

Federal Court



Cour fédérale

Date: 20250602

Docket: T-2278-22

Citation: 2025 FC 983

Ottawa, Ontario, June 2, 2025

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**FEDERATION OF NOVA SCOTIA
NATURALISTS and EAST COAST
ENVIRONMENTAL LAW ASSOCIATION
(2007)**

Applicants

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Minister of Environment and Climate Change [the Minister] to prepare and, on September 29, 2022, publish the *Recovery Strategy (Amended) and Action Plan for the Piping Plover melodus subspecies* (Charadrius

melodus melodus) in Canada [the Amended Recovery Strategy] under subsection 45(1) of the *Species at Risk Act*, SC 2002, c 29 [SARA]. Specifically, the Applicants, which are non-profit environmental organizations, challenge section 7.1 and Appendix C of the Amended Recovery Strategy, which identify critical habitat for the Piping Plover – *melodus* subspecies [Plover], an endangered shorebird found in Québec and Atlantic Canada [the Decision].

[2] The Amended Recovery Strategy replaced the *Recovery Strategy for the Piping Plover* (*Charadrius melodus melodus*) in Canada, published in August 2012 [the Recovery Strategy]. The Applicants assert that the Amended Recovery Strategy adopted an approach to critical habitat identification, different from that used in the Recovery Strategy, and that the new approach is unreasonable and contrary to the SARA. The Applicants refer to this new approach as the “bounding box approach”, the Applicants’ articulation of which will be explained later in these Reasons. The Applicants seek: (a) an order quashing the Decision and sending it back to the Minister for reconsideration in accordance with the Court’s reasons; (b) a declaration from this Court that the critical habitat identification in the Amended Recovery Strategy is unreasonable and contrary to the SARA; and (c) a more general declaration that the bounding box approach to critical habitat identification is contrary to the SARA.

[3] The Respondent, the Minister, contends that the Decision is reasonable and that the critical habitat identification within the Amended Recovery Strategy complies with the SARA. In so arguing, the Respondent takes the position that particular deference should be owed to the Minister, because the Decision involves a scientific determination.

[4] As explained in further detail below, this application for judicial review is allowed, because the Decision is unreasonable in that it does not intelligibly respond to the principal concerns raised by the Applicants in their submissions to the Minister through the public consultation process leading to the publication of the Amended Recovery Strategy. My Judgment will quash the Decision and send it back to the Minister for reconsideration in accordance with the Court's reasons. However, I will also suspend for 10 months the operation of the order quashing the Decision, to avoid a potential gap in the legislative protection of Plover while the Minister performs the required reconsideration. I decline to grant the declaratory relief that the Applicants seek.

II. **Background**

[5] The first-named Applicant, Federation of Nova Scotia Naturalists [Nature Nova Scotia] is a registered non-profit society in Nova Scotia, founded in 1990. The affidavit of Robert Bancroft, a biologist and the president of Nature Nova Scotia since 2009, affirmed on December 14, 2022, in support of this application [the Bancroft Affidavit], describes Nature Nova Scotia as a federation of natural history societies and other grassroots environmental groups in Nova Scotia, which undertakes and supports networking, research, education, and advocacy initiatives for nature, including research and advocacy on habitat protections for local species at risk. The Bancroft Affidavit details Nature Nova Scotia's history of research and advocacy work in relation to Plover, focusing on protection of Plover's habitat.

[6] The second-named Applicant, East Coast Environmental Law Association (2007) [ECEL], is a registered charity in Nova Scotia, incorporated on April 16, 2007. The affidavit of

Lisa Mitchell, executive director and senior lawyer with ECEL, affirmed December 15, 2022 [the Mitchell Affidavit], describes ECEL's mission as advocating for progressive environmental laws and policies for Atlantic Canada, providing public legal education, and sharing legal skills to support individuals, communities, and organizations that are working to prevent or redress environmental harms. ECEL's work focuses on four main areas: (a) healthy communities; (b) species and habitat; (c) climate and energy; and (d) marine and freshwater. The Mitchell Affidavit describes ECEL's history of research and advocacy related to the implementation of species at risk legislation in the Atlantic provinces and at the federal level, with particular focus on the identification and protection of critical habitat.

