Environmental Review Tribunal

Case No.: 11-208

Middlesex-Lambton Wind Action Group Inc. v. Director, Ministry of the Environment

In the matter of an appeal by Middlesex-Lambton Wind Action Group Inc. filed on November 15, 2011 for a Hearing before the Environmental Review Tribunal pursuant to section 142.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended ("*EPA*") with respect to Renewable Energy Approval Number 6250-8KFTCQ ("REA") issued by the Director, Ministry of the Environment ("MOE"), on October 31, 2011 and posted on the Environmental Registry on November 1, 2011 to Zephyr Farms Limited under section 47.5 of the *EPA*, in respect of a Class 4 Wind facility consisting of the construction, installation, operation, use, and retiring of four (4) wind turbine generators, located at Ebenezer Road and Churchill Line on Concession 14 South Part Lot 13 South ½ Lot 13, Concession 14 South Part Lot 14, and Concession 14 North Part Lot 15 pt W ¾ of N ¾ of Lot 15, in the Municipality of Brooke-Alvinston, in the County of Lambton, Ontario; and

In the matter of Motions to dismiss heard on December 15, 2011 at 10:00 a.m. and January 6, 2012 at 10:00 a.m in Hearing Room 16-2 at 655 Bay Street, Toronto, Ontario.

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

Appearances:

Eric Gillespie and Rebekah Church	-	Counsel for the Appellant, Middlesex-Lambton Wind Action Group Inc.
Frederika Rotter, Andrea Huckins and Sylvia Davis	-	Counsel for the Director, Ministry of the Environment
Christopher Harris	-	Articling Student for the Director, Ministry of the Environment
Albert Engel	-	Counsel for the Renewable Energy Approval Holder, Zephyr Farms Limited

Dated this **14th** day of **February, 2012.**

Reasons for Decision

Background:

On October 31, 2011, the Director, Ministry of the Environment ("MOE") issued a Renewable Energy Approval ("REA") under section 47.5 of the *Environmental Protection Act* ("*EPA*") to Zephyr Farms Limited (the "Approval Holder" or "Zephyr") to engage in a renewable energy project (the "Project") in respect of a Class 4 Wind facility located at Ebenezer Road and Churchill Line in the Municipality of Brooke-Alvinston, in the County of Lambton, Ontario. The Project consists of the construction, installation, operation, use and retiring of four wind turbine generators, each rated at 2.5 MW generating output capacity. The proposal for the Project was posted by the MOE on the Environmental Registry, established under the *Environmental Bill of Rights, 1993* ("*EBR* Registry"), for 30 days. The REA notice was posted on the *EBR* Registry on November 1, 2011.

On November 15, 2011, Middlesex-Lambton Wind Action Group filed a Notice of Appeal (the "original Notice of Appeal") with the Environmental Review Tribunal (the "Tribunal") pursuant to section 142.1 of the *EPA*. On November 22, 2011, the Approval Holder brought a motion requesting from the Tribunal an Order limiting the scope of permissible evidence to be brought before the Tribunal in this appeal.

The Approval Holder also requested an Order varying the timeline of the appeal in order to allow sufficient time for the Motion to be heard.

The Motion was made returnable on November 25, 2011 at 10:00 a.m. The Parties agreed to put the Motion over to November 29, 2011 at 10:00 a.m. On November 26, 2011, Counsel for the Director served and filed a Motion to dismiss also returnable on November 29, 2011. On November 28, 2011, Counsel for the Appellant brought a Motion to adjourn the Motion to limit the scope of the evidence and the Motion to dismiss. Both the Approval Holder and the Director opposed the Motion to adjourn.

On November 30, 2011, Fredericka Rotter, Counsel for the Director, wrote to the Tribunal requesting a teleconference with the Parties.

The Tribunal scheduled a teleconference to commence at 1:00 p.m. on December 1, 2011 for the purpose of discussing scheduling of the Motions. During that teleconference, the Tribunal also scheduled another teleconference to commence at 4:00 p.m. on December 8, 2011. An additional teleconference was held at 11:30 a.m. on December 2, 2011.

In its Order dated December 15, 2011, the Tribunal stated that the Motion to dismiss and the Motion to scope the evidence before the Tribunal would be heard on December 15, 2011. The Order also scheduled the Preliminary Hearing to be held in Wyoming, Ontario on December 22, 2011 and outlined the relevant dates for the disclosure of evidence, the filing of documents and Witness Statements and the Hearing.

On December 16, 2011, the Tribunal issued an Order with the following disposition:

1. That the Motion to dismiss brought by the Director is dismissed for reasons that will follow.
2. That the Appellant shall serve on the other Parties and file with the Tribunal by 10:00 a.m. on December 21, 2011, a statement in accordance with Rule 29(e) of the Tribunal's Rules of Practice.

On December 21, 2011, the Appellant served on the Parties and filed with the Tribunal an amended Notice of Appeal (the "amended Notice of Appeal").

A Preliminary Hearing was held on December 22, 2011 and in its Order dated January 4, 2012, the Tribunal confirmed the Hearing dates for this proceeding and granted Eric Erhard Participant status. During the Preliminary Hearing, Ms. Rotter noted that it is her position that the revised Notice of Appeal, filed on December 21, 2011, remains deficient and the arguments she advanced at the December 15, 2011 hearing of the first Motion to dismiss were still applicable. The Tribunal, with the agreement of the Parties, scheduled the hearing of the second Motion to dismiss at 10:00 a.m. on January 6, 2012. On January 4, 2012, the Appellant served on the Parties and filed with the Tribunal a further amended Notice of Appeal (the "revised amended Notice of Appeal"). On the same date, the Tribunal issued an Order confirming the date for the Motion and the Hearing scheduled for this matter. It also confirmed Participant status for Eric Erhard. Due to a typographical error, the January 4, 2012 Order was re-issued on January 10, 2012 with the typographical error corrected.

This Order provides the reasons for the Tribunal's Order disposing of the Director's first Motion to dismiss dated December 16, 2011 as well as the Tribunal's disposition of the Director's second Motion to dismiss heard on January 6, 2012.

Relevant Legislation and Rules:

Environmental Protection Act

> 142.1(1) This section applies to a person resident in Ontario who is not entitled under section 139 to require a hearing by the Tribunal in respect of a decision made by the Director under section 47.5.
>
> (2) A person mentioned in subsection (1) may, by written notice served upon the Director and the Tribunal within 15 days after a day prescribed by the regulations, require a hearing by the Tribunal in respect of a decision made by the Director under clause 47.5 (1) (a) or subsection 47.5 (2) or (3).
>
> (3) A person may require a hearing under subsection (2) only on the grounds that 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.

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

(a) a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(i) serious harm to human health, or

(ii) serious and irreversible harm to plant life, animal life or the natural environment;

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

(c) the relief sought.

(2) Except with leave of the Tribunal, at a hearing by the Tribunal an applicant mentioned in subsection (1) is not entitled to appeal a portion of the renewable energy approval that is not stated in the applicant's notice requiring the hearing.

145.2.1 (1) This section applies to a hearing required under section 142.1.

(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.

Rules of Practice of the Environmental Review Tribunal

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

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

(a) the Appellant's name, address, telephone number, facsimile number and email address and the name and contact information of anyone representing the Appellant;
(b) a copy of the renewable energy approval being appealed;

(c) identification of the portions of the renewable energy approval that the Appellant is appealing;
(d) a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause,
  (i) serious harm to human health, or
  (ii) serious and irreversible harm to plant life, animal life or the natural environment;
(e) a statement of the issues and material facts relevant to the subject matter of the appeal that the Appellant intends to present at the main Hearing;
(f) a description of the relief requested; and
(a) an indication of whether the Appellant will seek a stay of the renewable energy approval.

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

Issues:

The issues are whether the Notice of Appeal filed by the Appellant on November 15, 2011 meets the statutory requirements in section 145.2.1(2) of the *EPA* and whether the revised amended Notice of Appeal filed on January 4, 2012 meets the requirements of Rule 29 of the Tribunal's Rules of Practice.

Discussion and Analysis:

The Parties provided submissions in writing as well as oral submissions during the hearing of the Director's first Motion to dismiss on December 15, 2011. The Parties provided further written and oral submissions for the January 6, 2012 hearing of the Director's second Motion to dismiss.

Director's Submissions

The Director brought the first Motion to dismiss on the grounds that the original Notice of Appeal was deficient and should be dismissed because it failed to provide a description of how the Brooke-Alvinston Wind Farm, operating in accordance with the REA, will cause serious harm to human health, as required under section 142.2(1)(a) of the *EPA* and Rule 29 of the Rules of Practice and Practice Directions of the Environmental Review Tribunal (the "Tribunal Rules"). The Director submits that the original Notice of Appeal does not comply with the principles of procedural fairness that require an appellant to provide substantive information regarding the nature of an appeal, and raises no genuine issues within the jurisdiction of the Tribunal.

