient explanation of the evidence before it in relation to property line setback distances (including maps and aerial photographs) and woodland raptor nesting habitat such that a site visit was unnecessary to appreciate or understand the evidence or issues before it.

[22] There was no disagreement with the setback distances measured by the Approval Holder's consultant and set out in the PLSA Report. That report indicated that all five of the turbines meet the minimum setback requirement of at least 550 metres ("m") from the nearest non-participating noise receptor, and that none of the turbines is located closer to a non-participating property line than the length of the turbine blades plus 10 m (i.e., 59 m in this case) as required by *O. Reg. 359/09*. The PLSA Report

does confirm that four of the five turbines are located closer to a non-participating property line than the height of the turbine tower (i.e., 95 m). The PLSA Report shows the following property line setback distances for each of the four wind turbines that are located less than 95 m from the closest property line:

Turbine Number	Property Line Setback Distance
1	66.62 m
2	89.90 m
3	73.59 m
5	88.70 m

[23] As noted above, *O. Reg. 359/09* requires that a proponent file a PLSA Report where a turbine tower is to be located less than 95 m from a property line. There was no disagreement in this case that the Approval Holder's application for the Original REA was deficient in that it failed to properly describe the setback distances above and failed to include a PLSA Report necessary to support a request for setbacks less than the 95 m.

[24] Brief summaries of the additional evidence of witnesses who provided testimony on Issue No. 1 are set out below.

Anne Fairfield

[25] Ms. Fairfield testified at the hearing on her own behalf. Ms. Fairfield is a Director of the West Lincoln and Glanbrook Wind Action Group Inc. which is in opposition to the Project. Ms. Fairfield's property is not one of the properties located less than 95 m from a Project turbine, but her property is within the area studied for the Project.

[26] Ms. Fairfield testified about the efforts she took to learn details about property line setbacks and specifically about the PLSA Report filed by the Approval Holder in support of its application for the Amended REA. She testified that she believed the Director was essentially allowing the Approval Holder to roll back the clock two years to file something that should have been filed with its application for the Original REA or,

alternatively, that the approval process was improperly iterative in nature, thereby allowing the Approval Holder to seek amendments to the Original REA at any time.

[27] Ms. Fairfield took issue with what she viewed as limited public consultation during the process leading to the approval of the Amended REA and the fact that the public's level of trust in the process was undermined, and that additional stress on her and other neighbours of the Project was the result.

[28] Ms. Fairfield expressed concern about what impact the Project may have on her health and testified that she has self-diagnosed as having "pre- and post-turbine stress disorder". It was not explained what she meant by this "disorder" but it appears this is how Ms. Fairfield refers to the stress associated with engaging in the approval process and, subsequently, with living close to the Project.

[29] Ms. Fairfield testified that she views the Approval Holder's failure to include the PLSA Report with its application for the Original REA as a "cover up" of a falsehood, and believes that rather than issuing the Amended REA, the Director ought to have revoked the Original REA entirely given what she views as a contravention of the regulations.

[30] Finally, Ms. Fairfield testified that she wonders what else remains to be fixed with the REA, which the public does not yet have knowledge of. She believes the Original REA is "illegal", that the Approval Holder should not be rewarded for covering up information by having an amended REA issued. In her view the Amended REA ought to be revoked and the Project components removed entirely.

[31] On cross-examination, Ms. Fairfield acknowledged that she has not visited a doctor in relation to stress and acknowledged that she has not filed any medical evidence documenting health issues already suffered or that may be suffered in future by herself or others in relation to the Project.

Zlata Zoretic

[32] Ms. Zoretic provided fact evidence as a presenter in support of the appeal. She is the property owner whose property line is 89.9 m from turbine #2 of the Project.

[33] Ms. Zoretic testified that she is one of the local residents living close to the turbines who is non-participating, in the sense that she does not have a participation contract with the Approval Holder.

[34] Ms. Zoretic explained the various negotiations she is aware of that led to the placement of the turbines on the properties where they are now located. She explained why she did not agree to having a turbine placed on her land, including her view that she would be unfairly impacting her neighbours' rights to enjoyment of their land.

[35] She testified that turbine noise interferes with her sleep and several of the turbines dominate views from her home. Ms. Zoretic believes her rights to her land have been interfered with.

[36] Additionally, Ms. Zoretic testified that she has concerns about property line setbacks and the potential for harmful effects on wildlife, livestock, property values and her health.

[37] Ms. Zoretic also expressed the desire to ensure that applicants for REAs are made to file complete and accurate applications for REAs before construction begins. She expressed her belief that without such a requirement, interests in land could be taken or private land impacted absent due process, outcomes she likened to her experience in communist Yugoslavia 40 years ago when individual rights were ignored and portions of her father's farm were taken without his input. She stated that she "trusted" the Approval Holder to follow the regulations, and that her trust was betrayed.

[38] Finally, Ms. Zoretic testified that she believes turbine #2 is too close to her home and she wants it moved or taken down entirely.

[39] On cross-examination, Ms. Zoretic acknowledged that she did not have any evidence that linked any specific health issue to the property line setbacks from turbines.

Anne Meinen

[40] Anne Meinen also provided fact evidence as a presenter in support of the appeal. Ms. Meinen is a local property owner with an “L”-shaped property that is located approximately 79.4 m and 73.6 m from turbine #3 at two points on the property line.

[41] Ms. Meinen testified that she has been farming various parcels of land in the area for over 40 years. Although she does not live on the property at issue, as she rents out the residence on the property and has an employee that assists her with farming it, Ms. Meinen stated that turbine #3 impacts her ability to grow field crops for a number of reasons set out below.

[42] The bulk of Ms. Meinen’s testimony related to her worries about what the Project could mean for the health of those using the land and her financial interests in the property. For example, she states that, since turbines do not meet the 95 m setback requirement, her safety is not ensured.

[43] Additionally, Ms. Meinen testified that she might need additional liability insurance due to the proximity of the turbine, that any aerial seeding she may want to do in future might be interfered with, that future technological advances in farming practices may be interfered with by the proximity of a wind turbine, that her property values have likely been depressed, that her tenant’s pets are disturbed by the noise from the turbines at night, and that if her tenants or the custom worker at her farm ever decide to leave as a result of the presence of the turbines then she will be harmed financially.