[7] Plover is a small, stocky shorebird that nests in coastal areas of Québec, New Brunswick, Prince Edward Island, Nova Scotia, and insular Newfoundland, prior to migrating primarily to the Atlantic coast of the United States to winter. Generally, Plover use sand, gravel, or cobble-dominated open ocean-front beaches, pocket beaches, and barriers (islands, beaches, spits and bars) in marine coastal areas for most life processes.

[8] Plover is listed under Part 2 of Schedule 1 of the SARA as an endangered species, which is defined under the SARA as a wildlife species facing imminent extirpation or extinction (s 2(1)). Plover was also assessed as endangered by the Committee on the Status of Endangered Wildlife in Canada [COSEWIC] in November 2013. The Amended Recovery Strategy notes that, despite active conservation programs throughout Atlantic Canada and Québec, the number of Plover breeding pairs declined more than 30% between 2006 and 2016. Factors determined in the Amended Recovery Statement to threaten the survival of Plover include residential and commercial development, human intrusions and disturbance, problematic native

species/diseases, natural system modifications, pollution, climate change and severe weather, and energy production and mining.

[9] The SARA requires, where a wildlife species is listed as an endangered species, that the competent minister(s) prepare a strategy for that species' recovery (s 37(1)). The Amended Recovery Strategy identifies the competent ministers (defined under subsection 2(1) of the SARA) for Plover as the Minister and the minister responsible for the Parks Canada Agency (who at the time was also the Minister). Additionally, in respect of a recovery strategy, the competent minister(s) must prepare one or more action plans based on the recovery strategy (s 47).

[10] The SARA defines a recovery strategy as one included in the public registry under subsection 43(2), including any amendment to it included in the public registry under section 45, and defines an action plan as one included in the public registry under subsection 50(3), including any amendment to it included in the public registry under section 52 (s 2(1)). The evidentiary record filed by the Minister in response to this application includes an affidavit of Sarah Wren, Director of the Species at Risk Implementation Division of the Canadian Wildlife Services [CWS] of Environment and Climate Change Canada [ECCC] since 2018, sworn on February 14, 2023 [the Wren Affidavit]. Ms. Wren describes a recovery strategy as a planning document that identifies what needs to be done to stop or reverse the decline of a species and an action plan as a planning document that describes in more detail those actions needed to implement a recovery strategy.

[11] In preparing a recovery strategy, the competent minister(s) must determine whether the recovery of the wildlife species is technically and biologically feasible (SARA, s 40) and, if so, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include the components listed in paragraphs 41(1)(a)–(g) of the SARA. In particular, paragraph 41(1)(c) requires the following to be included in a recovery strategy:

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| <p>(c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;</p> | <p>c) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible, notamment les informations fournies par le COSEPAC, et des exemples d'activités susceptibles d'entraîner sa destruction;</p> |
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[12] Regarding an action plan, the SARA requires that an action plan include the components listed in paragraphs 49(1)(a)–(f). In particular, paragraphs 49(1)(a)–(c) require the following:

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|---|--|
| <p>(a) an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;</p> | <p>a) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible et d'une façon compatible avec le programme de rétablissement, et des exemples d'activités susceptibles d'entraîner sa destruction;</p> |
| <p>(b) a statement of the measures that are proposed to be taken to protect the species' critical habitat, including the entering into of agreements under section 11;</p> | <p>b) un exposé des mesures envisagées pour protéger l'habitat essentiel de l'espèce, notamment la conclusion d'accords en application de l'article 11;</p> |
| <p>(c) an identification of any portions of the species' critical habitat that have not been protected;</p> | <p>c) la désignation de toute partie de l'habitat essentiel de l'espèce qui n'est pas protégée;</p> |

[13] Subsection 2(1) of the SARA defines as follows both the term “critical habitat” and the term “habitat” employed therein:

critical habitat means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species.

habitat essentiel L’habitat nécessaire à la survie ou au rétablissement d’une espèce sauvage inscrite, qui est désigné comme tel dans un programme de rétablissement ou un plan d’action élaboré à l’égard de l’espèce.

habitat means

habitat

(a) in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and

a) S’agissant d’une espèce aquatique, les frayères, aires d’alevinage, de croissance et d’alimentation et routes migratoires dont sa survie dépend, directement ou indirectement, ou aires où elle s’est déjà trouvée et où il est possible de la réintroduire;

(b) in respect of other wildlife species, the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced.

b) s’agissant de toute autre espèce sauvage, l’aire ou le type d’endroit où un individu ou l’espèce se trouvent ou dont leur survie dépend directement ou indirectement ou se sont déjà trouvés, et où il est possible de les réintroduire.

