Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: June 06, 2016 **CASE NO.:** 13-003

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

Appellant:	Prince Edward County Field Naturalists (ERT File No. 13-003)
Approval Holder:	Ostrander Point GP Inc., as general partner for and on behalf of Ostrander Point Wind Energy LP
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of appeal:	Renewable Energy Approval for Ostrander Point Wind Park
Reference No.:	7681-8UAKR7
Property Address/Description:	Helmer Road and Babylon Road
Municipality:	South Marysburgh
Upper Tier:	County of Prince Edward
ERT Case No.:	13-003
ERT Case Name:	Prince Edward County Field Naturalists v. Ontario (Environment and Climate Change)
Heard:	September 2-4, 2015, October 27, 28, 30, 2015, November 26, 2015 and January 15, 2016, and completed in writing on January 25, 2016

APPEARANCES:

Parties	**Counsel**
Prince Edward County Field Naturalists	Eric Gillespie and Graham Andrews

Director, Ministry of the Environment and Climate Change	Sylvia Davis and Sarah A. Kromkamp
Ostrander Point GP Inc. as general partner for and on behalf of Ostrander Point Wind Energy LP	Douglas Hamilton and Sam Rogers

Participants

Prince Edward County South Shore Conservancy	Chris Paliare and Andrew Lokan
Canadian Wind Energy Association	John Terry and Dennis Mahony (in writing only)

DECISION DELIVERED BY HEATHER I. GIBBS AND ROBERT V. WRIGHT

REASONS

Background

[1] These reasons follow upon the decision of the Environmental Review Tribunal (the "Tribunal") issued on July 3, 2013, and reported as *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* (2013), 76 C.E.L.R. (3d) 171 (the "*APPEC* decision").

[2] This is the first renewable energy approval appeal proceeding in which an appellant has met the environmental harm test in s. 145.2.1(2)(b) of the *Environmental Protection Act* (the "*EPA*") and, therefore, this is the first case to engage the Tribunal's statutory discretionary remedial power under s. 145.2.1(4).

[3] The Director, Ministry of the Environment and Climate Change (the "Director", "MOECC") issued a renewable energy approval (the "REA") on December 20, 2012, to Ostrander Point GP Inc. as general partner for and on behalf of Ostrander Point Wind Energy LP ("Ostrander" or the "Approval Holder") to install nine wind turbine generators,

with a total installed nameplate capacity of 22.5 megawatts, and supporting facilities (the “Project”) on the Ostrander Point Crown Land Block (also referred to as the “Project Site”).

[4] The Ostrander Point Crown Land Block is 324 hectares of provincial Crown land located about 15 kilometres (“km”) south of Picton on the south shore of Prince Edward County, and is one of the least developed areas of the County. It is bordered by three roads and Lake Ontario to the south. It contains a provincially significant wetland in the southeast corner and is known for its alvar vegetation. It is used for recreational purposes such as camping, hiking, “birding”, and all-terrain vehicles.

[5] The Project would require the construction of approximately 5.4 km of gravel access roads on the Site that would be approximately 6 metres (“m”) wide with larger turnarounds. The access roads would be used to construct the wind turbines, for their ongoing maintenance, and are to be removed after decommissioning.

[6] Additional background information regarding the Project and this proceeding can be found in the *APPEC* decision and subsequent court decisions identified below.

[7] The Director’s decision to issue the REA was appealed to the Tribunal by the Alliance to Protect Prince Edward County (“APPEC”) and the Prince Edward County Field Naturalists (“PECFN”, or the “Appellant”) under s. 142.1 of the *EPA*. A hearing was held and on July 3, 2013 the Tribunal issued a decision in which it found that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment under s. 145.2.1(2)(b) of the *EPA* (the “environmental harm test”). The Tribunal found: “that mortality due to roads, brought by increased vehicle traffic, poachers and predators, directly in the habitat of Blanding’s turtle, a species that is globally endangered and threatened in Ontario, is serious and irreversible harm to Blanding’s turtle at Ostrander Point Crown Land Block that will not be effectively mitigated by the conditions in the REA.” The Tribunal granted PECFN’s appeal under s. 145.2.1(4) of the *EPA* and revoked the decision of the

Director to issue the REA. APPEC's appeal, which focused on the s. 145.2.1(2)(a) harm to human health test, was dismissed and it is no longer involved in this proceeding.

[8] The *APPEC* decision was appealed to the Divisional Court, reported as *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 974 (the "*Ostrander* decision"), and then to the Court of Appeal. On April 20, 2015, the Court of Appeal released its decision allowing, in part, the appeal by PECFN of the Divisional Court's *Ostrander* decision. The Court of Appeal's decision is reported as *Prince Edward County Field Naturalists v. Ostrander Point GP Inc.*, 2015 ONCA 269 (the "*PECFN* decision"). Therefore, the *APPEC*, *Ostrander* and *PECFN* decisions all relate to the same proceeding.

[9] The Prince Edward County South Shore Conservancy (the "SSC") and the Canadian Wind Energy Association ("CanWEA") were parties in the court proceedings and have participant status in this remedy proceeding before the Tribunal. Under the Tribunal's *Rules of Practice*, a participant cannot call witnesses but can make submissions. The SSC was actively involved in the remedy proceeding but CanWEA only filed a letter confirming that it supports the remedy proposals made by Ostrander and the Director.

[10] As indicated, the Court of Appeal upheld the Tribunal's conclusion on the environmental harm test under the *EPA* but found that the Tribunal had "erred by failing to allow the parties to address the scope of its remedial jurisdiction and what the appropriate remedy was" (at para. 98). The Court's disposition at para. 101 was as follows:

> I would allow the appeal in part. I would allow the appeal on the merits and restore the Tribunal's conclusion that the project will cause serious and irreversible harm to the Blanding's turtle. I would allow the cross-appeal and the fresh evidence application. I would dismiss the appeal from the Divisional Court's finding that the Tribunal erred in dealing with remedy. I would remit the matter back to the Tribunal to address remedy after giving the parties the opportunity to be heard.

[11] The Tribunal has addressed remedy by considering Ostrander's fresh evidence, the responding evidence of the Director and PECFN, and the written and oral submissions of the parties and the participants. For the reasons that follow, the Tribunal concludes that the appropriate remedy under s. 145.2.1(4) of the *EPA* is to revoke the Director's decision to issue the REA.

Issue

[12] Given the Tribunal's determination in the *APPEC* decision that the environmental harm test in *EPA* s. 145.2.1(2)(b) has been met, the remaining issue is the appropriate remedy. The Tribunal may exercise its discretionary remedial powers under s. 145.2.1(4) to:

(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.

Relevant Legislation

[13] *Environmental Protection Act ("EPA")*

> **Interpretation**
>
> 1. (1) In this Act,
>
> "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario;
>
> **Purpose of Act**
>
> 3. (1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Definition

47.1 In this Part,

"environment" has the same meaning as in the *Environmental Assessment Act*.

Purpose

47.2 (1) The purpose of this Part is to provide for the protection and conservation of the environment.

Application of s. 3 (1)

(2) Subsection 3 (1) does not apply to this Part.

…

Director's powers

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.

Terms and conditions

(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.

Other powers

(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.

…

PART XIII – Appeals to Tribunal

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.

Discussion, Analysis and Findings

[14] In overview, these reasons first set out the parties' proposed remedies, and then address the considerations in the exercise of the Tribunal's discretionary statutory remedial powers under s. 145.2.1(4) before applying the considerations to the evidence on remedy.

Parties' Proposed Remedies

[15] Ostrander's alternative proposed remedies, supported by the Director, are stated as follows:

1. that the Tribunal confirm the REA pursuant to s. 145.2.1(5) of the *EPA;*
2. in the alternative, that the Tribunal amend the REA or direct that it be amended pursuant to s. 145.2.1(4)(b) or (c) of the *EPA* by adding a condition

requiring that the measures required by the Impact Monitoring Plan ("IMP") and the *Endangered Species Act* Permit to address the risk of harm to Blanding's turtle, including road mortality and cumulative risk of harm, and harm to Blanding's turtle habitat be implemented; and

3. in the further alternative, amendment of the REA as per paragraph 2 above plus any other measures the Tribunal considers necessary to remedy the Tribunal's previous conclusion regarding serious and irreversible harm to Blanding's turtle due to road mortality, and its habitat, and any new finding (for which another remedy hearing is requested).

[16] Thus Ostrander's proposed remedy is that the Tribunal amend the REA by either changing an existing condition, or adding a condition, to require that Ostrander implement measures set out in a permit issued by the Ministry of Natural Resources and Forestry (the "MNRF") on February 23, 2012 under the *Endangered Species Act, 2007,* S.O. 2007, c. 6 (the "*ESA*"). The *ESA* permit allows Ostrander to "kill, harm or harass" members of a species at risk ("SAR"), and requires that an IMP be carried out. Its terms are discussed in greater detail below. Appendix B to the IMP dated November 2013 and introduced in this remedy proceeding is an Access Road Control Plan, which includes gating of the proposed access roads.

[17] As Ostrander itself notes, it is already required by law to implement the measures set out in the 2012 *ESA* permit if the Project proceeds, and was required to do so when the Tribunal concluded, in its 2013 *APPEC* decision, that engaging in the Project in accordance with the REA (and all of the conditions) will cause serious and irreversible harm to Blanding's turtle. Further, the development of an IMP was also a requirement of the *ESA* permit at that time. Thus, Ostrander and the Director are essentially proposing that the REA may be approved with the existing conditions. They submit that the terms of the IMP have been fleshed out after the *APPEC* decision and that Ostrander has obtained a commitment from MNRF to issue a lease for exclusive possession of the access roads, so that Ostrander can prohibit public vehicles on the access roads.