[44] Finally, Ms. Meinen testified that she also worried about what else was absent from the Approval Holder’s application for the Original REA that was missed by the Director.

[45] On cross-examination, Ms. Meinen acknowledged that she has been able to grow crops on her land, despite the presence of the Project. It was clarified that Ms. Meinen is concerned that turbine #3 will interfere with future farming technologies, rather than any present-day farming practices she currently engages in. Ms. Meinen also acknowledged that none of her remaining concerns had yet come to pass, nor did she have any evidence that the impacts she fears have actually occurred. Ms. Meinen reiterated that she continues to worry about these potential issues however.

Vic Schroter

[46] The Director of the MOE, Vic Schroter, was summonsed to testify by the Appellant. Mr. Schroter approved the Original REA and reviewed the application in support of the Amended REA, though another Director signed the Amended REA due to Mr. Schroter being absent at the time. Mr. Schroter testified that at the time the Original REA was signed, he believed, based on the application supplied by the Approval Holder, that the Project met the setback requirement of 95 m from non-participating property owners' property lines.

[47] Mr. Schroter explained why the changes were made in the Amended REA. Mr. Schroter testified that after individuals contacted the MOE indicating that setback distances appeared less than 95 m, the Ministry's Niagara District Office in St. Catharines became responsible for considering any enforcement issues. His office became responsible to consider the application for amendment, once it was filed. Mr. Schroter also confirmed that the public had not been broadly consulted through the Environmental Bill of Rights Registry on the Amended REA before it had been issued. Mr. Schroter testified that the MOE trusts the information given to it by a proponent in an REA application.

Jordan Beekhuis

[48] Jordan Beekhuis is a project engineer employed by Rankin Construction Inc., one of the shareholders in Vineland Power Inc., the Approval Holder. He appeared as a fact witness for the Approval Holder to explain the approval process for the Amended REA. Mr. Beekhuis worked on the Project beginning in late 2011, overseeing

operations and coordinating with the manufacturer of the turbines and with various construction subcontractors.

[49] Mr. Beekhuis testified that part of his due diligence review for the Project involved confirming that the turbine locations could meet regulatory requirements for the application for the original REA. He testified that, in looking for "red flags" and determining whether a location is suitable for a project, he would check for a turbine /property line setback of blade length plus 10 m, which is viable assuming a proper report is completed that demonstrates compliance with regulatory requirements. He also testified that in the application for the Original REA the PLSA Report was a requirement because not all turbines could meet the turbine-height property line setback, but the Approval Holder's consultant had mistakenly not included the PLSA Report with the original application.

[50] Mr. Beekhuis testified that he had become aware of this issue only after local residents complained about setbacks shortly after turbines had been erected. He testified that the PLSA Report had been omitted mistakenly, and that setback distances from property lines were not marked on the maps submitted to the MOE in the original application. Thereafter, after becoming aware of the problem, he testified that he worked with the Approval Holder and the Ministry to bring the Project and the Original REA into compliance with regulatory requirements by submitting a PLSA Report and other documentation.

[51] Mr. Beekhuis testified that after the property line setback issue had been discovered in November 2013, the Approval Holder consulted with property owners on adjacent properties as required under *O. Reg. 359/09* s. 53(2)(b). The landowner adjacent to turbine #5 entered into an agreement with the Approval Holder while Ms. Meinen (adjacent to turbine #3 at two locations), Ms. Zoretic (adjacent to turbine #2) and the property owner adjacent to turbine #1 declined to enter into agreements. Mr. Beekhuis also testified that these property owners were given the opportunity to comment on the PLSA Report.

[52] Mr. Beekhuis also testified that the MOE had engaged in public consultation after receiving the application for the Amended REA from the Approval Holder and had provided a summary of those comments for responses by the Approval Holder.

[53] Finally, Mr. Beekhuis testified that the PLSA Report identified the potential for adverse impacts to abutting land. His witness statement states they are “limited to crop and vegetation damage or soil compaction only in the unlikely event of turbine collapse”, and states that preventative measures were identified to address these possibilities in the PLSA Report.

Analysis and Findings

[54] In order to satisfy the Health Test, the Appellant must show that the Project, operating in accordance with the Amended REA, will cause serious harm to human health. In *Erickson v. Ontario (Ministry of the Environment)* (2011), 61 C.E.L.R. (3d) 1 (“*Erickson*”), at paras. 596-648, the Tribunal engaged in a legal analysis of three areas in considering the Health Test: (a) "will cause", (b) "serious harm", and (c) "to human health".

[55] The component “will cause” can be satisfied where it is shown that the operation of a project results in either direct or indirect harm (*Erickson* at para. 631). “Serious harm” has been found to require an assessment of the specific harm complained of on a case-by-case basis and to consider all the evidence to determine whether the harm is serious in nature given that there can be differing interpretations of what is serious (*Erickson* at para. 638). “Human health” has been found to contemplate not only the absence of symptoms but a state of complete physical, mental and social well-being and as a result, it is to be assessed on a case-by-case basis (*Erickson* at paras. 166 and 645).

[56] In this instance, although the Appellant has raised what could be viewed as a legitimate human health issue – stress or anxiety – for the reasons that follow the Tribunal is not convinced on a balance of probabilities that the stress or anxiety complained of by Ms. Fairfield is caused by the operation of the Project in accordance

with the REA Amendments, or that it could be considered serious harm to human health.

[57] The bulk of the evidence adduced in support of the Appellant's case on Issue No. 1 was focused on the process leading to the approval of the Amended REA and on the identification of potential areas of Project impacts.

[58] The Tribunal has no doubt that the witnesses testifying in support of the Appellant's appeal are genuinely concerned about the potential for future harm resulting from the Project. However, the Tribunal is not satisfied that the Appellant has met the evidentiary burden of proving serious harm to the health to any individual or group of individuals. The only human health evidence in this case was in the form of self-diagnosis by non-experts, and allegations of stress caused by the possibility of future harm.