[14] The Minister produced the Recovery Strategy in 2012, which identified the criteria for identification of Plover critical habitat as follows under section 7.1:

...any site with suitable habitat (defined in the key habitat attributes section) occupied by at least one nesting pair of [Plover] in at least one year since 1991 (the year of first complete survey coverage) is critical habitat under the [SARA]. The complete list of sites in eastern Canada that currently meet these criteria, and are therefore critical habitat under the [SARA], is in Appendix C.

[15] Appendix C of the Recovery Strategy listed sites identified as critical habitat for Plover.

For each site, Appendix C included the name of the beach, the province where the beach is located, and a set of GPS coordinates. Appendix C also included the following notation:

Note: the coordinates provided in this Appendix are intended to orient the reader to the general location of a given beach. They are not intended to mark the exact centre of the beaches, which are part of dynamic coastal systems and change from time to time. Critical habitat exists at these beaches where the criteria for identification of critical habitat (Section 7.1) have been met.

[16] Below is an example, copied from the Recovery Strategy, of a site identified in Appendix C.

Prov	Beach	longitude (W)	latitude (N)	Land ownership
NS	Oak Island	-63.405	45.848	Private

[17] The subsection, under section 7.1 of the Recovery Strategy, titled “Key habitat attributes” provided as follows:

...Suitable habitat may be roughly approximated by the following key habitat attributes (Boyne and Amirault 1999):

Slope: gently sloping foredune

Beach width: wide stretches of beach that afford protection from flooding at normal high tide

Substrate: sand, gravel, or cobble, or some combination of these

Foredune vegetation density: sparsely vegetated or relatively free of vegetation

The area of beach considered suitable for nesting, feeding and/or cover includes the area of the coastal zone from the low water mark, the intertidal zone and up to the crest or peak of the vegetated dune (typically identified by the presence of marram/beach grass or other dune vegetation). This could include habitat managed for the benefit of the species. Although these are the most common habitat parameters, the subspecies will

occasionally nest in non-traditional habitats such as dredge spoils or in gravel parking areas.

Habitat required for feeding and brood-rearing is generally located in close proximity to nesting sites. Piping plovers (*melodus* subspecies) may use the entire beach area from the intertidal zone to the toe of the foredune. Microhabitat features such as the presence of wrack, driftwood, and ephemeral pools enhance habitat quality by providing feeding opportunities and shelter. The entire beach area from the low water mark and the intertidal zone up to the line of vegetation (marram/beach grass or other vegetation) or up to the crest or peak of the vegetated dune is therefore an important component of critical habitat. Any anthropogenic structure (e.g., wharves, utility poles) not possessing the characteristics of suitable habitat identified above is not identified as critical habitat.

[18] The subsection, again under section 7.1 of the Recovery Strategy, titled “Boundaries of critical habitat” provided further definition regarding the boundaries of what is considered critical habitat as follows:

Identifying boundaries for critical habitat helps to focus conservation efforts and ensure effective enforcement. Coastal features are, however, constantly changing. The following is provided for further clarification and guidance for establishing the limits of critical habitat.

Barrier beaches/islands: The entire barrier beach or barrier beach island area (the intertidal zone from the low water mark, the sand flats, the upper beach, the dune, and associated habitats) associated with the sites presented in Appendix C is critical habitat.