[18] The MNRF is not automatically a party to renewable energy approval appeals, and was not a party to this appeal, but has a central role as a consulting authority in all renewable energy approvals, as it reviews natural heritage assessments, including impacts on SAR, and other matters within its jurisdiction. The MNRF has had an even greater involvement in this particular proceeding because the entire Project Site would be situated on provincial Crown land and there are SAR involved. The MNRF is responsible for managing provincial Crown land and provincial SAR. As such, the MNRF has the legal authority to decide whether the public will have access to the Project Site, including the access roads. As indicated above, the MNRF is prepared to enter into a lease agreement with Ostrander for the Project Site access roads that are on Crown land. This lease arrangement occurred after the Tribunal's *APPEC* decision and is central to Ostrander's "fresh" evidence. Whether the Tribunal or the Director could impede or prohibit public use of the access roads was a matter of discussion in the Court of Appeal's *PECFN* decision. Given the MNRF's written commitment to the lease agreement, the question of whether the Tribunal would have jurisdiction to restrict public access to the access roads on Crown land as part of a remedy in this REA appeal is now moot.

[19] Ostrander's further alternative remedy, set out above, is a general catch-all referring to "any other measures that the Tribunal considers necessary" to address the Tribunal's previous conclusion regarding serious and irreversible harm to Blanding's turtle and its habitat. The Tribunal notes that all parties are represented by experienced counsel, they have had a full opportunity to address remedy, and the Tribunal considers that likely mitigation measures have been fully canvassed by the witnesses who have given evidence relevant to remedy. In all of the circumstances of this case, the Tribunal finds that it is not appropriate to supplement the parties' proposed remedies, nor is the Tribunal aware of any other measures that would be appropriate.

[20] PECFN and the SSC request that the Tribunal's decision regarding serious and irreversible harm to Blanding's turtle should not be altered, and the appropriate remedy is revocation of the Director's decision to issue the REA.

Considerations in the exercise of the Tribunal's discretionary remedial powers

[21] Under the renewable energy approval appeal regime, if the Tribunal determines that engaging in a renewable energy project in accordance with its approval will cause serious harm to human health, or serious and irreversible harm to plant life, animal life or the natural environment (the "harm test"), then s. 145.2.1(4) provides that the Tribunal may exercise discretionary remedial powers to: revoke the decision of the Director; order the Director to take action in accordance with the *EPA* and its regulations; or alter the decision of the Director and "substitute its opinion for that of the Director." The parties disagree on the matters that the Tribunal should consider in determining the appropriate remedy.

Parties' Submissions

[22] The Director submits that the proposed remedy of upholding the Director's decision to issue the REA, in accordance with the new IMP and its proposed measures, is "consistent with the purpose and provisions of the governing legislative scheme and is in the public interest." The Director relies upon the purposes of the *EPA*, which are to conserve and protect the natural environment and the environment, as is expressed in ss. 3 (1) and 47.2(1), respectively, and that the Director's decision must be in the public interest under s. 47.5.

[23] The Director underscores that, as "the Director's decision in issuing or refusing to issue a REA or in imposing terms and conditions must be in the public interest [t]he Tribunal should also be guided by the public interest when exercising its remedial discretion with respect to REAs." The Director further submits that in exercising its discretion in the public interest, the Tribunal should have regard to the broader considerations of the "environment" as defined in the *Environmental Assessment Act* (this term and its definition are specific to the purpose of Part V.0.1 of the *EPA* which governs renewable energy approvals by the Director). The Director further submits that these considerations include: the impact of the proposed remedy on Blanding's turtle

and its habitat, on Ostrander as the approval holder, and on the public interest in promoting renewable energy and combatting climate change; and the context of the renewable energy approval statutory scheme for appeals.

[24] Regarding the purpose of the renewable energy approval scheme, the Director cites statements made by the Divisional Court in *Hanna v. Ontario (Attorney General)* (2011), 105 O.R. (3d) ("*Hanna*") that "the main purpose of the *GEA* [the *Green Energy Act, 2009,* S.O. 2009, c. 12, Sch. A] is to streamline the process for developing green energy projects, including wind facilities", and *Association for the Protection of Amherst Island v. Ontario (Director of Environmental Approvals)*, 2014 ONSC 4574 ("*Amherst Island*") in which the court observed that people who support and oppose renewable energy projects "have procedural rights and expectations."

[25] The Director submits that the Tribunal's discretionary remedial powers are limited by the design of the *EPA*'s unique renewable energy approval appeal regime. Specifically, the Act includes: a broad right of standing to any resident of Ontario, though on narrow grounds; a very high standard in its harm test; a statutory onus of proving harm placed on the appellant; and confirmation of the Director's decision if the harm test is not met or the hearing is not disposed of within a six-month period. The Director submits that this appeal scheme clearly sets out the intention of the Legislature to promote renewable energy, absent evidence that serious and, in the case of environmental grounds, irreversible harm will result from a particular project. The Director argues that "if a remedy can rectify that harm such that there will no longer be serious and irreversible harm as a result of the project, the project should be allowed to proceed, even if there may still be some residual potential for harm."

[26] The Director submits that the MOECC's Statement of Environmental Values (the "SEV"), which incorporates ecosystem and precautionary approaches, should not be considered by the Tribunal in the exercise of its remedial discretion. The Director argues that the SEV is a policy document that applies to the Director when making decisions "in the ministry", but not to hearings by the Tribunal. The Director argues that

the broad parameters of a SEV, including the integration of the purposes of the *Environmental Bill of Rights, 1993,* S.O. 1993, c. 28 *(*the *"EBR")* with social, economic and scientific considerations, are irrelevant to, and outside the narrow scope of, the Tribunal's jurisdiction in a renewable energy approval appeal.

[27] The Director argues that applying the precautionary principle would change the burden of proof with respect to remedy and that would thwart the purpose of the s. 145.2.1 *EPA* test.

[28] In the alternative, the Director submits that, if the Tribunal finds that it should consider the application of the MOECC SEV in the context of a remedy hearing, then the SEV's broad statements of principle cannot be interpreted in a manner that conflicts with the express wording of the *EPA*, since s. 179 of the *EPA* provides that the *EPA* prevails where there is a conflict.

[29] Ostrander's argument focuses upon the environmental harm test and not the broader considerations discussed above. Ostrander argues that the scope of the Tribunal's remedial discretion is limited such that "the only type of harm that the Tribunal can consider in this remedy hearing is the 'precise type of harm' found by the Tribunal to be serious and irreversible after the main hearing", i.e., road mortality to Blanding's turtle due to the use of Project access roads, poaching and predation. Ostrander agrees with the Director's submission that a project should proceed if the environmental harm is just below the serious and irreversible threshold.

[30] Ostrander also submits that the MOECC SEV does not apply to the Tribunal's discretionary remedial authority, and that the precautionary principle conflicts with the Tribunal's jurisdiction and the renewable energy approval legislative framework of s. 145.2.1, i.e., the legislative onus on an appellant to prove serious and irreversible harm.

[31] PECFN agrees with the Director that the Tribunal's discretionary remedial powers include considering the general purpose of the *EPA* and the purpose of Part

V.0.1 of the *EPA*, which governs the Director's decision to approve renewable energy projects, as well as "the concerns of society generally." PECFN submits: "Under both the general and specific purposes set out in the … *EPA*, the public interest focuses on protecting the environment and SAR. Not having the Project proceed at this site best serves these purposes."

[32] PECFN also agrees with the Director that the Tribunal should consider the "public interest", but disagrees with the Director's interpretation of the ambit of this term. PECFN submits that in interpreting the public interest, the Tribunal "either should not take renewable energy considerations specifically into account because these are not mentioned in s. 3(1) or s. 47.5 of the *EPA*, or, alternatively, at a minimum these should be one of many other factors to be weighed, and certainly not an overriding factor." PECFN argues that renewable energy considerations should not be given "dominant weight" when the Tribunal is using its remedial power.

[33] PECFN submits that both *Hanna* and *Amherst Island* deal with procedural and not substantive matters, and that they are of no assistance when interpreting "public interest" in the context of renewable energy approval proceedings. Further, PECFN submits that it cannot have been intended by the Legislature that causing serious and irreversible harm to the habitat and population of a threatened species is in the public interest as the term is used in the *EPA*.

[34] The SSC submits that the Tribunal must determine "whether Ostrander and the Director have shown, on the balance of probabilities, that a remedy short of revocation (including mitigation measures) will sufficiently protect the population" of Blanding's turtle impacted by the Project. The SSC submits that ordering a remedy is a discretionary power, which is essentially a matter of balancing competing interests.

[35] The SSC submits that the language used in s. 145.2.1(4) bears "classic hallmarks of discretion". In particular the SSC points out that provisions (b) and (c), respectively, provide that the Tribunal may "direct the Director to take such action as the

Tribunal considers the Director should take" and "substitute its opinion for that of the Director".

[36] The SSC also submits that the Director improperly relies on *Amherst Island*, because that case does not stand for any general proposition as to where the public interest lies, or how the Tribunal should exercise its remedial discretion. Rather, the SSC points to the Court of Appeal's observation in the *PECFN* decision, at para 43, that: "The Tribunal has the task of balancing the different and potentially opposing values".

[37] The SSC submits that, in this complex balancing of interests, it is appropriate for the Tribunal to have regard to statements of government policy such as the SEV. Therefore, the SSC submits, if the Director was required to consider the SEV in the initial decision to issue the REA, and the Tribunal is specifically given the power to substitute its opinion for that of the Director, then it follows that the Tribunal may consider matters that the Director may consider. It submits that the fact that the *EBR* refers to decision-making "in the ministry", does not preclude the Tribunal from considering the values set out in the SEV when the Tribunal is statutorily mandated to stand in the shoes of the Director.

[38] The SSC argues that the precautionary principle is consistent with the onus being on the Director and Ostrander to show that their proposed mitigation measures will reduce harm to Blanding's turtle sufficiently that the Project should be allowed to proceed; that is to say, if there is doubt, then it should be resolved in favour of protecting a threatened species.