[59] In relation to speculation about future harm, witnesses testified about their concerns as to what else might be wrong with the Amended REA that the Director has yet to fix. This does not constitute proof that serious harm to human health will be caused by the operation of the Project, as required by s. 145.2.1 of the *EPA*.

[60] The Appellant must prove on a balance of probabilities that harm will occur, rather than that it may occur. Evidence that only raises the potential for harm does not meet the evidentiary onus. Speculation about future events and outcomes is not sufficient (*Erickson* at paras. 851 and 871).

[61] In relation to stress, the Appellant led no medical evidence at the hearing other than the testimony that she believes she suffers from "pre- and post-turbine syndrome", along with evidence from presenters that the process and the possibility of future impacts cause them stress and worry. The majority of the evidence led appeared to relate to the frustration individuals have experienced with the process of approval undertaken by the Director, and the fact that a regulatory requirement was overlooked such that amendments were even needed. Importantly, the Tribunal heard no specific

evidence linking the operation of the Project in accordance with the specific amendments at issue on this appeal, to any particular human health issue.

[62] The witnesses for the Appellant also testified that stress arose as a result of the fact that the Director's decision to amend the Original REA was made absent broad public consultation. The Appellant and the presenters testified about their distrust of the MOE and the Approval Holder as a result of the issuance of an REA that subsequently needed to be amended. They expressed a loss of trust in the government's oversight of wind projects and their impacts, and resulting feelings of betrayal.

[63] In her submissions on the Health Test, the Appellant focused on the omission from the Original REA of measured property line setback distances and a property line setback assessment. The health submissions were closely linked to those with respect to the *Charter* claim. The Appellant submits that "while there is no 'expert medical evidence' in support of this submission, the (evidence of Ms. Meinen and Ms. Zoretic) must be considered as compelling, truthful evidence."

[64] Specifically, the Appellant submits with respect to Ms. Zoretic that:

> the actions of the proponent have caused Ms. Zoretic… to now feel that the "rules" in this country are becoming the same as the "rules" of the Communist country she fled. It is submitted that this alone is a travesty of justice and an absolute infringement on her guaranteed rights to the security of her psychological integrity and the protection against actions of the government which threaten that integrity.

[65] The Appellant submits with respect to Ms. Meinen that

> For the first time, she must worry about issues which had never presented themselves prior to this Project. And while this individual understood that, in general principal, she would have to accept this project, she did not understand that it would be acceptable for the owners of the Project to deliberately contravene the very regulations which permitted that the Project to move forward. She now worries about what else has been done illegally and how much of a negative impact this particular situation will have on her livelihood in the future, and as such, is now living under a level of stress she had not previously experienced. It is submitted that this, as well, is a travesty of justice and absolute infringement on her rights to the security of her psychological integrity and the protection against actions of the government which threaten that integrity.

[66] The Appellant further submits that a determination by the Tribunal "that the proponents actions are acceptable … will only serve to add to the already high levels of stress being experienced by citizens living in the Project area."

[67] Even if the Tribunal were to accept that stress levels experienced during the approval processes would continue during the operation of the Project, and even if the Appellant had shown that the stress could be attributed to the amendments at issue on this appeal, the evidence of stress and anxiety evinced during the hearing does not, in the Tribunal's view, rise to the level of "serious harm" as required by the Health Test.

[68] With regards to the Appellant's characterization of the errors made in the Original REA as being deliberate, no evidence was adduced showing that the failure to include the PLSA Report with the application for the Original REA was intentional or that it was originally omitted with any intent to mislead or hide anything from the public.

[69] Even if it had been demonstrated to the Tribunal that the process by which the Original and Amended REAs were approved was inadequate or that the omission of the PLSA Report was deliberate, without more, one cannot simply assume that serious harm to human health will result. Under the *EPA*, the Tribunal has only the narrow jurisdiction to consider whether operating in accordance with the Project will cause serious harm to human health or serious and irreversible harm to plant life, animal life or the environment. As noted below, the MOE's exercise of prosecutorial discretion is an entirely different matter.

[70] In relation to speculation about future harm, witnesses testified about their concerns as to "what else might be wrong" with the Amended REA that the Director has yet to fix. Such speculation does not constitute proof that serious harm to human health will be caused by the operation of the Project in accordance with the REA Amendments. As stated in *Erickson* the legal test under this section of the *EPA* requires evidence that the Project will cause serious harm to human health, not that it might cause or may cause such harm.

[71] Finally, the Appellant made reference during the hearing and in submissions to a lack of enforcement of the *EPA* by the Ministry in this instance, and a lack of verification of information provided in applications for REAs by the MOE. The Appellant argues in her written submissions, for example, that "(r)evoking the original REA will send a clear message that no one is above the law and regulatory conditions are not voluntary standards to be met upon discovery of non-compliance."

[72] The Tribunal does not view it as relevant to the determination of issues on this appeal whether or not the Ministry has decided to charge the Approval Holder under the *EPA* for errors made in its application for the Original REA. The Ministry's enforcement decision is a separate matter altogether that does not assist the Tribunal in determining whether serious harm to human health will result from the operation of the Project in accordance with the REA Amendments.

[73] Similarly, whether or not the MOE has decided to undertake a process to independently verify the contents of the Approval Holder's application for the Original REA and the Amended REA does not, in itself, assist the Tribunal in determining whether or not the operation of the Project in accordance with the REA Amendments will result in serious harm to human health or the environment.

[74] The Appellant additionally made submissions that the Original REA should be considered invalid, and asked that the Tribunal revoke the Original REA. The Tribunal notes that it issued an order in this appeal on September 19, 2014, following a motion by the Approval Holder to dismiss or strike portions of the appeal. In that order, the Tribunal struck a number of issues raised by the Appellant relating to the Original REA which had been subject to a prior settlement agreement, or were not the subject of the Director's decision to approve the REA Amendments. The question before the Tribunal in this appeal is whether engaging in the Project in accordance with the REA Amendments will cause harm. The validity of the Original REA is not the legal question to be determined by the Tribunal in this proceeding.

[75] The Tribunal finds that the Appellant has failed to demonstrate that the operation of the Project in accordance with the REA Amendments will cause serious harm to human health.