The Director submits that, under the heading "Description of how engaging in the renewable energy project in accordance with the Renewable Agency Approval will cause serious harm to human health," the Appellant failed to provide material facts or refer to clear scientific evidence

to substantiate any alleged health concerns with respect to this particular project. The Director argues that the Appellant instead has made broad, vague and general statements regarding its overall position on the development of wind turbines in Ontario.

The Director notes that the original Notice of Appeal defines the issues under appeal as follows:

> Issue #1: Will the project as approved cause serious harm to human health?
>
> Sub-issue #1(a): Will the project as approved cause serious harm to human health of non-participants?
>
> Sub-issue #1(b): Will the project as approved cause serious harm to human health if the approval authority is unable to properly predict, measure or assess sound from the facilities including audible noise and/or low frequency noise and/or ultrasound?
>
> Sub-issue #1(c): Will the project as approved cause serious harm to human health because the approval does not comply with the approval authority's Statement of Environmental Values ("SEV")?

The Director submits sub-issue #1(a) of the original Notice of Appeal is merely a restatement or refinement of the question raised in issue #1, and that sub-issues #1(b) and (c) fail to disclose any issue for adjudication by the Tribunal because no explanation is provided concerning how the alleged serious harm to human health will be caused by the sub-issues identified. Furthermore, the Director submits that the general statement in the Notice of Appeal about current projects and the Ministry's alleged lack of ability to measure in sub-issue #1(b) has no bearing on and provides no explanation of how this particular project will cause harm to human health, nor do other paragraphs in the Notice of Appeal.

The Director states that the statement of the issues in the original Notice of Appeal reproduces the issues raised in the amended Notice of Appeal in *Erickson v. Director, Ministry of the Environment* (2011), 61 C.E.L.R. (3d) 1 ("*Erickson*"), an appeal dismissed by the Tribunal, and fails to explain the nature of and mechanism for the specific harm anticipated from the Zephyr Project. The Director emphasizes that the Tribunal has already decided, in *Erickson*, the issues listed in the Notice of Appeal. The Director argues that the Appellant has filed a 'generic' appeal based on its general objections to wind energy projects, rather than providing the required particularized description of how this specific renewable energy project, operating in accordance with its approval, will cause serious harm to human health. The Director relies on *Varnicolor Chemical Ltd. v. Ontario (Ministry of the Environment)*, [1991] O.E.A.B. No. 38 ("*Varnicolor*"), which provides that grounds of appeal must be described with a certain minimum level of detail so that the notice can be considered "regular" or adequate, including sufficient information so

that a party understands what case it must meet. The Director submits that, in the present case, the grounds of appeal do not disclose what case the Director must meet, nor do they comply with the requirements of section 142.2(1)(a) of the *EPA*.

The Director asserts that the key test in determining whether an appeal should be dismissed is whether or not there are genuine issues that should go to a hearing. The Director submits that a notice of appeal cannot be considered sufficient to allow an appeal to proceed where the grounds of appeal have not been described with an adequate level of detail, and that such a lack of material facts constitutes an abuse of process and can be described as frivolous and vexatious. In support of these arguments, the Director relies on *Limbeek v. Director (Ministry of the Environment)*, Case No. 01-139, September 10, 2002 (Ont. Env. Rev.Trib.) ("*Limbeek*") and *Waterdown Garden Supplies Ltd. v. Ontario (Ministry of the Environment)* (2007), 27 C.E.L.R. (3d) 144 at para. 42, ("*Waterdown Garden Supplies*"), in addition to *Varnicolor*.

The Director cites *Copland v. Commodore Business Machines Ltd.*, (1985) 52 O.R. (2d) 586 (Ont. S.C. (Mast.)) and *Curry v. Advocate General Insurance Co. of Canada*, [1986] O.J. No. 2564 at para. 23 (Ont. S.C.H.C.J.), in support of the assertion that an appeal should be dismissed where an appellant has failed to adequately describe or set out a genuine issue for hearing in its notice of appeal because parties should not be required to speculate about the exact nature of the questions to be tried. The Director also submits that the form and content of a notice of appeal must be reasonable in that it conveys the real intentions of the appellant and enables the person to whom it is directed to know the case that must be met, referring to *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro et al.; Energy Probe Intervenor*, 46 O.R. (2d) 715 (Ont. H.C.J. Div. Ct.) ("*Re Central Ontario Coalition*").

The Director argues that, by raising questions such as those in sub-issues #1(b) and (c) and citing the concerns listed in the original Notice of Appeal, without demonstrating any apparent nexus or showing how these issues will cause the harm specified in the statute, the Appellant has failed to provide sufficient material facts to allow the respondents to adequately respond to this case. The Director relies on the statement of the Tribunal in *Erickson* that appellants must demonstrate a nexus between the SEV (and the consideration or lack of consideration thereof) and the harm listed in section 145.2.1 of the *EPA*.

Furthermore, the Director submits that it is not sufficient to say that more or better particulars will be available at the hearing or at some later date in the hearing process; instead, the particular issues must be provided at the filing of the notice of appeal. In support, the Director cites: *Waterdown Garden Supplies*; *Pizza Pizza Ltd. v. Gillespie*, (1990) 75 O.R. (2d) 225 (Ont. Ct. Gen. Div.); *569006 Ontario Ltd. v. Ontario (Ministry of the Environment) (2006)*, 24 C.E.L.R. (3d) 187 at para. (Ont. Env. Rev.Trib.) ("*569006 Ontario Ltd.*"); and *Colonia Life Insurance Co. v. York (Regional Municipality) Environment Services Department*, [1995] O.E.A.B. No. 64

("*Colonia Life Insurance*"). In particular, the Director notes that in *569006 Ontario Ltd.*, the Tribunal dealt with this issue and quoted the following passage from *Colonia Life Insurance* with approval:

> The motions judge, therefore, is expected to be able to assess the nature and quality of the evidence supporting a "genuine issue for trial"; the test is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; if so then the parties "should be spared the agony and expense of a long and expensive trial…."
> …
> It is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. The occasion is now. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue for trial.

The Director submits that the *EPA*, the Tribunal Rules and the principles of procedural fairness all require an appellant to provide detailed substantive information regarding the nature of the appeal in its original pleadings to allow respondents and members of the public who may be affected by the appeal to identify the subject of the proceeding, understand the relevant issues and prepare their responding case. In support, the Director cites: *Re Central Ontario Coalition*; *1657575 Ontario Inc. (c.o.b. Pleasures Gentlemen's Club) v. Hamilton (City)*, [2008] O.J. No. 3016, at paras. 24-28, (Ont. C.A.); and Robert Macaulay & James Sprague, *Hearings before Administrative Tribunals*, 4th ed. (Scarborough, Ont.: Thomson Carswell, 2010) at 12-33 to 12-38.2.

The Director argues that the Appellant should not be permitted to wait until disclosure is completed to determine the real issues in the appeal. The Director further argues that the Appellant had notice for many months that the proposed project was in the works through public consultations and notice on the *EBR* Registry, and therefore had time to prepare its case in this matter.

The Director also submits that it is unreasonable and prejudicial to require the Director to expend time and resources and provide extensive prompt disclosure in response to a vague and inadequately particularized REA appeal, providing the Appellant with the possibility of a 'fishing expedition' to buttress its case. Relying on *British Columbia (Workers' Compensation Board) v. Figliola*, [2011] S.C.J. No. 52, at para. 38, *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] S.C.J. No. 64, at paras. 35, 37, 47 & 51 and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 23 ("*SPPA*"), the Director argues that it is an abuse of the Tribunal's process to attempt to re-litigate issues already decided by the Tribunal by recycling the issues from *Erickson* in the Notice of Appeal, and that the Tribunal should not be put in the position of reconsidering *Erickson*.

The Director notes that the Tribunal's Rule 111(b) permits a motion to dismiss based on grounds that the proceeding relates to matters outside the jurisdiction of the Tribunal and citing *Waterdown Garden Supplies Ltd.*, argues that the Appellant is raising matters outside the Tribunal's jurisdiction by raising issues without demonstrating any apparent connection to the allowable grounds of appeal.

The Director argues that section 145.2.1(4) of the *EPA* provides no authority to invalidate or circumvent any portions of the *EPA* or its regulations, or expand the subject matter within its consideration under section 145.2.1(2) beyond what is mandated by that subsection. Given that the Tribunal has authority under section 23 of the *SPPA* to prevent the abuse of its processes by ordering that an appeal be dismissed, the Director submits that the deficiencies in the original Notice of Appeal and the abuses identified are sufficiently serious that it should be dismissed as being abusive, frivolous and vexatious.