[39] The SSC argues that in balancing public interest considerations, the Tribunal may legitimately consider the consequences of uncertainty of the results of the proposed mitigation measures. It submits that, if it is not clear on the evidence that the proposed mitigation measures will sufficiently protect the local population of Blanding's

turtle, then the Tribunal may consider that the risks to the population outweigh countervailing considerations, such as the claimed “importance of renewable energy”.

Analysis and Findings

[40] A finding that the harm test under s. 145.2.1(2) is satisfied triggers the Tribunal’s s. 145.2.1(4) discretionary remedial powers. The Court of Appeal recognized that the scope of the Tribunal’s remedial powers, or jurisdiction, is yet to be determined, stating at para. 100 (emphasis added):

> As well, that the Tribunal will allow the project to proceed upon the roads closure should not be regarded as a foregone conclusion. I note that the Tribunal had evidence of how the proposed access roads would cause harm to the Turtles’ habitat quite apart from collisions with motor vehicles. *Finally, the Tribunal has yet to determine the scope of its remedial jurisdiction in the context of this case*.

[41] In interpreting the provisions of the *EPA* that give the Tribunal its remedial powers, the Tribunal is guided by the decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., (Re)*, [1998] 1 S.C.R. 27 (“*Rizzo*”), at para. 21, that there is only one approach to statutory interpretation, “namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”

[42] Additional relevant interpretative principles are discussed in the Tribunal’s first decision on a renewable energy approval appeal, reported as *Erickson v. Ontario (Director, Ministry of Environment)* (2011), 61 C.E.L.R. (3d) 1 (Ont. Env. Rev. Trib.) (“*Erickson*”), including s. 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, which provides that an Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

[43] In the recent decision *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819 (“*Midwest*”), the Ontario Court of Appeal cited Supreme Court of Canada jurisprudence

to confirm that Ontario's *EPA* should be interpreted expansively, not narrowly, given its preventative and remedial purposes. The relevant passages are as follows:

> [50] In addition to violating the general rules of statutory interpretation, the trial judge's interpretation of s. 99(2) is also inconsistent with the specific principles applicable to interpretation of the *EPA*. The trial judge stated explicitly, at para. 20 of her reasons, that s. 99(2) should not be interpreted expansively. This is inconsistent with the interpretive approach to the *EPA* mandated by the Supreme Court of Canada.
>
> [51] In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 54, the Supreme Court held that the preventative and remedial purposes of the *EPA* must "be borne in mind in interpreting the scheme and procedures established by the Act." Similarly, in *R. v. Castonguay Blasting Ltd.*, 2013 SCC 52, [2013] 3 S.C.R. 323, at para. 9, the Supreme Court held as follows:
>
> > The *EPA* is Ontario's principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation (*Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 64; *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.), at para. 84). ... [E]nvironmental legislation embraces an expansive approach to ensure that it can adequately respond "to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation". Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep. [Emphasis added, citations removed.]

[44] It is clear from the wording of s. 145.2.1(4) that the Tribunal's statutory remedial power is discretionary. It provides that the Tribunal: "may" choose one of the listed remedies; by order direct the Director to take such action "as the Tribunal considers" the Director should take …; or … "may" substitute its opinion for that of the Director.

[45] In the *PECFN* decision, at para 43, the Court of Appeal spoke to the balancing of different, and possibly opposing, values in deciding whether a renewable energy project should proceed if it will cause serious and irreversible environmental harm:

> The legislature confided to the Tribunal the question whether the project should be disallowed because it will cause "serious and irreversible harm to plant life, animal life or the natural environment". The Tribunal has the task of balancing the different and potentially opposing values involved in answering that difficult question.

[46] To determine the weight to be given in the balancing of factors that the Tribunal should consider when exercising its remedial powers, it is significant that the Director, PECFN and the SSC agree that Tribunal should consider the purposes of the *EPA*. In looking at the scheme and object of the *EPA*, as per *Rizzo*, its general purpose, as set out in s. 3(1), is: "to provide for the protection and conservation of the natural environment" (emphasis added). The "natural environment" is defined as "the air, land, and water … of the Province of Ontario". This is one of the terms used in s. 145.2.1(2), together with harm to plant life and animal life. The purpose of renewable energy approvals under Part V.0.1 of the *EPA* is stated in much broader terms in s. 47.2(1): "to provide for the protection and conservation of the environment" (emphasis added). This Part incorporates the *Environmental Assessment Act* definition of "environment", which is:

> (a) air, land or water,
> (b) plant and animal life, including human life,
> (c) the social, economic and cultural conditions that influence the life of humans or a community,
> (d) any building, structure, machine or other device or thing made by humans,
> (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
> (f) any part or combination of the foregoing and the interrelationships between any two or more of them.

[47] Neither the purpose provisions of the *EPA*, nor the definitions of "natural environment" and "environment", specifically refer to renewable energy projects, nor do they indicate that the promotion of renewable energy should be given primacy over other environmental concerns. The preamble to the *Green Energy Act* refers to promoting opportunities for renewable energy projects and the green economy. While the renewable energy approval process has been described as "streamlining", this streamlining of approvals is to take place only in the absence of serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment.

[48] The overall legislative scheme for renewable energy includes promoting and streamlining the approval of renewable energy projects in the province as a whole.

However, this scheme for renewable energy projects includes embedding protections for the environment and human health within the *EPA*. The *EPA* appeal provisions focus on a renewable energy project's impact at a smaller scale (as discussed in the Tribunal's 2013 *APPEC* decision) that is more local in nature. Once the stringent environmental harm test of s. 145.2.1(2) the *EPA* has been satisfied at the project level, as in this case, the policy goals of promoting and streamlining renewable energy projects lose their primacy and become one of many factors to consider within the broader legislative framework and the public interest in energy generation that mitigates harm to the environment.

[49] Even in the context of the s. 145.2.1(2) environmental harm test itself, as opposed to remedy, the Tribunal has found in a number of decisions that the policy of promoting renewable energy does not automatically trump protecting against other environmental harm. For example, see *Erickson* at paras. 572-573, and *Lewis v. Director, (Ministry of the Environment)* [2013] O.E.R.T.D. No. 70, which states at para. 96:

> What the Tribunal must look at in this expedited appeal process, with respect to environmental concerns, is whether serious and irreversible harm will occur. It will not employ an approach to the test that automatically sacrifices all local habitats and species populations simply because a project involves renewable energy. As noted in *Erickson* at paras. 572-573, renewable energy is not automatically considered to be without potential for serious and irreversible harm. For the Tribunal to effectively carry out its statutory mandate, it needs to carefully assess the evidence of each project and the receiving environment in order to determine whether the test is met. As foreseen in the statutory language, in some places renewable energy projects, just like other industrial development, may lead to serious and irreversible environmental harm. Only when that has been shown may the Tribunal alter the renewable energy approval decision.

[50] The Legislature set a high standard in the harm test in s. 145.2.1(2) and placed the onus upon an appellant to prove such harm. However, where that test has been met, the Tribunal's remedial powers under s. 145.2.1(4) are very similar to, or the same as, other such provisions in the *EPA*. For example, s. 145.2(1) of the *EPA*, which applies to appeals other than renewable energy approval appeals, provides:

> 145.2 (1) Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may 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, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

[51] Such wording has generally been interpreted as putting the Tribunal "in the shoes of the Director". The wording of s. 145.2.1(4) should be interpreted harmoniously and consistently with other similar remedial provisions in the *EPA*.

[52] The source of the Director's decision-making power on renewable energy applications is s. 47.5 of the *EPA*. Key to the exercise of the Director's powers is consideration of the "public interest". The Director, PECFN and the SSC submit that it follows that under s. 145.2.1(4) the Tribunal may step into the shoes of the Director and may consider matters that the Director may consider in respect of the public interest. The Tribunal agrees with this analysis.

[53] The Director's submissions diverge from those of PECFN and the SSC, in that the Director argues that the predominant factor in determining the public interest is the intention of the Legislature to promote renewable energy. PECFN and the SSC argue that this is only one factor for the Tribunal to consider, and it does not predominate in the circumstances of this case.

[54] The Tribunal finds that in considering the public interest in the context of its s. 145.2.1(4) remedial powers, the Tribunal may consider the *EPA*'s general and specific purposes. The Tribunal may also consider the legislative objective of promoting renewable energy approvals, even where the environmental harm test has been met, but this factor cannot be presumed to take priority over other all other factors.

[55] The Director and Ostrander argue that the Tribunal should not have regard to the precautionary principle when deciding upon the appropriate remedy under s. 145.2.1(4). The precautionary principle is a principle of international law that has been applied in

domestic law by the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 ("*Spraytech*"), at para. 31:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[56] The precautionary principle is also incorporated into the MOECC's SEV, which provides:

> Statements of Environmental Values (SEV) are a means for designated government ministries to record their commitment to the environment and be accountable for ensuring consideration of the environment in their decisions. …
>
> 3. Application of the SEV
>
> The Ministry of the Environment and Climate Change is committed to applying the purposes of the EBR when decisions that might significantly affect the environment are made in the Ministry. As it develops Acts, regulations and policies, the Ministry will apply the following principles:
>
> - 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 uses a precautionary, science-based approach in its decision-making to protect human health and the environment. …

[57] In *Dawber v. Ontario (Director, Ministry of the Environment)* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.) (leave to appeal to the Ont. C.A. refused) the Court found that it is reasonable to regard the SEV as a policy developed to guide government decisions, including those of the Director, reviewable by the Tribunal:

> [6] Part II [of the EBR] also provides a process for a ministry to develop a Statement of Environmental Values ("SEV") (ss. 7-10). The SEV is to explain how the purposes of the EBR are to be applied when decisions that might significantly affect the environment are made in the ministry, and explain how considerations of the purposes of the EBR should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry.