Issue No. 2: Whether Engaging in the Project in Accordance with the REA Amendments will cause Serious and Irreversible Harm to Plant Life, Animal Life or the Natural Environment

Discussion

[76] In order for the Appellant to meet the onus established under the *EPA*'s Environment Test, she must satisfy the Tribunal that the operation of the Project in accordance with the REA Amendments will result in serious and irreversible harm to plant life, animal life or the natural environment.

[77] As previously noted, the Amended REA removed two conditions relating to woodland raptors nesting habitat in the post-construction phase of the Project.

[78] Condition I4 was contained under the heading "Thresholds and Mitigation" in the Original REA and required that monitoring of woodland raptor nesting habitat at two woodland locations be undertaken as follows:

> I4. The Company shall implement the post-construction monitoring described in the Environmental Effects Monitoring Plan and the Environmental Impact Study, described in Condition I1, including the following:
>
> (1) Disturbance Monitoring for Raptor Nesting Habitat (Mill Creek-Inverary Woods, Twenty Mile Creek Woodland)

[79] Condition I14 had been contained under the heading "Reporting and Review of Results" in the Original REA. It established the reporting requirements for the monitoring undertaken under Condition I4 as follows:

> I14. The Company shall report, in writing, both the winter raptor mortality levels and the yearly (May-March) raptor mortality levels for the post-construction monitoring described in Conditions I4(1), to the Ministry of Natural Resources for three (3) years on an annual basis

> and within three (3) months of the conclusion of the March mortality monitoring for each year, with the exception of the following:
>
> (1) if either of the bird mortality thresholds described in Conditions I6(4) or I6(5) is reached or exceeded , the Company shall report the mortality event to the Ministry of Natural Resources within 48 hours of observation;
>
> (2) for any and all mortality of species at risk (including a species listed on the Species at Risk in Ontario list as Extirpated, Endangered or Threatened under the provincial *Endangered Species Act, 2007*) that occurs, the Company shall report the mortality to the Ministry of Natural Resources within 24 hours of observation or the next business day;
>
> (3) if the raptor mortality threshold described in Conditions I6(3) is reached or exceeded for turbines located within 120m of bird significant wildlife habitat, the Company shall report mortality levels to the Ministry of Natural Resources for the additional three (3) years of effectiveness monitoring described in Condition I9, on an annual basis and within (3) months of the conclusion of the March mortality monitoring for each year;
>
> (4) if the raptor mortality threshold described in Conditions I6(3) is reached or exceeded for turbines located outside 120 m of bird significant wildlife habitat, the Company shall report mortality levels to the Ministry of Natural Resources for the additional two (2) years of cause and effects monitoring described in Condition I10, on an annual basis and within three (3) months of the conclusion of the March mortality monitoring for each year; and
>
> (5) if the Company implements operational mitigation following cause and effects monitoring in accordance with Condition I10 due to raptor mortality thresholds being reached or exceeded, the Company shall report mortality levels to the Ministry of Natural Resources for the three (3) years of subsequent effectiveness monitoring described in Condition I10, on an annual basis and within three (3) months of the conclusion of the March mortality monitoring for each year.

[80] The Appellant submits that the deletion of these monitoring and reporting conditions for woodland raptor nesting habitat will result in serious and irreversible harm to raptors.

[81] The Director submits that the Appellant has not demonstrated that the deletion of these monitoring and reporting conditions for woodland raptor nesting habitat will result in serious harm to raptors. Additionally, the Director submits that even if the Appellant has proven that serious and harm will result, it has not been proven that such harm is irreversible.

[82] The Approval Holder's submissions mirror those of the Director. The Approval Holder submits that the Appellant has filed no evidence showing how operating the Project in accordance with the REA Amendments will impact raptors and as a result, the Appellant has failed to meet the onus under the Environment Test.

Evidence

[83] The Appellant and one presenter, Loretta Shields, testified in support of the Appellant's case on Issue No. 2. Emma Valliant, an employee of the Ministry of Natural Resources ("MNR"), testified as a fact witness for the Director. Erin McLachlan testified as an expert on behalf of the Approval Holder. All witnesses focused their testimony on the deletion of Conditions I4 and I14.

Loretta Shields

[84] Loretta Shields, a presenter testifying in support of the Appellant's appeal, is a local resident who is a long standing member of several nature groups in the Niagara Region, including the Niagara Peninsula Field Naturalists and Niagara Woodlot Association.

[85] Ms. Shields provided fact evidence focusing on the issue of identification and monitoring of woodland raptor nesting habitat. More specifically, Ms. Shields testified by way of a power point presentation that was attached to her witness statement that set out her views about the Natural Heritage Assessment Report ("NHA Report") and associated materials filed with the application for the Original REA. Ms. Shields' view was that there were deficiencies in all three components of the natural heritage assessment, namely the records review, site investigation and evaluation of the significance of woodland raptor nesting habitat in the Project area. Her testimony was that:

a. Multiple raptor species are located in the region in which the Project is located;

b. The Approval Holder failed to contact local residents, the Niagara Peninsula Hawkwatch organization or the Christmas Bird Count compilers that may have had additional information about woodland raptor nesting habitat;

c. There is no evidence that the *Ontario Bird Breeding Atlas* was consulted in conducting the records review;

d. There is no evidence that field investigations were conducted at the proper time of year or in the proper manner to find raptor nests;

e. Overwintering habitat was not properly considered and assessed;

f. An area of approximately 18 hectares ("ha") of woodland located between turbines #2 and #3 was not properly identified as a candidate woodland raptor nesting habitat area; and

g. Species abundance levels in the Project area have not been properly assessed.

[86] Ms. Shields testified that she did not have confidence in the Approval Holder's data gathering and assessment for woodland raptor nesting habitat and that, therefore, it was difficult to decide what mitigation measures were actually required to ensure local raptor populations were not irreversibly harmed by the Project. She concluded with her view that until proper field studies are conducted, the Project puts local raptor populations in peril.

[87] In cross-examination, Ms. Shields acknowledged that she is not an expert and has not received any specific training in the categorization of woodlands, though Ms. Shields did mention that it is common knowledge that the region is an important area for raptors, citing the proximity of the Project to an important raptor habitat area such as Beamer Falls.