In the alternative, the Director submits that the Tribunal has the authority to require an amendment of the pleadings or to order particulars. The Director notes that sections 142.2(2) and (3) of the *EPA* set out the Tribunal's authority to allow an applicant to appeal a portion of the REA that is not stated in the applicant's notice requiring a hearing. The Director also notes that the Tribunal has found it has the authority to order pleadings to be amended or to order particulars in an appropriate case, under Rule 7 of the Tribunal Rules and sections 23 and 25.0.1 of the *SPPA*, and has allowed applicants and appellants to amend notices of appeal and notices of hearing, or provide particulars, in the past. In support of this, the Director refers to *Blue Disposal Services Inc. v. Ontario (Ministry of Environment and Energy)*, [1995] O.E.A.B. No. 34, *Gunther Mele Ltd. v. Ontario (Ministry of Environment)*, [2004] O.E.R.T.D. No. 56 and *National Hard Chrome Plating Co. v. Ontario (Ministry of Environment and Energy)*, [1996] O.E.A.B. No. 58.

The Director notes that the Tribunal considered and allowed an amendment of the pleadings in *Erickson*. The Director also cites *Sheridan v. Ontario (Ministry of the Environment)*, [2000] O.E.A.B. No. 8, at para 22, in which an adjournment was granted to allow the applicants to remedy the inherent deficiencies in their notice of appeal and to provide more time to obtain necessary evidence.

The Director submits that if the Tribunal declines to dismiss this matter, the Tribunal should exercise its authority to require that the Appellant's pleadings be amended and sufficient particulars be provided to enable the Respondents to understand the case to be met. The Director further submits that all the events and proceedings scheduled in this matter should be adjourned pending receipt by the Tribunal of a sufficient Notice of Appeal from the Appellant, and that the appeal be dismissed if an adequate Notice of Appeal Is not received within a reasonable period of time.

The Director submits that the Appellant misstates the statutory requirement in section 142.2(1) of the *EPA* by stating it as "how engaging in a renewable energy project will cause serious harm to human health" because the language in the Act refers to "the renewable energy project." The Director states that by switching from the definite to the indefinite article, the Appellant shifts the focus from the specific approval under appeal to a consideration of REAs in general. The Director further submits that by omitting the phrase "in accordance with the renewable energy approval" in its statement of the statutory requirement, the Appellant goes beyond the Tribunal's jurisdiction, which is limited to the consideration of a specific project, rather than the broader consideration of whether a wind farm will cause harm in any circumstance.

In response to the Appellant's assertion that because the Notice of Appeal in *Erickson* was not challenged and was permitted to progress through a full hearing, the similar notice in this matter should be accepted, the Director states that it is not relevant what position the Director took in a separate matter. The Director argues that a review of the *Erickson* Notice of Appeal demonstrates that it also did not comply with the statutory requirements of the *EPA* and the Tribunal's Rules.

The Director further notes that the Tribunal stated that it allowed greater latitude to the parties in *Erickson* because it is was the first appeal of a renewable energy project and of an industrial wind turbine project, but submits that the Tribunal found this approach problematic and did not intend it to be a template for future hearings and that the Appellant cannot rely on the same novelty exception in this case.

The Director states that in dismissing the issues on appeal in *Erickson*, the Tribunal noted that the hearing was not about a specific project, but was an attempt to prove that the Ontario standards relating to the development of wind turbines were wrong. Furthermore, the Director submits that the Tribunal found that the issue for future appeals should be whether the Ontario standards are inadequate protection in the context of the specific project under appeal, stating at para. 872 that:

> This case has successfully shown that the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree. The question that should be asked is: What protections, such as permissible noise levels or setback distances, are appropriate to protect human health. In Ontario, recent regulations have provided guidance in that regard. In cases such as this, where the Appellants have not sought to demonstrate any type of unique harm associated with the design of this Project and have not attempted to demonstrate the sensitivity of a particular receptor, it was essentially up to the Appellants to prove that the Ontario standards are wrong in the context of the specific Project under appeal.

The Director submits that while the Appellant wants the Tribunal to reconsider its findings in *Erickson*, Rule 243 prevents the reconsideration of a REA appeal by stating that the rules allowing for a review of a Tribunal decision do not apply to a proceeding under section 142.1 of the *EPA*. The Director further argues that even if the Tribunal were to find it could reconsider this matter, the Appellant has not put forward any new evidence, nor shown that serious harm will result.

The Director asserts that the Appellant's original Notice of Appeal outlines its desire to re-engage in an inquiry about the safety and development of wind turbines in general and attempts again to challenge Ontario standards relating to wind turbines. The Director argues that the Tribunal does not have jurisdiction to allow a REA appeal to be an inquiry into the opinions, articles and general science on wind turbines because the *EPA* requires REA appeals to be focused on specific projects and the specific harms that will result.

The Director further argues that the Tribunal does not have jurisdiction under the *EPA* to allow this appeal to be a challenge to the regulation, guidelines or statute, and that the Director should not be required to generally defend the existence and creation of the Ontario standards relating to wind turbines every time a REA is issued and appealed. In support, the Director cites *Merlo v. Upper Thames River Conservation Authority*, [1997] O.E.A.B. No. 18 at para. 51 ("*Merlo*"). The Director notes that in all other types of appeals before the Tribunal, appellants are not permitted to ground their appeals in general inquiries about the development of legislation, regulation, policies or guidelines, but must focus their appeal on a particular instrument and project. The Director submits that, given the restrictive statutory requirements required for a REA appeal, it is even more imperative that REA appellants be prevented from engaging in general policy inquiries. The Director submits that the *EPA* intends the Tribunal to focus strictly on the narrow issues within its jurisdiction and not engage in a review of extraneous matters, in that it narrows the types of evidence and arguments than can be presented and requires the Tribunal to conduct an expedited hearing.

The Director submits that the Tribunal should dismiss the original Notice of Appeal under Rule 11(c) as it fails to comply with section 142.2(1) of the *EPA* because it does not describe the Zephyr project, nor how the Zephyr project will cause serious harm to human health. The Director further submits that the Appellant's Notice of Appeal must be required to indicate:

- what unique harm associated with the design of the Zephyr project will cause serious harm to human health, or must be required to demonstrate that there is a sensitive receptor that will be caused serious harm by the project; and

- whether it is the whole project or a particular aspect of the project that will cause serious harm to human health (for example, will all four wind turbines cause serious harm to human health at the approved noise limits in the REA, and are all

> of the setbacks as outlined in the Noise Assessment going to result in serious harm to human health?).

In response to the Appellant's contention that the original Notice of Appeal "categorically sets out the portions of the approval under appeal," the Director submits that the Appellant has not delineated the nexus between serious harm and human health and the specific portions of the REA that are targeted. The Director notes that it is extremely difficult to imagine how the portions of the REA dealing with "operations and maintenance," "record creation and retention" and "notification of complaints" could result in health hazards of any sort and that it is therefore impossible to know what portions of the file would be considered relevant for the purpose of disclosure.

The Director brought the second Motion to dismiss, heard January 6, 2012, after the amended Notice of Appeal was filed on December 21, 2011. The Director notes that the Appellant put forward a revised amended Notice of Appeal in response to the second Motion to dismiss. The Director takes the position that both the amended and revised amended Notices of Appeal remain deficient as they are overly general, and that sub-issues 1(b) and 1(c) are outside the scope of what should be decided at this Hearing.

The Director notes that the Appellant identifies every portion of the REA as being under appeal without stating what is being appealed in relation to each of those portions, and submits that the Appellant should specify the portions in respect of which the Hearing is required. The Director also observes, with respect to sub-issue 1(a), that the Appellant's revised Notices of Appeal state that previous projects approved using the same or similar sound levels (30 dbA and above) and distance setbacks (550m to 10km) have caused serious harm to human health. The Director submits that these ranges set out by the Appellant are too general and not specifically linked to the numerous symptoms of serious harm to human health listed, nor does the Appellant state how this project will cause harm. The Director also suggests that the Appellant is not appealing this particular project, but the entire statutory scheme that mandates a 550 m setback and a 40 dbA sound limit. The Director states that this Hearing is not the place for an attack on the entire statutory scheme.

Furthermore, the Director states that there are no specific links made to the list of other wind energy projects to which the Appellant refers. The Director acknowledges that the Tribunal stated in *Erickson* at para. 575 that

> …it stands to reason that evidence gathered from other projects is admissible and useful so long as the evidence is used as an input into the evidence concerning the predicted effects of the project under appeal. Parties should point out how the witnesses they have called have used the information gathered about other projects in providing relevant evidence about the project under appeal.