> Section 11 requires the minister to take every reasonable step to ensure that the ministry SEV is considered whenever decisions that might significantly affect the environment are made in the ministry.
>
> [7] In the SEV of the Ministry of the Environment, there are three guiding principles: the ecosystem approach, environmental protection (which includes the precautionary approach) and resource conservation.
>
> …
> [56] Upon a consideration of ss. 7 and 11 of the EBR, it is arguable and, therefore, reasonable for the Tribunal to have regarded the SEV as relevant policy which should guide the decisions of the Directors.
> …
> [57] We conclude that the Tribunal was reasonable in finding that leave should be granted because of the failure to apply the SEV. The Tribunal concluded that the SEV falls within "government policies developed to guide decisions of that kind", which was consistent with past jurisprudence of the Tribunal on SEVs".

[58] In *Erickson* the Tribunal canvassed the application of the precautionary principle in the context of the *EPA* renewable energy approval scheme, using the term interchangeably with the precautionary "approach". The Tribunal concluded, at paras. 521 and 523:

> The Tribunal finds that the precautionary principle can play an important role in applying section 145.2.1. More specifically, the Tribunal finds that the precautionary principle is most likely to play a significant role in guiding action under section 145.2.1(4) if a determination of harm has taken place in accordance with section 145.2.1(2). However, the precautionary principle does not act to fundamentally change the nature of the test in section 145.2.1(2).
> …
> The precautionary principle also plays an important role when MOE Directors are considering application for approval and the conditions attached to an approval under section 47.5.

[59] Although the wording of the MOECC SEV has been changed since the *Erickson* decision, the Tribunal finds that does not affect the analysis of whether the precautionary principle should be taken into account by the Tribunal in exercising its remedial powers under s. 145.2.1(4).

[60] Section 11 of the *EBR* provides "The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry."

Directors are defined in the *EPA* as persons "who work in the Ministry" and it follows that their decisions are made in the Ministry. Changes to the MOECC SEV do not change the underlying provisions of ss. 7 and 11 in the *EBR*.

[61] The Tribunal finds that the precautionary principle, a principle of international law incorporated into domestic law in *Spraytech* and a key principle of the MOECC's SEV, applies to decisions of the Director and to the Tribunal's choice of the appropriate remedy. On the same basis, the Tribunal further finds that the principle of an ecosystem approach to environmental protection is also a relevant consideration to the Tribunal's s. 145.2.1(4) remedial powers.

[62] Of note, the MNRF SEV echoes the precautionary and ecosystem principles. It provides:

> The Ministry of Natural Resources and Forestry is committed to applying the purposes of the EBR when decisions that might significantly affect the environment need to be made in the ministry as it develops Acts regulations, and policies, by the application of the following principles: …
>
> - As our understanding of the way the natural world works and how our actions affect it is often incomplete, MNRF staff should exercise caution and special concern for natural values in the face of such uncertainty. …
> - An ecosystem approach to managing our natural resources enables a holistic perspective of social, economic and ecological aspects and provides the context for integrated resource management.

[63] The Director's alternate submission is that the broad statements of principle in the MOECC's SEV cannot be interpreted in a manner that conflicts with the express wording of the *EPA*. Section 179 of the *EPA* states that where there is a conflict between the provisions of two Acts regarding the natural environment or a matter specifically dealt with in the *EPA*, the *EPA* shall prevail. However, here there is no identified conflict between the provisions of two Acts. The Tribunal finds that the precautionary and ecosystem principles are both relevant considerations when exercising its remedial powers to determine an appropriate remedy in the context of a

renewable energy project and preventing serious and irreversible harm to plant life, animal life and the natural environment.

[64] The above analysis of the Tribunal's discretionary remedial powers and the interpretation of s. 145.2.1(4) also apply to Ostrander's argument that the s. 145.2.1(4) remedy provision should be narrowly interpreted, i.e., that the scope of the Tribunal's remedial discretion is circumscribed by the "precise type of harm" (emphasis added) found by the Tribunal to be serious and irreversible after the main hearing.

[65] In keeping with the *Rizzo* approach to statutory interpretation, and the Court of Appeal's direction in *Mayfair*, the Tribunal finds that Ostrander's interpretation of the remedy provision is overly narrow and contrary to its clear meaning. The Tribunal also finds that it is incompatible with: s. 3(1) and 47.2(1) (the purposes of the *EPA*); s. 47.5; public interest considerations; and the ecosystem and precautionary approaches as set out in the MOECC SEV. It also appears to be contrary to the direction of the Court of Appeal in the *PECFN* decision, which noted in para. 100 that the Tribunal "had evidence of how the proposed access roads would cause harm to the turtle's habitat quite apart from collisions with motor vehicles." The implication of this finding on the evidence considered in this remedy proceeding is discussed below in the "Evidence" section.

The Onus of Proof under s. 145.2.1(4)

[66] The parties agree that once there has been a finding of environmental harm under s. 145.2.1(2)(b), as is the case here, then the s. 145.2.1(3) onus provision does not apply and the general rule applies that the party who asserts a proposition must prove it. (See *Snell v. Farrell*, [1990] 2 S.C.R. 311, per Sopinka, J., at para. 17.) However, having agreed to this general proposition, the parties went on to make contrary arguments about the onus to prove particular remedies.

[67] The Tribunal's remedial powers are discretionary under s. 145.2.1(4). Unlike the statutory onus placed on an appellant to prove the harm test, determining the "onus" in

regards to the Tribunal's remedial powers does not add anything to the general proposition that a party must prove what it asserts. At the end of the day the Tribunal determines the appropriate remedy by exercising its discretion on the basis of the parties' submissions on the evidence, as proved on a balance of probabilities.

Summary of Tribunal's Discretionary Remedial Powers

[68] To summarize the Tribunal's analysis and findings on the scope of its discretionary remedial powers under s. 145.2.1(4) of the *EPA*:

1. there must be a finding that the harm test under s. 145.2.1(2)(a) or (b) has been satisfied, before the Tribunal can exercise its remedial powers under s. 145.2.1(4);
2. the Tribunal's statutory remedial powers under s. 145.2.1(4) are discretionary;
3. in the exercise of its discretionary remedial powers under s. 145.2.1(4), 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 [the EPA] 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; and
4. in exercising its discretionary remedial powers and determining the appropriate remedy under s. 145.2.1(4), the Tribunal may consider: the general purpose and renewable energy approval purpose in sections 3(1) and 47.2(1) of the *EPA*, respectively; the public interest under s. 47.5 and the principles of the MOECC SEV, including the ecosystem approach and the precautionary principle, as they apply to decisions of the Director.

[69] The Tribunal will now turn to the evidence on remedy and apply the above statutory provisions, principles and policies to determine the appropriate remedy.

Evidence on Remedy and Findings on Evidence

[70] The starting point is the Tribunal's finding in the *APPEC* decision that engaging in the Project in accordance with the REA will cause serious and irreversible harm to Blanding's turtle under s. 145.2.1(2), as follows:

> [359] The Tribunal finds that engaging in the Project in accordance with the REA will cause serious and irreversible harm to Blanding's turtle. The Tribunal makes this finding having regard to the biological population that will be impacted by the Project; that is, the population that uses the habitat on the Project Site and the surrounding area.
>
> [362] The Tribunal finds that, in its analysis of Blanding's turtle for the Ostrander Point Project, the following elements are important in determining whether engaging in the Project in accordance with the REA, will cause serious and irreversible harm:
>
> - Conservation status of the species
> - Species habitat on the site and in the area
> - Vulnerability of the population
> - Type and extent of harm caused by the Project
> - Vulnerability of the species to this type and extent of harm due to its life history traits
> - Mitigation measures in the REA
> - Demonstrated effectiveness of the mitigation measures.
>
> [363] The Tribunal finds that mortality due to roads, brought by increased vehicle traffic, poachers and predators, directly in the habitat of Blanding's turtle, a species that is globally endangered and threatened in Ontario, is serious and irreversible harm to Blanding's turtle at Ostrander Point Crown Land Block that will not be effectively mitigated by the conditions in the REA.

[71] At the outset of this remedy hearing, the parties agreed that the Tribunal should receive Ostrander's fresh evidence, as referenced in the Court of Appeal decision. This fresh evidence was created after the Tribunal's 2013 *APPEC* decision, and consists of the following:

- Ostrander letter dated August 1, 2013 to the MNRF, requesting a lease agreement for the access roads on Crown land;
- MNRF letter dated September 16, 2013, accepting Ostrander's proposal to lease the roads;
- Ostrander Point Wind Energy Park IMP dated November 15, 2013; and
- MNRF letter dated November 15, 2013, accepting the IMP as complying with the requirements of the February 23, 2012 *ESA* permit.

[72] Ostrander initially opposed the proposition that other parties might bring responding evidence, but the Tribunal ordered that they were entitled to do so. In response to Ostrander's fresh evidence, PECFN filed witness statements from Kari Gunson (an expert road ecologist) and Dr. Frederic Beaudry (an expert in Blanding's turtle), both of whom had been witnesses at the Tribunal's hearing in 2013. The Director called MNRF employees Joe Crowley (an expert in Blanding's turtle) and Karen Bellamy, neither of whom had previously given evidence in the earlier Tribunal proceeding. Ostrander adduced further evidence in reply from Shawn Taylor (an expert in restoration projects for aquatic and terrestrial habitat).

[73] The evidence before the Tribunal in the remedy hearing can be classified into four categories:

1. evidence already before the Tribunal and referenced in the 2013 *APPEC* decision;
2. Ostrander's "fresh" evidence, created post-2013 and listed above;
3. responding evidence of PECFN and the Director to Ostrander's fresh evidence, and reply evidence of Ostrander addressing harm to Blanding's turtles caused by road mortality, predation and poaching;

4. responding and reply evidence addressing “other types of harm to Blanding’s turtle”. Evidence in this category includes studies that:
    - existed at the time of the 2013 *APPEC* decision but were not adduced earlier (e.g., studies indicating larger development setback requirements for habitat protection, and “road effects” on hydrology and vegetation); and
    - did not exist at the time of the 2013 *APPEC* decision (e.g., new studies regarding overwintering in shallow pools, fragmentation to habitat caused by turtles refusing to cross roads).