Mainland beaches: The entire area of habitat suitable for nesting, feeding and cover, including the intertidal zone from the low water mark, the sand or mud flats, and upper beach that normally includes dune vegetation (marram/beach grass or other vegetation) up to the crest or peak of the vegetated dune (to facilitate recognition of the boundary line) associated with the sites presented in Appendix C is critical habitat. Breaches that cross from the ocean to bays, low back shores, landward extensions of washovers, washover fans, sand fans, runs from ponds, and pond outlets are considered extensions of the beach habitat and therefore are critical habitat. When a distinct dune crest does not exist (i.e.,

where a dune is not present), the landward boundary of critical habitat extends to the line of permanent non-beach vegetation (e.g. marsh or bog vegetation, shrubs, trees, farmland) or another permanent physical structure (e.g. road, bridge, culvert, river).

[19] Subsections 45(1) and 52(1) of the SARA allow the competent minister(s), at any time, to amend a recovery strategy or action plan, respectively. The Minister released the proposed *Recovery Strategy (Amended) and Action Plan for the Piping Plover melodus subspecies (Charadrius melodus melodus) in Canada* [the Proposed Amended Recovery Strategy] on March 25, 2021, for public comment until June 23, 2021. The Proposed Amended Recovery Strategy was intended to include both a recovery strategy and an action plan as contemplated by the SARA.

[20] The Proposed Amended Recovery Strategy described one of its purposes as updating and refining the “Critical Habitat Section 7” of the Recovery Strategy to provide clarity on the specific locations of critical habitat. Section 7.1 of the Proposed Amended Recovery Strategy, bearing the heading “Identification of the Species’ Critical Habitat”, identified the critical habitat for Plover as follows:

Critical habitat for the [Plover] is identified as all areas of suitable habitat (Table 5) within the defined 1 x 1 grid squares (C-3 – 86). Suitable habitat relates to areas possessing a specific set of biophysical attributes required for [Plover’s] life processes as summarized in Table 5. Note that not all attributes in Table 5 must be present in order for an area to be identified as critical habitat. If the area is capable of supporting [Plover], it is considered critical habitat for the species, even though some of the associated attributes might be missing.

[21] Table 5, titled “The area and associated biophysical attributes required for Piping Plover to carry out its life processes”, is reproduced from the Proposed Amended Recovery Strategy below:

Life stage	Life process	Area or type of site	Biophysical attributes
adults, eggs, young	<ul style="list-style-type: none"> • reproduction: pair formation, nest building, copulation, egg-laying, incubation, hatching; • growth: brood-rearing, fledging; • rest: sleeping, roosting 	<ul style="list-style-type: none"> • backshore [footnote omitted], foredunes [footnote omitted] (including wave washover features and wind-formed blowouts) and beach ridges [footnote omitted] of Atlantic coastal beaches (e.g., ocean-front beaches, pocket beaches) and • barriers (beaches, islands, spits and bars). 	<ul style="list-style-type: none"> • sand, gravel and/or cobble substrate with elevated areas safe from highest tides; • gently sloping foredune (< 9% Boyne et al. 2014); • sparsely vegetated [footnote omitted]; and • relatively wide backshore; with one or more natural elements that provide shelter and/or camouflage (e.g., small clumps of vegetation, stones, logs, driftwood, pebbles, dried macroalgae, shells).
adults, young	<ul style="list-style-type: none"> • nutrition 	<ul style="list-style-type: none"> • foreshore [footnote omitted], backshore, foredunes (including wave washover features and wind-formed blowouts) and beach ridges of Atlantic coastal beaches and barriers in close proximity to breeding sites. 	<ul style="list-style-type: none"> • presence of suitable invertebrate prey resources; • sand, gravel, or cobble substrate; • with one or more natural elements that enhance foraging potential (e.g., dried macroalgae, driftwood, ephemeral pools, tidal flats, sparsely vegetated dunes).