The Director notes, however, that the Tribunal also found in *Erickson* at para. 576 that if a party "fails to show how transferable the experience gained in one locale is to another, then the evidence will be of little use in a hearing." The Director submits that in the revised Notices of Appeal, it is not clear what is being alleged nor how transferable those circumstances are to this project.

In response to the Appellant's distinction between material facts and evidence, the Director states that the Appellant is not required to provide evidence, but should provide a more specific story about the nature of the complaints. The Director asserts that the Appellant does not need to provide a longer Notice of Appeal, but should provide a more informative one, including more particular identification of receptors, distances and types of harm.

With respect to sub-issue 1(b) of the revised Notice of Appeal, the Director asserts that the MOE has the ability to predict, measure or assess sound, and points out the Ministry's July 2011 publication, Compliance Protocol for Wind Turbine Noise, which sets out how to respond to noise complaints and measure sounds. The Director submits that this shows that the MOE has clear methodologies in place for measuring sounds and responding to noise complaints.

The Director notes that, under section 142.2(1), the Tribunal may only consider whether a wind project will cause serious harm to human health while being conducted "in accordance with" the REA. The Director submits that the Tribunal may not consider whether there will be harm to human health if the project is not operated in accordance with the REA; if the project operates outside the REA's allowable parameters, this can be addressed with the MOE compliance and enforcement measures. The Director states that principles of statutory interpretation require that the words "in accordance" be considered to have meaning. The Director seeks to have sub-issue 1(b) struck from the revised amended Notice of Appeal.

With respect to sub-issue 1(c) of the revised Notice of Appeal, the Director submits that the issue of the Director's consideration of the SEV was fully argued in the *Erickson* appeal, and that it is inappropriate to raise it in this appeal in the absence of any new evidence. The Director notes that the Tribunal in *Erickson* addressed the question of the SEV and the precautionary principle at paras. 521 and 522 and found as follows:

> The precautionary principle does not act as a mandatory condition precedent to the adoption of environmental measures nor does it prevent proactive decision-makers from adopting environmental measures in other situations. What the principle does is prevent decision-makers from using uncertainty as an excuse for inaction when it comes to threats of serious or irreversible damage. Section 145.2.1 is structured differently. It first sets out a test in subsection (2), which essentially acts as a statutory precondition to the Tribunal exercising discretion under subsection (4). That is the direction given by the Legislature and the Tribunal must follow it.

In response to the Appellant's allegation in sub-issue 1(c) that the Director has failed to consider the economic impacts of the project and this failure is causing great stress, i.e., serious harm to human health for residents, the Director submits that this is not the kind of serious harm to human health contemplated by the legislation. The Director seeks to have sub-issue 1(c) struck from the revised amended Notice of Appeal.

Zephyr's Submissions

Albert Engel, Counsel for the Approval Holder, stated that Zephyr supports the Director's Motion to dismiss the appeal and adopts the Director's main arguments as to why the appeal should be dismissed. However, Zephyr made separate submissions on the question of the Tribunal's authority to allow the Appellant to amend its Notice of Appeal or order particulars.

Zephyr submits that, should the Tribunal decline to dismiss this matter based on the Appellant's failure to comply with the procedural requirement set out in section 142.2(1)(a) of the *EPA*, Zephyr will consent to a waiver of the procedural requirement of section 142.1(2) of the *EPA* to permit the Appellant to produce an amended Notice of Appeal that provides the description required by section 142.2(1)(a) of the *EPA* beyond the 15 day time period set out in section 142.1(2) of the *EPA*.

Citing *Erickson*, at para. 549, Zephyr argues that, as a creature of statute, the Tribunal can only perform the tasks permitted by its enabling statute. In relation to REA appeals, these tasks are set out sections 142(4), 142.1, 142.2, 145.2(2), 145.2.1 and 145.2.2 of the *EPA*.

Zephyr asserts that the Appellant's failure to comply with section 142.2(1)(a)(i) of the *EPA* is fatal to its application for a hearing, and that without consent of the parties and the Tribunal, the Appellant may not amend its notice of appeal so that it complies with section.142.2(1)a)(i) of the *EPA* at this time, because it is now past the 15 day time limit set out in section142.1(2) of the *EPA*. Zephyr states that compliance with section 142.1(2) of the *EPA* is a procedural requirement that can be waived with the consent of the parties and the Tribunal, pursuant to section 4(1) of the *SPPA*.

Zephyr submits that section 142.2(3) of the *EPA* only allows the Tribunal to grant leave to appeal a portion of a REA that the applicant for leave did not state in its notice of appeal, or to allow an applicant to expand upon the portions of the REA that it is appealing. Zephyr submits that section 142.2(3) does not permit the Tribunal to allow an applicant for an REA hearing to expand on the grounds of appeal or the relief sought, in contrast to section 142 of the *EPA*, which applies to most other appeals before the Tribunal.

Zephyr argues that the cases cited by the Director in support of the Tribunal's authority to allow the Appellant to amend its Notice of Appeal or order particulars are not relevant to this proceeding because they did not deal with hearings brought under section 142.1 that are subject to section 142.2 of the *EPA*. Zephyr notes that the Tribunal did not consider or discuss the statutory authority for requiring appellants to submit revised Notices of Appeal in *Erickson*.

Zephyr states that because section 142.1(2) of the *EPA* imposes a 15-day time limit on the service of a Notice of Appeal under section 142.1 of the EPA, this time limit expired on November 16, 2011 for this appeal. Zephyr submits that the Appellant requires consent of the parties and the Tribunal, pursuant to section 4(1) of the *SPPA*, in order to serve an amended Notice of Appeal. However, if the Tribunal declines to dismiss this matter, Zephyr consents to waiving section 142.1(2) of the *EPA* and allowing the Appellant to file an amended Notice of Appeal.

Appellant's Submissions

The Appellant asserts that the Tribunal has previously determined in *Limbeek* that an appeal should "be dismissed only in the clearest cases and only where there is truly no genuine issue to be determined on the appeal," and states that the present appeal is not such a case. The Appellant argues that the appeal is not frivolous or vexatious, has been filed in good faith under the *EPA*, is based on genuine concerns about the health impacts that will result from the Project, and is fully within the jurisdiction of the Tribunal.

The Appellant submits that there are two separate sets of Notice of Appeal requirements at issue in the motion: the requirements imposed by section 142.2(1) of the *EPA*, which requires that the Appellant set out how engaging in a renewable energy project will cause serious harm to human health, the portion of the approval in respect of which the hearing is required, and the relief sought; and the requirements imposed by Rule 29 of the Tribunal Rules, which mirror the statutory requirements in section 142.2(1) but also require an appellant to provide a statement of the issues and material facts relevant to the subject matter of the appeal in Rule 29(e).

The Appellant notes that Rule 111(c) of Tribunal Rules provides that an appeal may be dismissed for a failure to comply with the statutory requirements, but submits that a distinction must be drawn between the statutory requirements imposed by the *EPA* and the additional procedural requirement for material facts set out in Rule 29(e). The Appellant argues that only a failure to comply with the statutory requirements may serve as a basis for dismissal of the appeal, while any deficiency in material facts is best remedied through an order made under the Tribunal Rules.

The Appellant notes that while the Notice of Appeal begins by briefly outlining in general terms how the project will cause serious harm to human health, the description of how the project will cause serious harm to human health is not limited to the initial section of the Notice and the information provided in the rest of the Notice also speaks to this issue. The Appellant submits the Notice of Appeal fully complies with the statutory requirements of section 142.2(1) of the *EPA*, as follows:

- It sets out how engaging in the renewable energy project will cause serious harm to human health, specifically providing an extensive list of the human health impacts known to be caused by industrial wind turbines, including sleep disturbance, annoyance, stress, inner ear symptoms, headaches, excessive tiredness and loss of quality of life;

- It categorically sets out the portions of the approval under appeal, specifically the Terms and Conditions, General, Noise Performance Limits, Acoustic Audit, Operations and Maintenance, Record Creation and Retention, Notification of Complaints, and Reasons; and

- The relief requested is stated, namely that the Appellant requests the Tribunal to revoke the decision of the Director to issue the approval.

The Appellant argues that the Notice of Appeal raises a number of important issues, including: the ability of the approval authority to measure exposure to infrasound, low frequency and audible noise, which have a known impact on human health; the failure to consider human health effects; and the consideration of the MOE's SEV.

The Appellant, therefore, submits that the Notice of Appeal not only describes how the project will cause serious harm to human health as required by the statutory test, but also clearly delineates the issues that the Director must respond to, such as whether the project will lead to the indicated health impacts and whether these considerations were part of the decision to issue the approval. The Appellant suggests that, as a result, the Director knows that he must produce whatever information informed his decision to issue the approval in relation to these issues.