[74] Ostrander submits that if evidence from category 4 is relied upon at this stage, then the Tribunal would have to make a further determination of “serious and irreversible harm” and a new remedy hearing should take place.

[75] In determining the relevance of evidence on remedy in this proceeding, the starting point is the following statement of the Court of Appeal (*PECFN* decision at para 96):

> given the broad and varied range of attacks launched against the REA, it was not realistic to expect the parties to address the appropriate remedy at the end of the hearing of the merits without knowing what the Tribunal’s findings were in regard to the broad range of alleged harms.

[76] In this case the Tribunal found that, in regard to the broad range of alleged harms, it was serious and irreversible harm to Blanding’s turtle and its habitat that met the s. 145.2.1(2) test.

[77] An additional complicating factor in this case is that Ostrander and the MNRF created fresh evidence after the Tribunal’s finding of harm in the 2013 *APPEC* decision that Ostrander introduced in the remedy hearing. The fresh evidence effectively modifies the REA conditions that were in evidence in the 2013 hearing.

[78] While the Tribunal has not found it necessary to rely on evidence in category 4 in making its remedy finding, it sees no reason why that evidence could not be relied

upon. The Tribunal finds that evidence that relates to whether the Project will cause harm to the Blanding's turtle, directly or indirectly, will help it decide upon the appropriate remedy and is, therefore, relevant to the remedy phase of the proceeding. (In the *EPA*, harm to "animal life" includes harm to the habitat of a species. See the *APPEC* decision at paras. 208 and 209, and *Lewis* at para. 17.) The Court of Appeal signalled this wider scope of evidence on remedy in stating at para. 100 of the *PECFN* decision that "the Tribunal had evidence of how the proposed access roads would cause harm to the turtle's habitat quite apart from collisions with motor vehicles."

[79] To respect procedural fairness in the matter of remedy, the Tribunal ensured that all parties were given an opportunity to respond to the others' evidence regarding harm to Blanding's turtle and its habitat. In fact, Ostrander took the opportunity to bring further evidence on remedy, in addition to its "fresh" evidence referred to above, by calling a new expert witness who had not testified in the 2013 hearing, Shawn Taylor, in reply to the responding evidence of PECFN and the Director.

[80] The Tribunal has again considered all of the factors identified by the Tribunal at para. 362 of its 2013 *APPEC* decision (set out above) in light of the additional evidence and submissions in this remedy hearing, and through the lens of the considerations that apply to its discretionary remedial powers under s. 145.2.1(4).

[81] The Tribunal will now consider the additional conditions in the IMP dated November 15, 2013, including the Access Road Control Plan that is Appendix B to the IMP. As noted above, the Access Road Control Plan was made possible by a road lease agreement between Ostrander and the MNRF confirmed by letter dated September 16, 2013.

The IMP

[82] The IMP dated November 15, 2013 was created to satisfy two conditions of the February 2012 *ESA* permit: the creation of a Site Monitoring Plan (condition 11.3) and

an IMP (condition 11.4). The MNRF confirmed its acceptance of the IMP by a letter of the same date, November 15, 2013.

[83] While the Tribunal did not have the completed IMP to consider at the time of the 2013 hearing in this appeal, it nonetheless had a list of "minimum requirements" for the plan as laid out in the *ESA* permit, which it did consider. The Tribunal noted in its 2013, *APPEC* decision:

> *Impact monitoring plan*
>
> [334] …The *ESA* Permit lists the following minimum elements to be included in an IMP:
>
> - Ensuring impact monitoring takes place every year;
> - Ensure the Site restoration and mitigation measures are installed, maintained and function as intended;
> - Identification of Blanding's turtle high frequency intersects with the proposed road using an MNR approved methodology. Once these intersects are identified and provided to MNR, using adaptive management, site specific mitigation measures may be implemented, to the approval of MNR (e.g., relocation of signage to raise awareness and wildlife travel corridor/underground passage/modified culvert constructed); and
> - Monitoring mortality of Blanding's turtle in accordance with an MNR approved protocol as a result of the Construction Activities and Maintenance Activities.

[84] The November 15, 2013 IMP includes an introduction and discussion of the Monitoring Plan and adaptive management approach, and the following appendices:

A. Figure (Operations Site Plan, dated November 2013)
B. Access Road Control Plan, dated September 2013
C. *Endangered Species Act* Permit, issued February 23, 2012
D. Restoration and Mitigation Measures, dated November 15, 2013
E. Monitoring Plan, dated November 15, 2013
F. Adaptive Management, dated November 15, 2013

Monitoring and Adaptive Management

[85] Ms. Bellamy introduced a chart to explain where the various monitoring requirements are contained in the REA documents. The IMP includes additional monitoring requirements, over and above those listed in the *ESA* permit and other REA documents. The Monitoring Plan attached to the IMP states that "This Plan provides the detailed data collection methods that will be used to collect site specific information on the realized (rather than projected/potential) impacts of the Project to the identified Species at Risk." Thus, "monitoring" by itself does not prevent harm, but records "realized impacts." Through adaptive management, monitoring may allow a project operator to identify harm and take measures to address that harm; however, the monitoring and adaptive management will only prevent future harm if mitigation measures are adopted, and are effective. The effectiveness of the measures is, therefore, a key consideration, and will be analyzed together with the proposed measures, below.

[86] In their evidence in this remedy matter, Mr. Taylor and Ms. Bellamy stressed the benefits of adaptive management, although this approach was already stated to be a theme of the *ESA* permit minimum requirements and it was considered by the Tribunal in its 2013 decision. Adaptive management was identified by both of the Blanding's turtle experts as a useful and positive approach. Dr. Beaudry, however, testified that adaptive management is "costly learning", which the local population of Blanding's turtle will not withstand.

[87] Mr. Crowley is employed as a herpetology SAR specialist at MNRF. Although he provided advice to MNRF in 2011 in the *ESA* permit issuing stage of this REA, he was not called as a witness in the 2013 appeal hearing. Mr. Crowley's view at the time, as documented in his memo to MNRF of February 14, 2011 (i.e., prior the MNRF issuance of the *ESA* permit), was that road mortality at the Project site could result in the loss (i.e., extirpation) of the local Blanding's turtle population. This memorandum was not disclosed during the 2013 appeal, or on the appeals heard by the Divisional Court and

the Court of Appeal in this matter, and only surfaced during Mr. Crowley's cross-examination at the remedy hearing in 2015. It states:

> Extensive research into the life history and biology of Blanding's turtles, and other Ontario freshwater turtles, has demonstrated that an increase in annual adult mortality of as little as 1-2% can cause populations to decline, and that an increase in annual adult mortality of 5% will always cause turtle populations to decline. For example, in a population of 200 Blanding's Turtles, annual road mortality of 2 adults can cause a population decline. As such, road mortality is one of the most significant threats facing Ontario's Turtles, and road mortality is far more severe to turtles than any other taxa; the annual loss of 2 or 3 breeding birds or mammals from a population would be relatively negligible, whereas these same rates of loss would be detrimental to turtle populations.
> …
> The creation of new roads and the improvement of existing roads will result in additional traffic and increased road mortality. Given the high quality of Blanding's Turtle habitat at the site and the fact that even small, low traffic, low-speed roads still result in road mortality of reptiles, it is reasonable to conclude that the increased access and traffic could cause the mortality of at least 1-2 adult turtles each year. Speed bumps, low speed limits and turtle crossing signs may contribute to a very small reduction in the potential road mortality rates at the site, but they are unlikely to mitigate road mortality enough to prevent population declines, and road mortality rates of at least 1-2 turtles per year are still possible. As such, it is reasonable to conclude that road mortality at the site could result in the eventual loss of the population.

[88] Mr. Crowley's opinion in this 2011 memo is consistent with that of Dr. Beaudry, and the Tribunal's finding in the 2013 *APPEC* decision. In addition, he confirmed at the remedy hearing that MNRF may conclude there is an "overall benefit" to a species, for purposes of issuing an *ESA* Permit, despite loss of a local population.

[89] At the remedy hearing, Mr. Crowley considered the additional mitigation measures and testified that, as long as the newly proposed mitigation measures are actively maintained, he "would expect there to be a very low likelihood that Blanding's Turtles would be killed on the new project roads in any given year".

[90] Given his opinion that the site is "high quality" Blanding's turtle habitat, and that "even small, low traffic, low-speed roads still result in road mortality of reptiles", Mr. Crowley's current opinion clearly depends on the effectiveness of the mitigation

measures adopted as a result of adaptive management. The Tribunal now turns to a consideration of the mitigation measures and their effectiveness.

Mitigation Measures

[91] There are two types of mitigation measures proposed to reduce road mortality: measures to keep the turtles off the roads, and measures to keep traffic off the roads where turtles are present.

[92] Generally, measures to keep turtles off roads include the use of culverts, fencing, and the creation of artificial nesting sites in safe locations. Page 10 of the 2015 *"Best Management Practices for Roads"* document co-authored by Ms. Gunson and Mr. Crowley outlines the methods that are recognized as effective for keeping wildlife off roads:

> To date, crossing structures (see section 5.1) combined with fencing (see section 5.2) offer the most effective mitigation of road impacts for amphibians and reptiles by facilitating landscape connectivity and reducing road mortality by excluding animals from the road (Dodd et al. 2004, Aresco 2005).