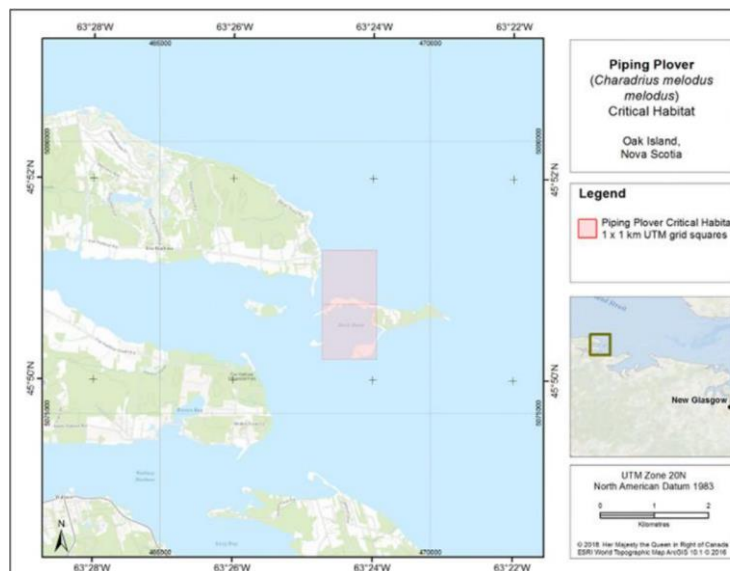
[22] Section 7.1.1, bearing the heading “Information and methods used to identify critical habitat”, includes a further description of the identification of critical habitat as follows:

In [Atlantic Canada and Québec], suitable habitat (Table 5) within the 1x1 km grid representations is identified as critical habitat under SARA and provides enough habitat to meet the long-term population and distribution objectives.

Due to the dynamic nature of coastal ecosystems, critical habitat mapping is represented by 1 x 1 km grid squares where the habitat occupancy criteria (above) and suitable habitat (Table 5) are met. Grid representation is created based on the site scale (1 x 1 km)

and best characterizes the extent and nature of critical habitat. In Quebec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador there are 163, 313, 223, 180 and 75 grid square units, respectively, identified as critical habitat (totaling 954 grid square units). These are presented in Appendix C.

[23] By way of example, Appendix C of the Proposed Amended Recovery Statement included the following map depicting Plover critical habitat at Oak Island, Nova Scotia:



[24] The description below this map stated:

Grid squares containing critical habitat for [Plover] in Nova Scotia. Critical Habitat for [Plover] occurs within these 1km x 1km UTM grid squares (red shaded squares), where the criteria and methodology set out in section 7.1 of the recovery strategy are met. Areas outside of the shaded polygon do not contain critical habitat.

[25] Counsel for the Applicants sent a letter addressed to the Minister dated June 23, 2021, to the Recovery Planning division of ECCC, on behalf of the Applicants and additional organizations, in order to provide the Minister with these organizations' comments on the

Proposed Amended Recovery Strategy [the Comments]. The Comments expressed the Applicants' position that, in contrast to the Recovery Strategy, the Proposed Amended Recovery Strategy's method of identifying critical habitat of the Plover was vague and therefore contrary to the SARA. The Applicants' arguments expressed in the Comments in support of their position will be explained in more detail later in these Reasons. The Comments requested that an amended recovery strategy retain the critical habitat identification method contained in the Recovery Strategy, with a possible exception for the addition and removal of discrete sites.

[26] In response to the Comments, the Applicants' counsel received a letter dated July 12, 2022 [the Response Letter] from Tara Shannon, the Associate Deputy Minister for CWS. The Response Letter stated that one of the primary purposes for updating the Recovery Strategy was updating and refining the section regarding critical habitat to provide clarity on the specific locations of critical habitat. The Response Letter expressed reasons why the critical habitat description in the Recovery Strategy was considered inadequate.

[27] In connection with the attributes necessary for the recovery or survival of Plover, the Response Letter described the attributes in the Proposed Amended Recovery Strategy as largely equivalent to those in the Recovery Strategy, with additional clarification to more accurately and precisely describe the habitat used by Plover. The Response Letter included as an appendix a side-by-side comparison of these sets of attributes. The Response Letter also informed the Applicants' counsel that, based on the Comments, an appendix (included with the Response Letter) would be added to the final amended recovery strategy, summarizing the changes to critical habitat from the Recovery Strategy for each site location.

[28] On August 22, 2022, the Applicants' counsel wrote to the Minister, noting receipt of the Response Letter and reiterating the Applicants' concerns, which the Applicant did not consider to have been addressed by the Response Letter.