[88] Additionally, Ms. Shields conceded that none of the woodland areas in the study area were greater than 30 ha in size, the threshold for considering a woodland area as a "candidate significant woodland raptor nesting habitat area" under the MNR's *Significant Wildlife Habitat Ecoregion Draft Criteria Schedule* for Ecoregion 7E.

Ecoregion 7E represents much of southwestern Ontario, including the study area for the Project.

[89] Ms. Shields also conceded that remaining conditions in the Amended REA required monitoring of bird strikes but she stressed that her concern was not just one of mortality from strikes but also related to habitat disturbance issues.

[90] Finally, Ms. Shields agreed that she had no evidence to provide in relation to raptor population levels in the area or mortality rates that could be expected from the operation of the Project. Ms. Shields testified that a Red-tailed hawk and an American kestrel had been found dead in the area but Ms. Shields acknowledged that she was not sure how these raptors had been killed.

Erin McLachlan

[91] Ms. McLachlan is a terrestrial ecologist who was called by the Approval Holder to testify. Ms. McLachlan was qualified by the Tribunal as an expert to give opinion evidence in relation to terrestrial ecology, wildlife habitat assessment and the assessment of terrestrial ecosystems in the context of renewable energy approvals and natural heritage assessments.

[92] Ms. McLachlan was the lead author of the NHA Report, Environmental Impact Study Report and Environmental Effects Monitoring Plan for Birds and Bats that were collectively prepared for the Approval Holder as part of its application filed for the Original REA.

[93] Ms. McLachlan testified that the NHA Report was prepared to document the records review, site investigations and evaluation of significance of all natural features within 120 m of the Project location.

[94] Ms. McLachlan explained the process followed to evaluate the significance of woodland raptor nesting habitat using the MNR's *Natural Heritage Assessment Guide for Renewable Energy Projects, 2011* as required by *O. Reg. 359/09*.

[95] It was Ms. McLachlan's evidence that all woodlots within 120 m of the Project location were properly delineated in the NHA Report. It was her evidence that all natural areas, including woodland raptor nesting habitat, were classified using the MNR's Ecological Land Classification for Southern Ontario system and assessed as per the requirements of *O. Reg. 359/09*.

[96] Ms. McLachlan testified that there were two areas of candidate significant woodland raptor nesting habitat identified and these two areas were treated as significant without having to evaluate for significance, consistent with MNR's 2011 *Natural Heritage Assessment Guide for Renewable Energy Projects*.

[97] Ms. McLachlan critiqued the evidence provided by the Appellant's witness Ms. Shields. Ms. McLachlan testified that Ms. Shields had misinterpreted the MNR's *Natural Heritage Assessment Guide* and the steps taken by Ms. McLachlan's team in carrying out their assessment, including consulting proper documentation and characterization of candidate significant woodland raptor nesting habitat areas. For example, Ms. McLachlan confirmed that her team had consulted the *Ontario Bird Breeding Atlas* and local bird specialists in the Niagara Region in their records review. Additionally, she responded to Ms. Shields' critique of the site investigations by stressing that field investigations are normally used to determine types of species and abundance as part of an evaluation of significance which was unnecessary in this instance as both candidate woodlots had been treated as significant.

[98] Ms. McLachlan expressed the opinion that Conditions I4 and I14 had been included in the Original REA in error and that remaining conditions contained in the Amended REA address the need for mitigation and reporting of impacts on raptors in the post-construction phase.

[99] Finally, in answering questions by the Tribunal, Ms. McLachlan expressed her opinion that the construction of the Project would not have any impact on woodland raptor nesting habitat given that construction would not impact any wooded areas.

Additionally, Ms. McLachlan expressed the opinion that operation of the Project would not have any impacts on woodland raptor nesting habitat and that bird strikes would be the only potential for impacts to raptors during operation.

Emma Valliant

[100] Ms. Valliant was called by the Director as a fact witness, meaning she was not qualified to give opinion evidence to the Tribunal. Ms. Valliant has been employed by the MNR since 2003 and has been a renewable energy planning ecologist since April 2014. Ms. Valliant was not involved in the review of the NHA Report for the Project before the Original REA was approved in 2013.

[101] In May 2014, after the Director received the application for the Amended REA, Ms. Valliant was assigned to consider whether post construction monitoring of woodland raptor nesting habitat was required for the Project.

[102] It was Ms. Valliant's testimony that, as there is no significant woodland raptor nesting habitat within 120 m of the Project, there was no requirement for post construction monitoring and reporting for impacts on such habitat in the Original REA and that the inclusion of conditions I4 and I14 in the Original REA was an error. As a result, on behalf of MNR, she had communicated to MOE staff in May 2014 that these conditions could be removed as an administrative change and advised that they had been erroneously included in the Original REA.

[103] Ms. Valliant explained the rationale for the advice she had provided to the Director on behalf of MNR before the Amended REA was issued, which was as follows:

a. No known records for woodland raptor nesting habitat were identified by the Approval Holder;

b. Two candidate woodland raptor nesting habitat sites were identified by the Approval Holder within 120 m of the Project but since these two sites are less than 30 ha in size (4.97 ha and 2.49 ha respectively), an evaluation of significance was not required;

c. The Approval Holder took the additional step to undertake a site investigation and had not identified any stick nests in the woodlots that would indicate that those areas had been used as nesting habitat by raptors;

d. The MNR issued a letter in April 2012 confirming that the natural heritage assessment had been prepared as required; and

e. As no significant woodland raptor nesting habitat was found within 120 m of the Project, in accordance with the MNR's *Natural Heritage Assessment Guide for Renewable Energy Projects*, no post construction monitoring and reporting was required.

[104] Ms. Valliant also explained how several of the monitoring and reporting conditions remaining in the Amended REA relating to raptors operate:

a. Condition I1 states that the Approval Holder shall implement the Environmental Effects Monitoring Plan dated March 2012 including bird mortality monitoring at all five turbine locations for three years of operations;

b. Condition I6 sets a mortality threshold of 2 raptors for the Project per year which, if reached or exceeded, requires the Approval Holder to implement various mitigation measures to reduce raptor-turbine strikes; and

c. Condition I15 requires reports summarizing the results of the mortality monitoring be submitted to the MOE and the MNR.