The Appellant notes that, although the Director submits that the Notice of Appeal fails to explain the mechanism for the specific harm anticipated from this particular project, the Tribunal has previously stated that the precise mechanism through which the harm occurs is not a necessary consideration; instead, what must be considered is the cause and effect relationship between the project and the harm. In support of this, the Appellant cites *Erickson*, at paras. 818-819.

The Appellant submits that the Notice of Appeal satisfies each of the requirements in section 142.2(1) of the *EPA* so that the appeal cannot be dismissed under Rule 111(c) of the Tribunal Rules. The Appellant further submits that, in addition to satisfying the statutory requirements of the *EPA*, the Notice of Appeal does set out adequately the nature of the appeal, the issues to be tried and the case to be met by the Director.

The Appellant agrees with the Director's statement that the present appeal is substantially similar to the appeal filed in *Erickson*, and notes that the validity of the Notice of Appeal in *Erickson* was not challenged and was permitted to progress through a full hearing. The Appellant submits that the present appeal would not constitute a reconsideration of *Erickson* and is not an attempt to re-litigate issues already decided by the Tribunal because the evidence on this appeal will differ from that which was available in *Erickson*.

The Appellant asserts that the core issue in this Motion is that the Director is seeking further details of the evidence relating to the alleged health impacts set out in the Notice of Appeal. The Appellant argues that this has no bearing on whether the statutory test has been met, but instead concerns the requirements of Rule 29(e) of the Tribunal Rules, which cannot serve as a basis for dismissal but, if necessary may be addressed through an order by the Tribunal under its Rules.

The Appellant states that the Director has sought to conflate the requirements of Rule 29(d), which repeats the statutory requirements in section 142.2(1) of the *EPA* and Rule 29(e), which requires that material facts be provided. The Appellant argues that Rule 29(e) cannot be applied in such a way so as to constitute a statutory requirement within the context of Rule 111(c), as this would conflict with section 142.2(1) of the *EPA*, and as a result, any deficiency in material facts cannot serve as grounds to dismiss the proceedings.

The Appellant notes that the Tribunal has wide discretion to interpret and apply its Rules and to depart from them in appropriate circumstances, and cites several of the Rules regarding interpretation:

4. These Rules shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits.
5. If it considers it appropriate in the particular circumstances, the Tribunal may depart from these Rules or may waive any provision of these Rules other than a provision which is also found in a statute or regulation.
6. The Tribunal may issue procedural orders for a proceeding that, if in conflict with these Rules, prevail over these Rules.

The Appellant submits that any deficiency of material facts would constitute only a defect or other irregularity of form, which under Rule 10 would not make the proceeding invalid.

The Appellant asserts that the Notice of Appeal satisfies the obligation articulated in *Varnicolor* to describe grounds of appeal with a certain minimum level of detail such that notice can be considered adequate. However, the Appellant submits that if the Tribunal finds the Notice of Appeal is defective in the adequacy of material facts, the Tribunal is empowered to make an order under its Rules for the Appellant to provide whatever additional information it directs.

The Appellant also notes that a distinction should be drawn between material fact and evidence, and submits that the purpose of the Notice of Appeal is to set out the nature and scope of the appeal rather than to provide extensive evidence or set out all points in great detail. The Appellant states that the evidence supporting the issues raised in the Notice of Appeal will be provided through the disclosure process, which has not yet begun, so that it is incorrect for the Director to rely on cases based on a failure to make proper disclosure and on authorities that discuss the obligation to provide full substantive information, including evidence, over an entire proceeding. The Appellant also notes that according to civil procedure, a party should plead their issues and not evidence at this preliminary stage.

The Appellant submits that the Director knows the nature and scope of this appeal from the Notice of Appeal, and that further particulars and the evidence will be provided through disclosure so that all parties, including the Director, will have proper notice prior to the commencement of the Hearing.

In response to the Director's assertion that the Appellant had notice of this particular project for many months and therefore had time to prepare its case in this matter, the Appellant notes that there are dozens of postings on the *EBR* Registry and it is not possible to know during the public comment stage whether or when proposed projects will receive approval. The Appellant submits that it is too onerous for the Director to expect that residents should be preparing their cases and Notices of Appeal from the time of the comment period for every proposed project on the Registry. The Appellant suggests that most appellants will prepare their cases during the 15 days provided following notice of the approval of a project.

The Appellant submits that the Tribunal determined in *Erickson* that findings on other projects may be relevant to any hearing, and cites *Erickson* at para. 575:

> Normally, appeals for renewable energy projects will be heard before a project is operating. In such cases, determining whether a project "will cause" harm will involve expert evidence about what is predicted to happen. In many fields of expertise, predicting future effects relies on extrapolating from the experience gained in other situations. Thus, it stands to reason that evidence gathered from

> other projects is admissible and useful so long as the evidence is used as an input into the evidence concerning the predicted effects of the project under appeal. Parties should point out how the witnesses they have called have used the information gathered about other projects in providing relevant evidence about the project under appeal. In some cases, one witness may speak about a previous project while another ties that evidence to the project in question.

The Appellant also submits that the *Merlo* case, cited by the Director as an authority stating that appellants should be prevented from engaging in general policy inquiries, is a 1997 decision that has not been referred to in subsequent cases.

The Appellant notes that the Director states in his reply submissions that the Appellant's Notice of Appeal must be required to indicate what unique harm associated with the design of the Zephyr project will cause serious harm to human health or must be required to demonstrate that there is a sensitive receptor that will be caused serious harm by the project. The Appellant disagrees that this is the test and asserts that there does not have to be unique harm, but that the Appellant will have made out its case if it demonstrates similarities between the Zephyr project and other projects, and that serious harm will result.

In response to the Director's statement that it does not understand how "operations and maintenance," "record creation and retention" and "notification of complaints" could result in health hazards of any sort, the Appellant states that there are links. The Appellant submits that operation and maintenance may be a factor related to problems such as ice throw or turbine failure, and that a volume of complaints may indicate serious problems. The Appellant further submits that there is a clear nexus between these portions of the Notice of Appeal and harm to human health, and that the Tribunal may rely on Rule 29(e) to request more particulars to assist the Director's understanding of the issues and material facts. However, the Appellant argues that the Notice of Appeal in this matter is not deficient and that the Notice of Appeal in *Erickson* was not deficient either, noting that initial concerns about the Notice of Appeal in *Erickson* were dealt with and the hearing moved forward.

With respect to the Director's argument that *Erickson* was a novel case, the Appellant submits that its novelty was not due to the Notice of Appeal but to the evidence gathered during the hearing, and that the Tribunal made this clear at the time. The Appellant also states that the Appellants in *Erickson* were unsuccessful because they did not provide sufficient evidence to meet the legal tests to prove their case, citing *Erickson* at paras. 822 and 841.

The Appellant agrees with the Director's submission that this case should not repeat the *Erickson* hearing, and therefore submits that Zephyr's Motion on the scoping of evidence is integral to establishing parameters of appeals of REAs.

The Appellant submits that the Director is aware of the real issues and the case to be met relating to serious harm to human health in this matter. The Appellant further submits that it is not possible to say that this is the clearest of cases to be dismissed or that there are obviously no genuine issues for trial.

The Appellant argues that it has met the requirement of the statutory test in section 142.2 (1) of the *EPA*. The Appellant acknowledges that the Tribunal has discretion under Rule 111 to dismiss this appeal for failing to set out a statement of the issues and material facts as required by Rule 29(e), but submits that this appeal should not be dismissed because a solution to allow for a fair hearing is available given that the Tribunal has jurisdiction under its Rules to allow that the Notice of Appeal be amended.

In respect of the second Motion to dismiss, the Appellant relies on *Canada Post Corp. v. Epost Innovations Inc.*, [1999] F.C.J. No. 1297 at paras. 14-16 (Fed. Ct. T.D.) and *Chen v. Canada (Minister of Citizenship & Immigration)*, [2006] F.C.J. No 500 at paras. 8 & 11 (Fed. Ct. T.D.), to submit that the purposes for providing particulars in pleadings are:

- to inform the party of the nature of the case it has to meet;
- to limit and decide the issues to be heard;
- to limit the generality of the claim;
- to make clear what is unclear;
- to determine whether the appeal discloses a legally valid case;
- to allow the party to know the outline of the case against it;
- to bind the party down to a definite story; and
- to ensure that the party is not left guessing what the opposing party is alleging.

The Appellant submits that it has satisfied these requirements in its revised amended Notice of Appeal.