[93] Many of the mitigation measures elaborated in the November 2013 IMP continue to depend upon identification of high-frequency intersects, including educational signage, speed bumps and exclusionary fencing. The Tribunal found at para 337 of its *APPEC* decision in this appeal that mitigation measures which depend on the identification of high frequency intersects will not be effective and will not prevent serious and irreversible harm to Blanding's turtle at this location:

> [337] The ESA Permit refers to site specific mitigation measures such as signage, underground passage or modified culverts to prevent road mortality. However, their efficacy relies on identifying high frequency intersects. As noted above, the Tribunal accepts the evidence of Dr. Beaudry and Ms. Gunson with respect to the inefficacy of culverts or passages at the Project Site. Dr. Shilling endorsed Dr. Beaudry's opinion in this regard. All experts agreed that the entire Site is a patchwork of suitable Blanding's turtle habitat, with temporary wetlands scattered throughout. All experts agreed that Blanding's turtles will criss-cross the Site during the active period. The evidence reveals that there

> are permanent wetlands in the south-east corner of the Site, as well as adjacent to the Site to the north, with connected wetlands angling down to the Lake adjacent to the Subject Property on the west side (see Appendix B). **The Tribunal accepts that it would not be possible to identify high frequency intersects at the granularity of the site scale**. (emphasis added)

[94] The Tribunal finds that the evidence, including the new evidence in the context of determining the appropriate remedy, does not support a finding that Ostrander's proposed mitigation measures that rely on identification of high-frequency intersects will be effective at this location.

[95] Section F.5.2 of the IMP's "Adaptive Management" appendix, entitled "Blanding's turtle Nesting on access roads", describes the methods proposed to be taken at the Project to prevent the turtles from nesting on the roads:

> One of the performance objectives of the created nesting habitat is to reduce nesting of Blanding's turtles on the access roads. In the event Blanding's turtle nesting is found to occur on access roads, the following responses and contingency measures may be implemented:
>
> - Clearly mark the nest location, inform all on-site staff of nesting occurrence and require onsite traffic to avoid the nest; and /or
> - Implement additional controls on access roads to reduce the risk of injury to nesting of Blanding's turtles (i.e. controls on traffic in the evenings from May 15 through June 30).
>
> If turtle nests cannot be protected on access roads, or damage to nests is observed, response and contingency measures that may be implemented include the following:
>
> - Measures to reduce the attractiveness of access roads as nesting sites; such as
>
> - Promotion of vegetation on roads and road shoulders; and/or
> - Road surface treatments (e.g. tamping or addition of bounding compound to harden surface).
>
> - Additional measures to encourage turtles to nest away from access roads (e.g. exclusionary fencing and additional or improved created nesting habitat).

[96] At para. 25 of his witness statement, Mr. Taylor states that it may be important to inhibit turtles from nesting on the shoulders of the access roads, which can "best be accomplished" through fencing the roads. However, neither of the Blanding's turtle

experts, Dr. Beaudry or Mr. Crowley, recommends exclusionary fencing as a means of keeping the turtles off the roads in this location, nor did the road expert Ms. Gunson. They observed that the access roads form a circle located entirely within high quality Blanding's turtle habitat that Blanding's turtles may criss-cross in every direction for their various life cycle requirements. There are temporary wetlands scattered throughout the Project Site, permanent wetlands in the south-east corner of the Project Site and to the north, and connected wetlands along the west side, with Lake Ontario to the south (see para. 337 of the *APPEC* decision). Fencing was not recommended by the experts in the 2013 hearing because it would fragment this high quality habitat, creating more harm than good. For these reasons, the Tribunal concludes it is not an acceptable mitigation measure in this location.

[97] The experts disagreed on the likely "success" of creating artificial nesting habitat in discouraging Blanding's turtles from nesting on roadsides. Much of the disagreement originates from their different definitions of success.

[98] Mr. Taylor cited scientific literature, including papers published by Dr. Beaudry, that establishes that Blanding's turtles use artificially created nesting mounds. He suggested that creating such mounds on the compensation lands (as described in the 2013 *APPEC* decision) "may therefore be a suitable form of mitigation to avoid turtles nesting along the proposed access roadsides." Mr. Taylor testified that the "grey literature", i.e., project reports that have not made their way into scientific peer-reviewed journals, indicates that artificial nesting sites have been shown to be successful, in that they have been used by Blanding's turtle. In cross-examination, he testified that for one project in which he has personally been involved, one Blanding's turtle was observed on one of the artificial nest sites.

[99] On the question of the definition of "success", Mr. Taylor noted in his witness statement that in the USA, "wetland construction success is deemed to be acceptable by the US Corp of Engineers, and, therefore, deemed successful by the proponents, if the plants simply remain alive after three months." Nonetheless he recognized that "the

key to the preservation of this species … is to plan for their longevity," and that Blanding's turtles "are thought to live to an age of about 65-75 years, perhaps longer". For this reason he opined that the 20-year conservation recommendation for the compensation property in the *ESA* permit may be inappropriate.

[100] Mr. Crowley testified that artificial nesting habitat is a technique used to replace high-risk sites. He stated: "this can be accomplished by preventing access to the high risk sites and providing new habitat to replace the lost sites, or by adding additional habitat to the site in strategic locations where the turtles will encounter and use it". Mr. Crowley concluded: "It is reasonable to expect that some Blanding's Turtles will use newly created nesting habitats, and that this will help to divert at least some nesting activity away from high risk areas."

[101] Dr. Beaudry stated that artificial nest sites have not been shown to be effective at diverting Blanding's turtles from high risk nesting areas. He explained that one must have a clear goal to determine the "success" of a mitigation method. While he accepts that artificial nest sites may be used by Blanding's turtles, Dr. Beaudry points out that they have never been documented as being successful at directing turtles away from roads. He testified that he would be aware of any scientific studies published in this regard.

[102] The Tribunal finds that a long-term metric of success is clearly required when dealing with the survival of a population of Blanding's turtle, a long-living SAR, with a low annual reproductive output.

[103] Given that no scientific reports were produced to support Mr. Taylor's opinion, the Tribunal prefers the opinion of Dr. Beaudry, who is a specialist in this species, that creating artificial nest sites has not been shown to be successful at directing Blanding's turtles away from nesting on roadsides. The Tribunal also considers the fact that Blanding's turtles are widely reported to nest in granular material on roadsides, and that 5.4 km of new nesting habitat will therefore be created in this Project, in the form of

access roads. While some Blanding's turtles might nest on artificial nest sites that they happen upon, this evidence indicates that they are more likely to happen upon access roads.

[104] Much of Mr. Taylor's testimony related to the possibility of creating artificial wetlands on the compensation property. The provision of a compensation property was considered in the 2013 *APPEC* decision. The evidence does not support any finding that improvements to the compensation property will reduce or prevent the harm that in the *APPEC* decision was found would be caused to Blanding's turtle by the Project. In any event, Mr. Taylor was called as a reply witness to PECFN's evidence, which did not address constructing wetlands.

[105] Section F.5.2 of the IMP, cited above, suggests that turtle nesting on access roads may be reduced by promoting vegetation on the shoulders of the access roads, or using road surface treatments to harden the surface.

[106] The Project Report states that access roads are to be composed of "granular A" gravel material, which all experts acknowledge is often used by Blanding's turtles for nesting. The experts agreed that turtles are less likely to nest on hard road shoulders, or in areas with dense vegetation. No evidence was adduced, however, to indicate how these measures could successfully be implemented at this Site.

[107] It will be recalled from the 2013 *APPEC* decision that much of the Ostrander Point area is an MNRF-designated "significant" alvar, or an alvar landscape, which is "characterized by a mosaic of distinctive plant associations adapted to extreme environmental conditions, including periodic flooding and severe drought, mediated by shallow soil depths, variable water tables and dramatic runoff patterns" (*APPEC* decision, paras. 546, 558). The Tribunal found that engaging in the Project will cause "serious harm" to the alvar, although it found that the evidence did not establish that the harm would be "irreversible". Minimizing impacts to alvar vegetation is recognized as a goal in the Project design through, for example, building the access roads at grade

(*APPEC* decision, para 558). Ms. Gunson, among others, provided evidence that invasive plant species are a serious danger to self-sustaining alvar.

[108] In this case, there is no evidence as to the types of vegetation that might be planted that would survive in the harsh local conditions, and at the same time not facilitate invasive species or otherwise damage the alvar. There is no evidence as to the type of material that might be used to harden the road shoulders, and whether such material might produce negative impacts such as water contamination or hydrological changes. The Tribunal finds that these proposed mitigation measures are exceedingly vague, and their consequences in this location have not been examined. There is other evidence that this is an ecologically vulnerable area. While the experts agreed that these measures help in some measure to discourage turtle nesting on roadsides, there is insufficient evidence of what the measures would entail, or how they would otherwise impact the ecosystem.

[109] With respect to predation, the experts agreed that nest cages are effective in increasing hatchling survival, although nests may be difficult to find, even for experts. On the other hand, cages identify turtle nests, and thus increase the risk of poaching. The IMP's Adaptive Management appendix states: "the increased risk of poaching from members of the public will be addressed by restricting public access to the road network." As further discussed below, however, the evidence is far from clear that restricting public access will deter people who set out to conduct the illegal activity of poaching. In this regard, it must also be noted that this restriction only applies to public vehicles on the roads; the rest of Ostrander Point Crown Land Block will remain open to the public.

[110] On balance, the Tribunal finds that nest cages are effective at protecting eggs from predation and thus increasing hatchling survival, but do not serve as an effective tool to mitigate against adult turtle road mortality or poaching on this Site.

[111] The Tribunal now turns to an evaluation of the "Access Road Control Plan", Appendix B to the IMP, which is intended to reduce the number of vehicles on the access roads.

Access Road Control Plan

[112] In its August 1, 2013 letter of application to MNRF for secured tenure for the access roads, Ostrander explains that the Project Access Road Control Plan is to "prevent public vehicle travel on the access roads while allowing access to the existing on-site trails and the Ostrander Point Crown Land Block." It states further that:

> Ostrander LP has no interest in the balance of the property and we do not intend on limiting the activities which currently take place on the Ostrander Point Crown Land Block. The Crown leases and easement are specific to the facility and encompass only the project footprint (6.2 ha). The remaining 318 ha of the property will be available to the public without restricted access.

[113] In a letter of September 16, 2013, MNRF stated that it is "supportive" of Ostrander's request for secured tenure for the access road, and "will issue a lease, which would give Ostrander Point Wind Energy LP exclusive possession of the road during the term of the lease" upon completion of the construction of the access road and subject to certain requirements, including an issued REA.