Analysis and Findings

[105] The Appellant has the onus of proof on this appeal under the Environment Test to show that the deletion of conditions I4 and I14 relating to woodland raptor nesting habitat in the post-construction phase of the Project will cause serious and irreversible harm to raptors.

[106] The evidence must show that the operation of the Project will cause serious and irreversible harm. As stated by the Tribunal in *Lewis v. Ontario (Ministry of the*

Environment), [2013] O.E.R.T.D. No. 70 ("*Lewis*") at para.54, it is insufficient to show that harm may result or could result. The Environment Test imposes a high evidentiary burden on appellants.

[107] On this appeal, there was significant debate during the hearing relating to whether the NHA Report was properly prepared in relation to woodland raptor nesting habitat. However, even assuming the report contained errors or omissions, the Tribunal did not hear any evidence showing that any such deficiencies will result in serious and irreversible harm to raptors.

[108] Even if it had been shown that deficiencies existed in both the application for the REA and the approval process carried out by MOE specifically in relation to woodland raptor nesting habitat, it does not necessarily follow that any such deficiencies will result in serious and irreversible harm to raptors as a result of the REA Amendments. The Appellant did not adduce evidence linking alleged process deficiencies to the serious and irreversible harm this Tribunal is specifically required to consider under the *EPA*.

[109] As stated by the Tribunal in *Lewis*, the test undertaken by the Tribunal in a s. 145.2.1 analysis is not the same as the analysis conducted by the MNR during the REA approval process. Paragraph 32 of *Lewis* sums up the findings of the panel in that case, which the Tribunal endorses on this appeal:

> To conclude on this aspect, the Tribunal finds that the work done at the REA approval stage (including any MNR sign-off regarding natural heritage features) and in other regimes (such as the *ESA* and Bald Eagle Guidelines) may be relevant information to consider under the *EPA* test, but it is not determinative because the statutory test is part of a distinct appellate process, which involves a different test than what is used by other decision-makers in reviewing applications for renewable energy approvals and other regimes.

[110] Under s. 24(2) of *O. Reg. 359/09* the Approval Holder was required to comply with MNR's *Natural Heritage Assessment Guide for Renewable Energy Projects* (the "NHA Guide") when applying for the Original REA. The NHA Guide directs applicants for REAs to consider the Significant Wildlife Habitat Eco-Region Criteria Schedules applicable to the area where a project is proposed. The Project in this case is located in

Ecoregion 7E. MNR's 2011 Draft Significant Wildlife Habitat Ecoregion 7E Criterion Schedule ("Ecoregion 7E Criteria") stipulates that the habitat criteria for considering an area as candidate significant wildlife habitat is that the area is "All natural or conifer plantation woodland/forest stands combined [greater than] 30 ha". The Ecoregion 7E Criteria remain in draft form. The 2011 draft of the Ecoregion 7E Criteria indicates that 10 ha of the 30 ha must be interior habitat, while the most recent 2012 draft has reduced that area to 4 ha of the 30 ha. Interior habitat is characterized in the Ecoregion 7E Criteria as that portion of woodland habitat that has a 200 m buffer of woodland surrounding it. There is no dispute on this appeal that there are no woodland areas within 120 m of the Project that are greater than 30 ha in total area and that have an interior habitat area of 10 ha or 4 ha.

[111] The dispute in this case relates to the level of assessment, information and detail that needed to be contained in the NHA Report filed with the application for the Original REA. The Appellant's submissions state as follows:

> 86. The discrepancies indicated at Para 85 above clearly indicate that complete, thorough study of the raptors natural nesting habitat in the Project area was not carried out nor was a thorough assessment of the findings of that study conducted. While the minimum woodland area of 30 hectares defines the habitat criteria in the SWH ecoregion 7E criterion schedule, site investigations still should have been conducted. As such, both the proponent and the MOECC failed in their legislated duties to thoroughly investigate the potential for harm, and determine, if applicable, appropriate mitigation.
>
> 87. It is submitted that, as a result of these failures, it is impossible to support the contention that it was proven post-construction monitoring of the raptors was unnecessary.

[112] The Tribunal is unable to conclude, based on the criticism leveled by Ms. Shields against the NHA Report, that removal of the post-construction woodland raptor habitat monitoring will cause serious and irreversible harm. For example, Ms. Shields disagreed with the MNR's reviewers respecting which local groups the Approval Holder ought to have contacted for relevant information. No evidence was provided indicating that, if different groups had been contacted, the Approval Holder would have obtained information indicating that the operation of the Project would cause serious and irreversible harm to raptor species.

[113] Some of the criticism Ms. Shields leveled against the NHA Report resulted from the fact that the report was not particularly detailed, leaving her to state that there was no evidence that certain steps had been taken.

[114] The Tribunal finds that Ms. McLachlan adequately addressed the issues raised by Ms. Shields in her testimony in criticism of the NHA Report. Most importantly, Ms. McLachlan explained that the woodlands identified, despite their size, were nevertheless treated as significant and mitigation considered to address any potential impacts as reflected in the remaining conditions in the Amended REA. The Tribunal accepts her expert opinion, which was uncontested, that the construction of the Project would not have any impact on woodland raptor nesting habitat given that construction would not impact any wooded areas.

[115] Even if it had been shown that errors or omissions remain in the NHA Report, the Tribunal cannot make the assumption, without evidence, that serious and irreversible harm will result from the operation of the Project as a result. MNR's NHA Guide appears to be directed at ensuring that potential impacts of a renewable energy approval are minimized in relation to aspects of the natural environment. It does not of necessity follow that a failure to meet those requirements will result in serious and irreversible harm. On the other hand, it may be that compliance with the NHA Guide does not ensure that serious and irreversible harm is avoided in every situation.

[116] No evidence was led showing that any impacts to raptors from the operation of the Project in accordance with the REA Amendments will result, other than direct strikes with the turbines. No evidence was led indicating that turbine strikes will cause serious and irreversible harm to raptors.