The Appellant asserts that the Director is still seeking the evidence that the Appellant intends to rely on, and submits that this information need only be provided at the disclosure stage. The Appellant notes that a distinction must be drawn between material facts and evidence, and that the purpose of the Notice of Appeal is to set out the nature and scope of the appeal, rather than to provide extensive evidence or set out all points in great detail. In support of this, the Appellant refers to Rule 25.06 of the Rules of Civil Procedure. The Appellant notes that the revised amended Notice of Appeal is a similar length to the statement of claim in a civil class action suit.

The Appellant also notes that it is no longer pursuing the ice throw issue raised in the revised amended Notice of Appeal.

The Appellant submits that the Director is incorrect in asserting that the exceedance of permitted sound levels described in sub-issue 1(b) is not an allowable issue for adjudication. The Appellant states that this issue is directly relevant to harm to human health because the Director has taken the position that the MOE is able to address exceedances by the Approval Holder by requiring compliance with the 40 dbA standard. The Appellant also submits that it would be prejudicial to remove this issue as the REA references compliance and questions remain as to whether or not the MOE is capable of measuring and predicting exceedances.

With respect to sub-issue 1(c), the Appellant asserts that the Director is legally required to consider the SEV under section 11 of the *EBR*, and the SEV requires the Director to take into account a number of factors, including economic effects. The Appellant states that the Director has failed to consider economic effects, and that engaging in the project has had impacts on individuals in the community who have experienced stress, which constitutes serious harm to human health. The Director submits that the language in the statute concerning "whether engaging" the project has a broader meaning than the operation of the turbines.

The Appellant submits that the legal threshold for striking a pleading set out in *R. v. Imperial Tobacco Ltd.*, [2011] S.C.J. No. 42 at para. 17, has not been met in this case, stating that a claim can only be struck if it is plain and obvious that the pleading discloses no reasonable claim. The Appellant further argues that each of its issues clearly discloses a reasonable claim and should not be struck.

In response to the Director's submission that the Appellant has identified every portion of the REA as being under appeal without stating what is being appealed in relation to each of those portions, the Appellant submits that the Notice of Appeal goes on for several pages with details and particulars relating to the portions under appeal.

In response to the Director's questions about the range of the sound levels that the Appellant raises as a concern, the Appellant states that it will be leading evidence to support a finding that there is serious harm to human health at sound levels of 30 dbA, and further information about those sound levels and the specific health effects will be brought forward in evidence during the disclosure process.

The Appellant submits that the MOE compliance protocol brought forward by the Director was not properly introduced into evidence, and further submits that the protocol states that complaints about wind turbine noise in the infrasound and ultrasound ranges, along with shadow flicker and heath effects, are beyond the scope of the document.

The Appellant asserts that it would be too onerous, given the 15 day appeal period, to require appellants to provide detailed particulars concerning the circumstances of every individual affected by an industrial wind turbine project.

Findings:

The Appellant served and filed the original Notice of Appeal dated November 15, 2011. Further to the Tribunal's Order dated December 16, 2011, the Appellant filed an amended Notice of Appeal on December 21, 2011. With the Motion to dismiss scheduled to resume on January 6, 2012, the Appellant served and filed a revised amended Notice of Appeal dated January 4, 2012.

The Notice of Appeal dated January 4, 2012 is attached as Appendix A. It includes text from the Notice of Appeal with the new underlined paragraphs and various words that were struck out.

The issue raised in the Motion to dismiss incorporates two sub-issues: first, does the Notice of Appeal meet the minimum statutory requirements for a Notice of Appeal; and second, does the Notice of Appeal meet the requirements under Rule 29(e) of the Tribunal's Rules of Practice. As such, the Tribunal's determination of the Motion focuses on a narrower issue, namely the sufficiency of the Notice of Appeal as measured against the requirements of the *EPA* and Tribunal Rules, than might otherwise be the case when the Tribunal employs a broader "genuine issue" approach, which often involves an analysis of the underpinnings of an appeal and not just the Notice of Appeal itself.

Sub-Issue No. 1: Whether the Notice of Appeal dated November 15, 2011 meets the minimum statutory requirements for a Notice of Appeal

The Tribunal has already disposed of this sub-issue, without reasons, in its Order dated December 16, 2011. The findings below constitute the reasons for that Order.

For the purposes of this sub-issue, the Director states that the November 15, 2011 Notice of Appeal is the relevant version to be considered. The Tribunal agrees with this position because if the Notice of Appeal dated November 15, 2011 does not meet mandatory statutory requirements, then the Motion to dismiss must be granted because the Tribunal would lack the jurisdiction to hear the matter. Moreover, if the Tribunal had no jurisdiction or authority, it could not order the Appellant to address the deficiency because the statutorily defined time limit to file a Notice of Appeal, namely, 15 days from the issuance of the REA, has lapsed. Hence, for sub-issue no. 1, the Tribunal will be referring to the November 15, 2011 version of the Notice of Appeal (that is, the Notice of Appeal in Appendix A without any of the additions or deletions noted in the text).

The *EPA* sets out the requirements with respect to a Notice of Appeal for a REA. Section 142.2(1) states that an applicant for a hearing required in section 142.1 shall state in the Notice of Appeal the following:

> (a) a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(i) serious harm to human health, or

(ii) serious and irreversible harm to plant life, animal life or the natural environment;

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

(c) the relief sought.

In the Director's Motion to dismiss, it would appear that there is no issue with respect to whether the Notice of Appeal meets section 142.2(1) (c). Hence, the issue in this proceeding is whether the Appellant's Notice of Appeal includes a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health and whether the Appellant was specific enough with respect to the portions of the REA being appealed.

The Appellant's Notice of Appeal attempts to satisfy section 142.2(1) of the *EPA* by stating that:

> Industrial wind turbines are known to cause a range of serious health effects in certain individuals. These effects occur at sound levels lower than levels prescribed and at distances greater than the set-backs prescribed for the renewable energy project in accordance with the Renewable Energy Approval.

The Notice then outlines three sub-issues (with the primary issue being whether the project as approved will cause serious harm to human health) along with eight paragraphs outlining the material facts.

The Director contends that the Appellant is raising the same issue that was raised and addressed in the appeal of the *Erickson* case, which involved the Kent-Breeze Wind Farm. The Director also states that the issue as stated is too vague and does not give sufficient specificity that would allow preparation of the case to be met, and in particular, does not provide guidance in terms of materials that must be disclosed, and other such matters.

The Tribunal disagrees with the position of the Director in this respect. First, the *EPA* asks that the Appellant must describe "how engaging in the renewable energy project in accordance with the Renewable Energy Approval will cause serious harm to human health." The Notice of Appeal, in its very essence, alleges that harm to human health will occur because health effects occur at sound levels "lower than levels prescribed and at distances greater than the set-backs prescribed…"

In the normal course of events, a Notice of Appeal is general in nature and only identifies the grounds to be advanced. "Grounds" of appeal usually refer to bases or areas that are being challenged which identify the boundaries of the appeal by identifying the areas in contention and those areas that will not be challenged. The point to be made is that the grounds of an appeal, while providing notice to the responding parties as to what the appeal is about, are intended to disclose the key or salient reasons the decision being appealed needs to be changed. The next step in the process is to identify the specific "issues" within the grounds that will provide the real

insight into the scope and substance of the appeal. Rule 29(e) of the Tribunal Rules of Practice requires such specificity, not the *EPA*.

In this matter, it is clear from the Notice of Appeal that the Appellant will not argue that this project will cause "serious and irreversible harm" to plant or animal life or the natural environment. Instead, the Appellant is arguing that the operation of the wind turbines approved by the Director will cause serious harm to human health because the set-backs are not sufficient to protect those who live near the wind turbines. The Tribunal finds that the Notice of Appeal gives the Parties sufficient indication of the Appellant's case so as to satisfy section 142.2(1)(a). The Tribunal agrees that this is a similar issue to the one raised in *Erickson*. However, the Tribunal has no understanding at this point in time whether the Appellant has new or different evidence to adduce; whether there is something particular to this project versus a previous one; or whether there is some other matter not contemplated previously by the Tribunal. The Tribunal has the power to address any attempt by the Appellant to simply re-litigate the previous case at the hearing of this matter.

The fact that the Tribunal finds that the Appellant's Notice of Appeal meets the statutory requirements under the *EPA*, does not mean that such grounds will be acceptable in every future appeal. This appeal is only the second appeal of a REA. As more REAs are appealed and dealt with by the Tribunal, more specificity will likely be necessary.

The Director also challenges the Notice of Appeal dated November 15, 2011 on the basis that it does not meet the requirements of section 142.2(1)(b). That section states that the Appellant must identify the portions of the REA that the Appellant is appealing. In the November 15, 2011 Notice of Appeal, the Appellant states that the portions being appealed are: Terms and Conditions; General; Noise Performance Limits; Acoustic Audit; Operation and Maintenance; Record Creation and Retention; Notification of Complaints; and Reasons.