[114] Ostrander's Access Road Control Plan, dated September 2013, provides for the following restrictions to public access:

> **Access Road Control**
>
> There is only one point of access from the existing roads to the proposed access roads for the Site. A gate will be located at this location to prevent public vehicles from accessing the proposed access roads from this location. Further, to prevent public vehicles from accessing the proposed access roads from the three trails on the Site, gates will be installed across the proposed access roads on both sides of the trails where they cross the access roads. This will permit public motor vehicle access on existing trails while preventing public motor vehicle access onto the access roads. Each gate will be a double swing gate opening with a locking mechanism as referenced in Appendix A.

> These gates would be locked from May 1 to October 15 of any given year. Project staff will be trained on how to answer questions from the public regarding the need for gated access on the Project access roads.
>
> **Site Monitoring**
>
> The enhanced mitigation measures to restrict public vehicle access to the proposed access roads on the Site will also include:
>
> - Installing signs on the gates indicating that there is to be no access;
> - requiring on-site Project maintenance staff to monitor and enforce access restrictions;
> - requiring regular monthly reports on the status of the gates and their associated lightsand signage;
> - Regular monthly reports to identify potential access issues of public motor vehicles bypassing gates;
> - Immediate reporting of any unauthorized vehicle found trespassing on the Project access road between May 1 and October 15 of any given year to the Site Operator;
> - Immediate reporting of any unauthorized vehicle found trespassing on the Project access road between May 1 and October 15 of any given year to the OPP; and
> - Annual training of Project staff in April detailing concerning these measures.

[115] The Site Monitoring provisions in the Access Road Control Plan include staff training, and a requirement that "on-site Project maintenance staff" report to the Ontario Provincial Police ("OPP") any public vehicles seen using the gated access roads.

[116] Dr. Beaudry, Ms. Gunson and Mr. Crowley all agreed that, assuming the mitigation measures included in the IMP and this Access Road Control Plan are effective, collision mortality for Blanding's turtles will be reduced but not eliminated. In Dr. Beaudry's view, although the risk of collision mortality may have a low probability of occurrence over a single year, harm to this long-lived and low-reproductive output species must be multiplied by the length of the Project and will result in serious harm to the Blanding's turtle population that will be irreversible, even with the proposed mitigation measures in place.

[117] Mr. Crowley testified that the effectiveness of measures to mitigate the effects of roads on turtles is very site-specific, and varies "significantly" depending on the characteristics of the road, the species, the design of the mitigation measures, and the

way in which the mitigation measures are implemented and maintained. He stated that "what works at one site may be largely ineffective at another site." In this case, in his view, "the proposed roads are small and they will have low speed limits and are anticipated to have very low traffic volumes. Despite intersecting Blanding's turtle habitat, such roads have a relatively low likelihood of resulting in turtle mortality in any given year." Mr. Crowley stated that "the fact that these new roads are intended to be used by trained staff and should be inaccessible to public vehicle traffic significantly reduces the likelihood of turtles being killed on these roads." (emphasis in the original). Similarly, he concluded: "Considering all of the above, I would expect there to be a very low likelihood that Blanding's Turtles would be killed on the new project roads in any given year as long as these mitigation measures are being actively maintained". (Emphasis added.)

[118] It is clear that Mr. Crowley's opinion depends on the assumption that the full range of mitigation measures are being actively maintained and effective, stating for example that "Gating the new roads, as well as maintaining the gates and actively enforcing no-trespassing rules, is essential for the rest of the mitigation to be effective and to maintain a reasonably low likelihood of road mortality of Blanding's Turtles."

[119] PECFN relies on Dr. Beaudry's evidence to submit that at this site, "there is simply no practical or effective way to exclude the public or personnel associated with the Project," and that the only effective mitigation measure is to not build the roads.

[120] The SSC relies on Dr. Beaudry's evidence that gating the access roads is the only proposed measure that would directly reduce the risk of mortality, by reducing traffic and allowing some control over the manner in which the access roads were used, but that:

- Due to the geology of the site, the gates would not physically prevent members of the public from driving onto the access roads by driving around them;

- Those who used the access roads for work purposes would not necessarily avoid all encounters with Blanding's turtles, in part because they can be difficult to see; and
- Gating the access roads would not reduce the risks from poaching or predation.

[121] The Director submits that the onus was on PECFN to adduce evidence that the gates will not be effective, and that it did not discharge this onus. As noted above, however, the parties are in agreement that under s. 145.2.1(4) the general rule as to onus applies; i.e., the onus is on the party who asserts a proposition to prove it. Therefore, the matter to be determined is whether the party proposing a mitigation measure has established on the evidence, on a balance of probabilities, that it will be effective. The Tribunal now turns to the evidence on the effectiveness of the Access Road Control Plan.

[122] With respect to Project vehicles using the access roads, Mr. Crowley and Mr. Taylor testified that employee training to identify and report endangered species can be very effective. Mr. Taylor cited his personal experience with a road construction project in Ottawa, where the workers became protective of the turtles they were instructed to watch for. Ms. Gunson, on the other hand, has conducted studies on the effectiveness of employee training, and roadside warning signs in Ontario. She stated that, since it will not be possible to identify Blanding's turtle "hot spots" on this Project Site, it will be difficult to train and educate maintenance workers effectively, when risk to turtles cannot be localized along a particular stretch of road. She stated that this is because motorists can become desensitized to known risk within a short time period, and that the desensitization occurs even more quickly when motorists are occupied or distracted doing other work tasks. Ms. Gunson does not agree that maintenance worker training has been proven to be effective in protection populations at risk. All experts have testified that is difficult to see Blanding's turtles on roadsides, even for the well-trained eye.

[123] The Tribunal finds on a balance of probabilities that employee training is likely to reduce, but not eliminate, road mortality from employee-driven vehicles on the Project site, while this mitigation measure is actively maintained. This is due to the acknowledged difficulty in spotting Blanding's turtles, as well as the number of Project-related staff vehicles that will be present on the roads, and the long-term nature of the undertaking (25 years). As noted by PECFN, the Project will continue to generate considerable traffic of its own, including bird and bat mortality monitoring at all turbines, contamination monitoring, weekly hydrology monitoring during spring and summer, landbird disturbance monitoring in spring and fall, amphibian disturbance monitoring in the spring, breeding bird disturbance monitoring, and ongoing hydrological monitoring. Therefore, the continuing possibility of some mortality from employee vehicles, and the ongoing and long-term nature of the mitigation requirement, are factors to be kept in mind in considering the overall effectiveness of mitigation measures.

[124] With respect to public vehicles driving on the access roads, Dr. Beaudry commented that there appeared to be no impediment to a vehicle driving around the proposed gates on the adjacent land. The Director argues that this is mere speculation; however, no evidence was adduced to counter this rather obvious possibility. The characteristics of the Site were well canvassed in the first part of this hearing in relation to turtles and alvar. The Ostrander Point Crown Land Block is relatively flat, hard-pan, with low-growing shrubby vegetation, and criss-crossed by existing trails, two of which lead to the lake shore. The proposed access roads are at grade, in order not to interfere with drainage. It is entirely foreseeable that individuals wishing to access the Site on the roads will simply drive around the gates.

[125] There are proposed new requirements for "no access" signs, and for maintenance staff to monitor and report road users to the OPP. However, the Tribunal puts little weight on maintenance staff reporting as an effective enforcement tool for the following reasons.

[126] First, the Ostrander Crown Land Block continues to be fully accessible to the public for recreational uses, except for this small portion of the roadbeds. As noted by PECFN, gates and signage will be installed at six locations, but the Site is 324 ha in size.

[127] Second, there is little to no reliable evidence about staff monitoring at the Project. For example, there was no evidence as to which employees, if any, would be on Site at any particular time, or that Project staff will ever be on Site at night. Once the turbines are up and running, it appears there is no ongoing requirement for staff presence apart from scheduled monitoring and maintenance. The *ESA* permit provides that there will be no road maintenance (s. 3.9) or structural maintenance (s. 3.12) during the "nesting season", which is defined in the *ESA* Permit as May 15 to October 15. This is almost identical to the period during which the road access controls are to be enforced by maintenance staff under s. 2.2 of the IMP (May 1 to October 15). Further, the uncontested evidence is that Blanding's turtles are often active in April. The evidence includes, for example, records of Blanding's turtles being found dead on roadsides in the immediate area in April.

[128] The REA conditions include "removal of the access roads" when the Project is decommissioned. Again, there was no evidence to indicate how this would be done or in what condition the land would be left. Therefore, it is unclear whether such removal would preclude public use of these decommissioned areas as roads, which could contribute to additional and continuing mortality of the species. This finding assumes that the access roads would be removed at the end of the Project's life as outlined in the REA. Given the 75+ year life span of Blanding's turtle, future decisions on whether these roads may be useful for post-Project land uses will also impact the survival of the Blanding's turtle population that uses the Project Site and its vicinity. This underscores the significance of introducing access roads in this currently "roadless" area of high quality habitat.

[129] The Tribunal accepts, on a balance of probabilities, that the gates will deter some public road users, and it is likely that there will be less public traffic on Project access roads with the gates, than without them. For all of the listed reasons, however, the Tribunal concludes that the success of the gates in preventing public access over the time period of relevance to this species depends almost entirely on well-intentioned visitors not to use the access roads because they are gated and signed. It is unlikely poachers will be deterred at all, and in fact easier access to the Site via better roads will likely facilitate poaching. The Tribunal received insufficient evidence on which it can reliably find, on a balance of probabilities, that the elements of the Road Access Control Plan will effectively deter members of the public from driving vehicles on access roads.