[117] The Tribunal notes that the monitoring, mitigation and reporting conditions relating to raptor turbine strikes remain in conditions I6, I9, I10, I11, I12 and I15 of the Amended REA. These conditions were in the Original REA and are not part of the current appeal.

[118] The Tribunal finds that the Appellant has failed to demonstrate that the operation of the Project in accordance with the REA Amendments will cause serious and irreversible harm to plant life, animal life or the natural environment.

Issue No. 3: Whether the Appellant's s. 7 *Charter* Rights have been Violated

Discussion

[119] Section 7 of the *Charter* provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[120] In *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 the Supreme Court of Canada set out the following three stages for consideration of a s. 7 *Charter* claim:

a. Whether there has been a deprivation of life, liberty or security of the person;
b. If so, whether the deprivation is not in accordance with the principles of fundamental justice; and
c. If so, whether the breach is saved under s. 1 of the *Charter* as demonstrably justified in a free and democratic society.

[121] The burden is on the Appellant to satisfy the Tribunal that the first two stages of this analysis have been met. If the Appellant were successful in that regard, the burden would then shift to the respondents to prove that any breach is saved under the third stage of the analysis.

[122] The Appellant alleges that the approval of the Amended REA and/or s. 142.1 of the *EPA* violate security of the person under s. 7 of the *Charter*.

[123] In submissions, the Appellant repeats and relies upon the evidence summarized above under Issue No.1 relating to the process of approving the Amended REA and the

evidence of stress and anxiety expressed by various witnesses as the evidence in support of her *Charter* claim. In reply submissions, the Appellant reiterates that her s. 7 claim focuses on the psychological impact of the "contravention of regulations" by the Approval Holder and the "approval of the MOE of this contravention".

[124] The Director responds that the Appellant has failed to establish a breach of s. 7 of the *Charter* and further, that the Appellant has failed to prove that any harm was caused by s. 142.1 of the *EPA*.

[125] The Approval Holder also responds by submitting that the Appellant has not properly explained how a breach of s. 7 of the *Charter* arises in this context and has not filed sufficient evidence to reveal a breach of s. 7.

[126] The Director and the Approval Holder also raise the issue of whether the Appellant has public interest standing to bring a *Charter* claim on behalf of other individuals. Given the Tribunal's finding of a lack of evidence of any *Charter* breach, it is not necessary to address this additional argument.

Analysis and Findings

Evidence of a Section 7 Deprivation

[127] In previous REA appeals, the Tribunal has reviewed the leading jurisprudence under s. 7 of the *Charter* and has found that, for s. 7 to be engaged, the evidence led by an appellant must show that state action has caused harm of a serious nature (See: *Bovaird v. Ontario (Ministry of the Environment)* (2013) 83 C.E.L.R. (3d) 13 at paras. 501-503; *Dixon v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 5 at paras. 71-73 and 81-84; *Drennan v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 10 at para. 76; *Kroeplin v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 24 at paras. 253-256). The Tribunal panel in the *Dixon* case made the following findings, which the Tribunal endorses in this case:

> 81. In reviewing the case law on s. 7 *Charter* claims, it is apparent that the courts have all held that the onus is on the claimant to establish, on

> the evidence provided, serious physical or psychological harm. Speculation, allegations and mere concerns do not suffice.
>
> 82. This proposition is stated in virtually every s. 7 *Charter* case. In *Chaoulli*, at paras. 111-117, the Supreme Court of Canada outlined the evidentiary base established in that case in some detail and then reviewed the evidentiary base in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. The Court stated at para. 123 that the "...evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets the threshold requirement of seriousness." In fact, courts have routinely outlined the evidentiary base they base their decisions upon in a s. 7 *Charter* claim. Also see: *Susan Doe v. Canada (Attorney General)*, [2006] O.J. No. 191, aff'd 2007 ONCA 11, at paras. 154-156; *PHS Community Services Society v. Canada (Attorney General)*, [2011] 3 S.C.R. 134 at para. 93; and *Bedford* at paras. 100-101.
>
> 83. The Court in *Chaoulli* went on to state:
>
> > 124. We conclude, *based on the evidence*, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, therefore increasing the risk of complications and death, interferes with the life and security of the person as protected by s. 7 of the *Charter*. [emphasis added]
>
> 84. For a s. 7 *Charter* claim, the Tribunal finds that the onus is on the Appellants to establish, on the evidence, the claimants have suffered or will suffer serious physical or psychological harm.

[128] The evidentiary burden is on the Appellant under s. 7 therefore to prove that the REA Amendments or s. 142.1 of the *EPA* cause harm of a serious nature.

[129] In this case, the Appellant argues that the stress caused by the Project, and more particularly by the Director's approval of an amendment to the Project approval after discovering it did not originally comply with the regulatory requirement that a PLSA Report be filed, has and will cause serious harm to her health and that of others in the community.

[130] The Supreme Court of Canada has stated that, in order for s. 7 of the *Charter* to be engaged, the impugned law or state action must have a "serious and profound effect" on a person's psychological integrity (*New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 para. 60). With regard to stress and anxiety, the Approval Holder cited the following excerpt from *R. v. Morgentaler*, [1998] 1

S.C.R. 30 at para. 196, which the Tribunal agrees is an apt description of the position of the Appellant in this case:

> As to an asserted right to be free from any state interference with bodily integrity and serious state-imposed psychological stress, I would say that to be accepted, as a constitutional right, it would have to be based on something more than the mere imposition, by the State, of such stress and anxiety. It must, surely, be evident that many forms of government action deemed to be reasonable, and even necessary in our society, will cause stress and anxiety to many, while at the same time being acceptable exercises of government power in pursuit of socially desirable goals…. Governmental action for the due governance and administration of society can rarely please everyone. It is hard to imagine a governmental policy or initiative which will not create significant stress or anxiety for some and, frequently, for many members of the community.

[131] Based on the Tribunal's analysis of and findings on the evidence set out above, under Issue No. 1, the Tribunal is not satisfied that the Appellant has met the evidentiary burden of proving state-imposed psychological stress that has a serious and profound impact on the Appellant or other members of the community. As noted above, the only human health-related evidence in this case was in the form of self-diagnoses by non-experts, and allegations of stress caused by the possibility of future harm.