Section 142.2(1)(b) of the *EPA* does not indicate how much detail is required to meet its intention. It simply states that the relevant portions of the REA must be identified. The Tribunal finds that the Appellant has identified potions of the REA that are to be challenged.

The Tribunal recognizes that the listing of various portions of the REA in the manner undertaken by the Appellant is not tremendously helpful to the Parties in scoping the appeal. However, it is anticipated that Rule 29(e) of the Tribunal's Rules of Practice would achieve this end.

Hence, the Tribunal finds the Appellant's Notice of Appeal dated November 15, 2011 meets the minimum requirements under section 142.2(1) of the *EPA*. The first Motion to dismiss brought by the Director is, therefore, dismissed.

Sub-Issue No. 2: Whether the Notices of Appeal dated December 21, 2011 and January 4, 2012 meet the requirements under Rule 29(e) of the Tribunal's Rules of Practice

Although the Appellant in this matter has met the minimum requirements under section 142.2(1) of the *EPA*, the Appellant must also satisfy Rule 29(e) of the Tribunal's Rules of Practice. This Rule requires that the Appellant include in the Notice of Appeal under an appeal of a REA a "statement of the issues and material facts relevant to the subject matter of the appeal that the Appellant intends to present at the main Hearing". If the Notice of Appeal does not include these requirements, the Tribunal has discretion under the Rules of Practice to dismiss an appeal or to order an appellant to provide that information. It should be noted that failing to abide by the Rule requirement is different from not satisfying a mandatory statutory requirement (see *Cassidy v. Ontario (Director, Ministry of the Environment)* (2006), 21 C.E.L.R. (3d) 254 (Ont. Env. Rev. Trib.)).

In the Notice of Appeal dated November 15, 2011, the Appellant identified the issues as follows:

> Issue # 1 Will the project as approved cause serious harm to human health?
>
> Sub-issue #1(a) Will the project as approved cause serious harm to human health of non-participants?
>
> Sub-issue #1(b) Will the project as approved cause serious harm to human health if the approval authority is unable to properly predict, measure or assess sound from the facilities including audible noise and/or low frequency noise and/or infrasound?
>
> Sub-issue #1(c) Will the project as approved cause serious harm to human health because the approval does not comply with the approval authority's Statement of Environmental Values?

The two subsequent Notices of Appeal reproduce the same issues.

The November 15, 2011 Notice of Appeal provides eight paragraphs of "material facts" that follow the Issues section. The December and January Notices of Appeal include additional text. For example, four new narrative paragraphs have been added in the Issues section. Other changes have been made to the Material Facts section. Hence, the issue for the Tribunal to decide is whether the Issues and Material Facts sections of the Notice of Appeal satisfy the requirements in Rule 29(e), namely, "a statement of the issues and material facts relevant to the subject matter of the appeal that the Appellant intends to present at the main Hearing".

In its December 16, 2011 Order, the Tribunal ordered the Appellant to serve on the Parties and file with the Tribunal a statement that meets the requirements of Rule 29(e) of the Tribunal's Rules of Practice. As of the date of that Tribunal Order, the November 15, 2011 Notice of Appeal did not meet the Rule 29(e) requirements.

The Tribunal made its December 16, 2011 Order regarding Rule 29(e) on the basis that the "issues" and "material facts" section of the Notice of Appeal taken together, did not provide sufficient information and detail to satisfy Rule 29(e).

The requirement to outline the issues and material facts in Rule 29(e) is to inform all of the Parties what key matters are to be challenged, and therefore what matters will not be involved, in the Hearing. The identification of the issues and material facts as required in Rule 29 is intended to have enough specificity to allow the other Parties, and in this case, the Director and the Approval Holder, to properly prepare their cases, and not waste time and resources on dealing with every issue or fact that could possibly arise in an appeal.

In the November 15, 2011 Notice of Appeal, the issues and material facts sections, taken together, did not meet the goals above. Hence, the Tribunal directed that the Appellant serve on the other Parties and file with the Tribunal a statement in accordance with Rule 29(e) of the Tribunal's Rules of Practice. The Tribunal did not dictate to the Appellant whether the issues or material facts sections (or both) required more specificity. It left the matter to the Appellant. As of the date of the Tribunal's December 16, 2011 Order, the Appellant knew that it had to submit an improved statement under Rule 29(e) in order for the responding Parties to better understand the case to be met.

The Tribunal wishes to note that there is not a prescription for drafting a Notice of Appeal. Some appellants may wish to utilize broadly worded issues, as here, while others may opt for much more detailed issue statements. Where a broad approach is used, it becomes even more important for the material facts section to include specific details. The November 15 Notice of Appeal had broad issue statements accompanied by a statement of facts that was not specific enough. The subsequent Notices add more specificity and material facts (recognizing that much of the added details have been placed in the issues section, even though they are of a "material fact" nature).

On December 21, 2011, the Appellant filed an amended Notice of Appeal, which included the new material underlined in Appendix A. After the filing of this Notice, the Director requested that the Tribunal schedule another day to continue hearing the Motion to dismiss. On January 6, 2012, the Motion to dismiss continued; however, by this time, the Appellant had filed a revised amended Notice of Appeal dated January 4, 2012 and these revisions are reflected by those words that are crossed out in Appendix A. Hence, the Tribunal will now review the January 4, 2012 Notice of Appeal.

The issues section of the January 4, 2012 Notice of Appeal elaborates on the matters that the Appellant intends to present to the Tribunal. The Tribunal interprets sub-issue #1(a) to state that the Appellant is alleging that wind turbine projects already approved (either under the current regulatory framework or the previous one) *will* cause harm to human health even if they

are operating within the terms and conditions of the REA and within the approved setbacks. The Notice then gives the types of health problems that are expected.

For the purposes of allowing the responding Parties to prepare their case, the Tribunal finds that the addition and revised text set out in Appendix A outlining the issues and material facts provides sufficient detail to satisfy the requirements of Rule 29(e) of the Tribunal's Rules of Practice. It must be noted that this appeal is only the second REA appeal. As more appeals occur, the Tribunal expects that the "issues" and "material facts" may become more specific and focused.

Further, the Tribunal agrees with the Parties that the Appellant need not disclose what evidence it will rely upon in the Notice of Appeal itself. The process established under the Rules of Practice sets out the time frame when the evidence must be disclosed and it is fairly early in the process.

The "Material Facts" section of the Notice of Appeal dated January 4, 2012 contains eight paragraphs. The first sentence reads:

> Expert opinion, scientific information and literature supports the Appellant's contention that industrial wind turbines operating at sound levels and /or located at the distances approved for this project are more likely than not to cause serious harm to human health.

The second paragraph then details the alleged health impacts and provides some facts relating to the Appellant's theory of causation. As noted above, four new paragraphs in the Issues section also provide additional detail with regard to the material facts to be presented, including the following material facts:

- A number of specific previous projects approved using the same or similar sound levels (30 dbA and above) and distance setbacks (550m to 10km) have caused serious harm to human health, including sleep disturbance, annoyance, stress, headache, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems with concentration and memory, panic episodes and interference with quality of life;

- Previous projects have demonstrated the importance of controlling, at minimum, the audible sound levels emitted by the project, and previous projects that have also demonstrated exceedances of, at minimum, approved audible sound levels; however, because the approval authority has no ability to control these exceedances, this project will be permitted to operate at any sound levels, resulting in serious harm to human health; and

- The Director is causing great stress that amounts to serious harm to human health for residents, due to his failure to comply with the MOE's Statement of Environmental Values, in particular his failure to consider the economic impacts of the Zephyr project or

> the precautionary principle/approach, and his failure to provide for transparency, timely report or enhanced ongoing engagement with the public.

The requirement in Rule 29(e) for "Material Facts" suggests that the Appellant must outline the factual underpinnings or the factual theory that supports its case. The material facts section of the Notice of Appeal should be the factual narrative that puts flesh on the bones of the issues. The Appellant should be expected to set out a concise statement of the facts on which it will lead evidence at the Hearing. The rationale for requiring the provision of material facts is similar to that for requiring a clear statement of the issues in the appeal: that is, so that the other Parties will have a clear understanding of the case so that they can prepare for the Hearing with confidence that they will not be taken by surprise at the Hearing. This is not a requirement for other *EPA* hearings before the Tribunal, but it is especially important for REA hearings under section 142.1 of the *EPA* because of the expedited nature of the proceedings.