[130] Both Dr. Beaudry and Ms. Gunson concluded that, despite the proposed gates on the access roads, the various threats to the local population of Blanding's turtle still represent a risk, although it may be moderate in any particular year, that will cumulatively over the life of the Project cause serious harm to the population of Blanding's turtle on the Project Site and surrounding area. Dr. Beaudry's opinion is that the harm will be irreversible given the species' life history traits and threatened status. Mr. Crowley's opinion, that the road mortality will be "very low", is based on his underlying assumption that the mitigation measures are ongoing and effective. Given the Tribunal's conclusions on the effectiveness of the proposed mitigation measures, the Tribunal prefers Dr. Beaudry's opinion.

[131] Ostrander argues that Dr. Beaudry's opinion should not be relied upon because he acknowledged that his opinion at the initial Tribunal hearing was based on a "best case scenario" of a stable Blanding's turtle population in the Project area, whereas he testified in this remedy hearing that it may be that the local population is already in decline. The Tribunal does not accept this submission. An assumption that the population is already in decline simply adds to the gravity of any additional harm; it is not a reason to question the reliability of Dr. Beaudry's opinion.

Conclusion on Effectiveness of Mitigation Measures

[132] For the above reasons, the Tribunal finds that Ostrander and the Director have not demonstrated, on a balance of probabilities, that the measures outlined in the IMP dated November 15, 2013, including the Road Access and Control Plan, together with the pre-existing REA conditions, will prevent serious and irreversible harm to the population of Blanding's turtle at the Project Site and surrounding area, as was found in the 2013 *APPEC* decision.

[133] The Tribunal finds that a small number of individual adult turtles will be killed annually, that poaching will not be reduced but rather facilitated, and that there will be no measurable change to the impacts of predation. The Tribunal finds that these harms cumulatively over the lifetime of the Project will cause irreversible harm to the local population, and lead to the eventual loss of the population.

[134] Given the Tribunal's finding, it is not necessary to address Ostrander's submission that allegations of harm to Blanding's turtles apart from the "precise type of harm" already found by the Tribunal in its 2013 decision, should either not be considered by the Tribunal on remedy, or, alternatively, must be proven by PECFN to the s. 145.2.1(2)(b) level of serious and irreversible harm.

Appropriate Remedy

[135] In the 2013 *APPEC* decision, and in regards to the s. 145.2.1(2)(b) harm test, the Tribunal found that engaging in the Project in accordance with the REA will cause serious and irreversible harm to Blanding's turtle. In this remedy hearing under s. 145.2.1(4), the Tribunal has found that Ostrander and the Director have not proven, on a balance of probabilities, that the remedy they propose, consisting of mitigation measures that include the IMP and the Road Access Agreement, will protect Blanding's turtle from serious and irreversible harm that would be caused by the Project due to road mortalities, predation and poaching.

[136] The Tribunal has found that in the exercise of its discretionary remedial powers under s. 145.2.1(4), it may consider, among other things, the general purpose of the *EPA* and renewable energy approval purposes of the *EPA* in ss. 3(1) and 47.2(1), respectively, and the public interest under s. 47.5. The Tribunal has found that the policy of promoting renewable energy is a factor in assessing the public interest but the policy does not automatically override the public interest in protecting against other environmental harm, such as harm to species at risk and their habitat. The Court of Appeal in the PECFN decision recognizes the difficult, but necessary, task the Tribunal has of balancing "different and potentially opposing values".

[137] In this case, the Project Site would be entirely composed of high quality Blanding's turtle habitat, which the Tribunal found in the 2013 *APPEC* decision (at para. 313) falls within the definition of "critical habitat". As described in the *APPEC* and *PECFN* decisions, Ostrander Point Crown Land Block is one of the least developed parts of the south shore of Prince Edward County. Ms. Gunson described it as currently being "roadless". As discussed in *Lewis* at para 97, when it comes to disturbance to the habitat of plant and animal life in particular, an important factor is the current state of such habitat.

[138] The Tribunal finds that to proceed with the Project, when it will cause serious and irreversible harm to animal life, a species at risk and its habitat, is not consistent with the general and renewable energy approval purposes of the *EPA* in s. 3(1), protection and conservation of the natural environment, and s. 47.2(1), protection and conservation of the environment, nor does it serve the public interest under s. 47.5. In this particular case, preventing such harm outweighs the policy of promoting renewable energy through this nine wind turbine project in this location.

[139] An additional reason for the Tribunal's decision on remedy in this case is that in the exercise of its discretionary remedial powers under s. 145.2.1(4) the Tribunal may also consider the precautionary principle and the ecosystem approach, which are key principles of the MOECC SEV that apply to decisions of the Director.

[140] As discussed in the 2013 *APPEC* decision, the Ostrander Point Crown Land Block is a complex ecosystem. For example, it supports a self-sustaining rare alvar landscape. In addition, the Project would be located entirely within a Candidate Life Sciences Area of Natural and Scientific Interest ("ANSI"), which extends from Prince Edward Point to, approximately, Petticoat Point, and is roughly 2,000 hectares. According to the MNRF, it is a "candidate" ANSI due to "the combination of size, extent of shoreline, known species diversity and special features that make this site unique in the Site District" (*APPEC* decision at para 607).

[141] The Tribunal considers that is also relevant to determining the appropriate remedy that the candidate ANSI has not been evaluated by MNRF to determine if it merits qualification, and any additional protections that would entail; instead, roads will be introduced on this area of Crown land that, in addition to being a candidate Life Sciences ANSI, is known critical habitat for a species at risk. The Tribunal finds that proceeding with the Project in these circumstances is also not consistent with the precautionary principle and the ecosystem approach, which are principles of the MOECC SEV; nor would it be consistent with the general and renewable energy approval purposes of the *EPA* in sections 3(1) and s. 47.2(1), or serve the public interest under s. 47.5.

[142] In regards to the general application of the precautionary principle (see *Spraytech*), Blanding's turtle has not been the subject of extensive scientific study generally, and in this location in particular. This is evident from the disagreements among the expert biologists at both the 2013 hearing and in this remedy hearing. Proceeding with the Project where there is the threat of serious and irreversible harm to a species at risk, including its habitat, and a lack of full scientific certainty regarding the species, would not be consistent with the precautionary principle.

[143] In summary, and although the promotion of renewable energy and its related benefits, and streamlining approvals, are important factors in consideration of the public interest, the Tribunal finds that not proceeding with this nine wind turbine Project in this

location best serves the general and renewable energy approval purposes in sections 3(1) and 47.2(1) of the *EPA*, the public interest under s. 47.5, and the precautionary principle and ecosystem approach.

[144] Having weighed all of the relevant considerations, the Tribunal finds that the remedies proposed by Ostrander and the Director are not appropriate in the unique circumstances of this case. The Tribunal finds that the appropriate remedy under s. 145.2.1(4) is to revoke the Director's decision to issue the REA.

Director's Decision Revoked

"Heather I. Gibbs"

HEATHER I. GIBBS
VICE-CHAIR

"Robert V. Wright"

ROBERT V. WRIGHT
VICE-CHAIR

Appendix 1 – Tribunal Reasons for Qualification of Shawn Taylor

Appendix 1

Tribunal Reasons for Qualification of Shawn Taylor

[1] Mr. Taylor testified at the remedy hearing on November 26, 2015. Ostrander requested he be qualified as an expert to give opinion evidence as "a biologist with expertise in planning, design, construction and monitoring of restoration projects for aquatic and terrestrial habitat in Ontario including habitat used by Blanding's turtle." The Director consented to the qualification; PECFN and the SSC objected. Mr. Taylor was cross-examined on his qualifications. The Tribunal then qualified Mr. Taylor as "a biologist with expertise in restoration projects for aquatic and terrestrial habitat." Ostrander requested that the Tribunal provide its reasons in writing for its decision on qualifications regarding Mr. Taylor. It does so now.

[2] PECFN submitted that Mr. Taylor is not an expert in Blanding's turtle, as his sole experience with Blanding's turtle had to do with one project in an urban setting, relating to Terry Fox Drive in Ottawa. He submitted that the Tribunal qualified two experts in Blanding's turtles at the 2013 hearing, listed at para 221 of the *APPEC* Decision, who have specific expertise relating to that species. PECFN submitted that Mr. Taylor's expertise should be treated in the same way as Ms. Gunson, who was qualified "to give expert opinion on the impacts of roads on wildlife", despite having worked on projects involving Blanding's turtle habitat in the past. .

[3] The SSC submitted that the inclusion the phrase "used by Blanding's turtle" implies that the restoration projects were successful as habitat used by this species. However, there is no evidence base for such a finding. Rather, the evidence shows there was one "foray" by one Blanding's turtle on one restoration project.

[4] Ostrander submitted that Mr. Taylor has done significant work involving Blanding's turtle habitat, and has published more recently than Dr. Beaudry. It submitted that his relative expertise can be dealt with through weight.

[5] The Tribunal found on the basis of his training and experience that Mr. Taylor has “expertise in restoration projects”. This recognized expertise permitted him to give opinion evidence on the “planning, design, construction and monitoring” of such projects, and there was therefore no need to repeat that phrase in the qualification itself. This modification to the proposed expertise took nothing away from the expertise proposed by Ostrander.

[6] The Tribunal did not include the phrase “including habitat used by Blanding’s turtle”, in the statement of Mr. Taylor’s qualification.

[7] A central issue before the Tribunal is the effectiveness and sufficiency of the mitigation measures proposed by Ostrander to prevent harm to the Blanding’s turtle. The Tribunal found that, by adding a modifier to Mr. Taylor’s expertise specifically with respect to one species, it implies a particular expertise relating to that species. Blanding’s turtle experts were called in the 2013 hearing of this appeal, and Dr. Beaudry and Mr. Crowley are Blanding’s turtle experts who were called in this remedy proceeding. Mr. Taylor testified in response to questions on his experience, that he was involved in one restoration project in Blanding’s turtle habitat, at which he observed the presence of one Blanding’s turtle. The Tribunal found that Mr. Taylor’s experience with Blanding’s turtle is insufficient to qualify him as having a particular expertise regarding this species and that the additional wording requested by Ostrander should not be added to his qualification of expertise in “restoration projects” generally.