[132] The Tribunal finds that the totality of the evidence taken at its very highest does not meet the threshold of proving serious harm to any individual or group of individuals. In light of this finding on the evidence, it is unnecessary to consider the Director's argument whether the Appellant has proven that the harm complained of is caused by s. 142.1 of the *EPA* or by the REA Amendments themselves.

Principles of Fundamental Justice

[133] Even if the Appellant were able to satisfy the Tribunal that s. 7 is engaged, step 2 of the s. 7 *Charter* analysis mandates that the Appellant show that the deprivation of life, liberty or security of the person is not in accordance with the principles of fundamental justice. Given the Tribunal's finding that there is a lack of evidence for a finding that s. 7 is even engaged, the Tribunal does not view it as necessary to consider the principles of fundamental justice. However, the Tribunal sets out the following analysis and findings

on the principles of fundamental justice in the interests of providing a full analysis of the Appellant's *Charter* claim.

[134] Principles of fundamental justice are concerned with capturing inherently bad laws or state action that take away life, liberty, or security of the person in a way that runs afoul of our basic values: *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101 at para. 96. The principles of fundamental justice that have evolved since the *Charter* came into force include requirements that a law not be vague, arbitrary or overbroad in application. New principles may emerge as new contexts arise.

[135] In this instance, the Appellant has not referred to a principle of fundamental justice as established by jurisprudence, nor proposed a new principle, that may be applicable in the context of this appeal.

[136] The Tribunal did not hear evidence or submissions by the Appellant that would establish that either the specific process followed by the Director in this instance or s. 142.1 of the *EPA* generally run contrary to a principle of fundamental justice. More simply, on balance the evidence on this appeal did not reveal that s. 142.1 is a bad law or that the process engaged in by the Director ran contrary to a principle of fundamental justice.

Justification of Infringement

[137] Given the analysis above, it is unnecessary for the Tribunal to consider the third step in a *Charter* analysis, namely whether a violation of s. 7 can be demonstrably justified in a free and democratic society under s. 1.

[138] The Tribunal finds that the Appellant has failed to establish her claim under s. 7 of the *Charter*.

Conclusion

[139] The Appellant was understandably frustrated, after her extensive effort to engage in public consultation processes and a previous appeal of the Original REA, to find that

property line setback information was not included in the Original REA as it should have been, and conditions relating to raptor habitat were deleted with no public consultation. However, based on the above analysis, the Tribunal has found that the Appellant has not established that operating the Project in accordance with REA Amendments will cause serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment under s. 145.2.1 (4) of the *EPA*.

[140] Additionally, the Tribunal finds that the Appellant has not established, on the facts of this case, that the REA Amendments or s. 142.1 of the *EPA* violate the right to security of the person under s. 7 of the *Charter*.

Request for an Injunction by the Appellant

[141] In her written submissions, the Appellant requests that, should the Tribunal determine that "the Amendment to the REA or portions therefore shall stand", that an injunction be ordered until further studies are completed and the Approval Holder undertakes further actions relating to the property line setback issue.

[142] However, the Tribunal only has the power to order the remedies listed in s. 145.2(4) of the *EPA* where it has first determined that the Health Test or the Environment Test have been made out. Sections 145.2(4) and (5) of the *EPA* provide:

> 145.2(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,
>
> (a) revoke the decision of the Director;
>
> (b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
>
> (c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.
>
> (5) The Tribunal shall confirm the decision of the Director if the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will not cause harm described in clause (2) (a) or (b).

[143] As the Tribunal has found that the Appellant did not demonstrate that the Project will cause serious harm to human health, or serious and irreversible harm to plant life,

animal life or the natural environment, the Tribunal cannot order “alternative” remedies as requested by the Appellant.

Request for Costs by the Approval Holder

[144] In its final written submissions, the Approval Holder submitted that “this case warrants consideration for an order for the Appellant to pay Vineland’s costs of this appeal”, because the Appellant:

a. provided no medical or expert evidence to support the appeal;
b. filed a motion for stay which was not pursued; pursued issues beyond the Tribunal’s jurisdiction even after a motion to strike;
c. made bald, unsubstantiated assertions and allegations, without any actual evidence, about the intention, motivation and conduct of Vineland, without putting the proposition to Vineland’s representative in cross-examination.

[145] The Approval Holder requested an opportunity to make full cost submissions following the Tribunal’s decision on this appeal, should the appeal be dismissed.

[146] Rule 216 provides that a party may file a costs application with the Tribunal at any time prior to the conclusion of the Hearing, or no later than within 30 days from the date of the issuance of the reasons for the decision. In this case, however, the Tribunal finds that it has sufficient facts and information before it at the current time to determine that this is not an appropriate case in which to order costs.

[147] Rule 213 notes that the Tribunal has differing jurisdiction to award costs, depending on the type of appeal. In an appeal such as this one under s. 145.2.1 of the *EPA*, the Tribunal only has a limited authority, springing from s. 17.1(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, to award costs in situations of improper conduct in a proceeding.

[148] The Appellant was within her rights under the *EPA* to appeal the Amended REA. In its order of August 13, 2014 (reasons issued September 19, 2014), the Tribunal dismissed the Approval Holder's argument that the appeal should be dismissed on the grounds of no genuine issue for adjudication. While the Tribunal has ultimately determined that the Appellant brought insufficient evidence to satisfy the test under s. 145.2.1 of the *EPA*, the Appellant's conduct was professional throughout the proceedings, respectful of the Tribunal's process and orders, and there was nothing to suggest a costs order might be warranted. The Tribunal is mindful of the additional costs involved to all parties in preparing and responding to motions, and finds that the Approval Holder's chance for success in a costs motion in this case is so remote that it does not justify the costs involved to all parties to prepare and defend such a motion. The Tribunal therefore will not accept further submissions from the Approval Holder on costs in this case.

DECISION

[149] The appeal from the Amended REA is dismissed without costs.

Appeal Dismissed without Costs

"Justin Duncan"

JUSTIN DUNCAN
MEMBER

"Heather I. Gibbs"

HEATHER I. GIBBS
VICE-CHAIR