In this proceeding, the Notice of Appeal is drafted in a way that mixes together issues, material facts and argument. While it could be drafted much more clearly, when read as a whole, the revised amended Notice of Appeal does provide a coherent narrative of the Appellant's case. Where specificity and material facts were lacking in the November version, they are now found in the new version (recognizing that the Appellant chose to add that detail to the Issues section even though most of the new text is more properly characterized as additional or revised material facts). For the responding Parties, the major frustration with this narrative is that it is a general one that could apply to virtually any REA for a wind turbine. In other words, it is not specific to the REA under appeal in this proceeding. In particular, the Appellant does not identify who will be harmed and how those individuals will be uniquely harmed by the operation of the specific project approved by the Director here. No doubt, the explanation for this "general" enunciation of the facts is that the Appellant is framing the key issue in the proceeding as a general one, namely, that this project is similar to others and that harm will be caused, as with those others, even if the noise levels are within the regulatory limits and the regulated set-backs are put in place. It is apparently the view of the Appellant that it does not need to demonstrate "unique" harm in this case based on its contention that all similar projects cause harm. This approach is similar to what occurred in *Erickson*, and while it is open to the Appellant to hold such a view, it will have to bring forward sufficient evidence in this appeal to prove that contention. There was not such sufficient evidence in *Erickson.*

While the Appellant's approach may be frustrating for the Director and the Approval Holder, there is no indication that the Notice of Appeal as revised is unfair. It appears that the responding Parties now do have an understanding of the facts that the Appellant will attempt to prove in the Hearing.

Hence, the Tribunal finds that, for the purposes of this proceeding, the Appellant's January 4, 2012 Notice of Appeal meets the requirements of Rule 29(e). However, as more REA appeals arise that are not of the "general challenge" approach, the Tribunal expects that the issues and

the material facts will serve to identify with greater particularity what is being challenged and provide more specific facts in support of each challenge.

Order

The Tribunal dismisses the Director's Motion to dismiss.

Motion Dismissed

_____
Paul Muldoon, Panel Chair

_____
Marcia Valiante, Member

_____
Maureen Carter-Whitney, Member

Appendix A – Notice of Appeal dated January 4, 2012

Appendix A

Notice of Appeal dated January 4, 2012

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January 4, 2012

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To Whom It May Concern:

Re: Notice of Appeal for Renewable Energy Approval Number 6250-8KFTCQ issued October 31, 2011 to Zephyr Farms Limited for the Brooke-Alvinston Wind Farm - EBR Registry Number 011-3779, posted November 1, 2011

Name and address of Appellant:

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Statement of appeal of Director's decision in relation to a renewable energy project:

The Appellant is appealing the decision of the Director to issue a Renewable Energy Approval to Zephyr Farms Limited to engage in the Brooke-Alvinston Wind Farm renewable energy project in respect of a Class 4 Wind facility consisting of the construction, installation, operation, use and retiring of the following: four (4) wind turbine generators, each rated at 2.5 MW generating output capacity with a total name plate capacity of 10 MW.

Copy of decision under appeal:

A copy of the instrument decision notice under appeal is attached being Renewable Energy Approval Number 6250-8KFTCQ issued October 31, 2011 - EBR Registry Number 011-3779, posted November 1, 2011.

Identification of the portions of the Renewable Energy Approval that the Appellant is appealing:

The portions of the Renewable Energy Approval that the Appellant is appealing are the following sections:

Terms and Conditions:

General

Noise Performance Limits

Acoustic Audit

Operation and Maintenance

Record Creation and Retention

Notification of Complaints

Reasons

Description of how engaging in the renewable energy project in accordance with the Renewable Energy Approval will cause serious harm to human health:

Industrial wind turbines are known to cause a range of serious health effects in certain individuals. These effects occur sound levels lower than levels prescribed and at distances greater than the set-backs prescribed for the renewable energy project in accordance with the Renewable Energy Approval.

Statement of the issues and material facts relevant to the subject matter of the appeal that the Appellant intends to present at the main Hearing:

Issue(s)

Issue #1 Will the project as approved cause serious harm to human health?

Sub-issue #1(a) Will the project as approved cause serious harm to human health of non-participants?

> Previous projects approved using the same or similar sound levels (30 dbA and above) and distance setbacks (550m to 10km), ~~including projects~~ in Ripley, Melancthon, Clear Creek, Kingsbridge 1, Kruger Energy Port Alma, Enbridge Ontario Wind Farm, Mars Hill, Vinyl Haven and Falmouth, Maine and Kent Breeze-MacLeod have caused serious harm to human health, including ~~but not limited to~~ sleep disturbance, annoyance, stress, headache, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems with concentration and memory, panic episodes and interference with quality of life.
>
> The Zephyr project as approved will operate at sound levels and setback distances that will expose receptors to the same conditions that have previously caused serious harm to human health and will cause the same effects.
>
> ~~Previous projects have demonstrated that ice throw is a significant issue that if not addressed will cause serious harm to human health. The Zephyr project as approved has failed to provide any analysis of ice throw impacts. The Zephyr project as approved will cause serious harm to human health due to ice throw.~~

Sub-issue #1(b) Will the project as approved cause serious harm to human health if the approval authority is unable to properly predict, measure or assess sound from the facilities including audible noise and/or low frequency noise and/or infrasound?

> Previous projects such as the Kent Breeze-MacLeod project have demonstrated the importance of controlling, at minimum, the audible sound levels emitted by the project. Previous projects such as Melancthon have also demonstrated exceedances of, at minimum, approved audible sound levels. However, the approval authority has no ability to control these exceedances. Because there are no approved protocols, the Zephyr

project will be permitted to operate at any sound level(s), thereby causing serious harm to human health.

Sub-issue #1(c) Will the project as approved cause serious harm to human health because the approval does not comply with the approval authority's Statement of Environmental Values?

The Director is required to comply with the approval authority's Statement of Environmental Values ("SEV"). The Director has failed to consider the economic impacts of the project. The Director's failure to consider these impacts is causing great stress i.e. serious harm to human health for residents. The Director has failed to consider the precautionary principle/approach. The Director's failure to consider this principle/approach is causing great stress i.e. serious harm to human health for residents. With regard to testing and data collection for infrasound and/or low frequency noise and/or audible noise, the Director has failed to provide for transparency, timely report or enhanced ongoing engagement with the public. The Director's failure to provide for these is causing great stress i.e. serious harm to human health for residents.

Materials Facts

Expert opinion, scientific information and literature supports the Appellant's contention that industrial wind turbines operating at the sound levels and/or located at the distances approved for this project are more likely than not to cause serious harm to human health.

Examples of these effects include sleep disturbance, annoyance, stress or psychological distress, inner ear symptoms, headaches, excessive tiredness, loss of quality of life, stress and physiological distress. Stress and sleep deprivation are well known risk factors for increased morbidity including significant chronic disease such as cardiovascular problems including hypertension and ischemic heart disease. These effects are more likely than not caused by exposure to infrasound and/or low frequency noise and/or audible noise and/or visual impact and/or shadow flicker produced by industrial wind turbines. The tonality, pulsating nature of the noise and the lack of nighttime abatement are further factors. ~~Other effects include exposure to ice throw/fall and turbine failure. These effects are caused by the operation and/or failure of industrial wind turbines or their individual components.~~ The effects of the project on human health will be serious.

In addition, current projects are known to exceed existing requirements for noise levels. The approval authority also has no reliable method of predicting, measuring or assessing exposure to infrasound and/or low frequency noise and/or audible noise in order to protect persons from these effects.

As well, the approval has been granted prior to the approval authority making any determination regarding the effects on human health and whether or how to regulate low frequency noise emissions from industrial wind turbines. Furthermore, a Research Chair has been selected but to date has released no findings.

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The Tribunal's decision must also be consistent with any policies issued by the Minister of the Environment designed to guide decisions of this kind that were in place at the time the Director's decision was made. The Ministry's SEV is such a policy. The project might significantly affect the environment. The approval was not exempted. As a result, it was the Minister's responsibility through the Ministry and its Director to take every reasonable step to ensure that the SEV was considered.

In this case, the Ministry did not consider the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society. More specifically, the economic impacts of the project on property values were not considered.

The Ministry did not use a precautionary, science-based approach in its decision-making to protect human health and the environment. More specifically, despite the risk of harm to humans from industrial wind turbines the approval was granted without resolution of the scientific uncertainty surrounding these effects.

The Ministry did not encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making. More specifically, there are no provisions requiring transparency, timely report or enhanced ongoing engagement with the public regarding testing and data collection for infrasound and/or low frequency noise and/or audible noise.

Description of relief requested:

The Appellant requests that the Environmental Review Tribunal revoke the decision of the Director to issue a Renewable Energy Approval to Zephyr Farms Limited for the Brooke-Alvinston Wind Farm.

Indication of Appellant's intention to seek a stay of the decision:

The Appellant will be seeking a stay of the decision.

ERIC K. GILLESPIE
PROFESSIONAL CORPORATION

Eric K. Gillespie
EKG/am
Encl.

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