[29] The Certified Tribunal Record [CTR] in this application includes a Memorandum to the Director General titled "MTDG 282: for the Final Posting of the Recovery Strategy (Amended) and Action Plan for the Piping Plover *melodus* subspecies (*Charadrius melodus melodus*)", issued by Ms. Wren and endorsed by Julie Spallin, the Director General, Wildlife Management on July 14, 2022 [the Memorandum]. The Memorandum echoes the statement in the Proposed Amended Recovery Strategy that it updates and refines the "Critical Habitat Section 7" of the Recovery Strategy to provide clarity on the specific locations of critical habitat.

[30] The Memorandum also states that all comments from stakeholders were addressed, no outstanding concerns were known, and many comments resulted in changes to the Proposed Amended Recovery Statement (resulting in the final Amended Recovery Statement). In relation to critical habitat identification, the Memorandum indicates that additional critical habitat grid squares were added due to additional data received from Parks Canada Agency, and the actual number of critical habitat sites added and removed by the Amended Recovery Statement was included in the document.

[31] On September 29, 2022, the Minister finalized and published the Amended Recovery Strategy, without making any material changes to the proposed critical habitat identification. I note that the Amended Recovery Strategy was authored by Julie McKnight, a wildlife biologist

whose affidavit affirmed February 14, 2023 [the McKnight Affidavit] is included in the evidentiary record filed by the Respondent in this application.

[32] On October 31, 2022, the Applicants applied for judicial review of the Decision to publish the Amended Recovery Strategy. The Applicants' Notice of Application [NOA] indicates that the substantive relief sought by the Applicants includes: (a) an order quashing the Decision and sending it back to the Minister for reconsideration in accordance with the Court's reasons; (b) an order declaring that the critical habitat identification in the Amended Recovery Strategy is unreasonable and contrary to the SARA; and (c) an order declaring more generally that the identification of critical habitat under the SARA requires, in addition to the biophysical attributes or conditions necessary for the survival or recovery of the species, the identification of a specific geographic location or locations.

[33] In their subsequent Memorandum of Fact and Law dated December 13, 2024, the Applicants have refined the last head relief identified above, explaining that they seek an order declaring that the bounding box approach to critical habitat identification is contrary to the SARA.

[34] In summary, the Applicants take issue with what they term the bounding box approach to critical habitat identification used in the Amended Recovery Strategy. The Applicants describe the bounding box approach as a method of critical habitat identification that maps or describes areas containing critical habitat but uses vague or technical criteria to describe the actual, narrower locations of critical habitat within the mapped or described areas. The Applicants also submit that the maps found in Appendix C of the Amended Recovery Statement and the

shaded grids therein exclude areas of beaches as critical habitat even where the required biophysical attributes may exist. The Applicants argue that the bounding box approach in the Amended Recovery Strategy is unreasonable, because these deficiencies preclude that approach being compliant with the SARA.

[35] The Applicants also argue that the Decision (as reflected in section 7.1 and Appendix C of the Amended Recovery Strategy) is not justified, transparent, or intelligible, because the Decision fails to demonstrate that the Minister considered the SARA's requirements and addressed the key issues raised by the Applicants.

[36] The Applicants further submit that use of the bounding box approach to identify critical habitat in recovery strategies published under the SARA is a systemic issue. In support of this position, the Applicants reference recovery strategies for several species unrelated to Plover, in which they submit that the bounding box approach is used.

[37] Prior to the hearing of this application, the parties each brought interlocutory motions to strike the contents of certain of the other's affidavits, specifically, the Bancroft Affidavit, the Mitchell Affidavit, the McKnight Affidavit, and the Wren Affidavit [the Impugned Affidavits]. By Order dated September 6, 2024, Associate Judge Alexandra Steele largely declined to grant these motions, finding the parties had not established that the circumstances warranted striking the Impugned Affidavits at the interlocutory stage. The Court noted the Respondent's undertaking to strike portions of paragraphs 75 and 77 of the McKnight Affidavit, which the Respondent had conceded contained improper opinion evidence. Those portions have been

redacted from the version of the McKnight Affidavit in the record before the Court in this application.

[38] The Court heard submissions from the parties in this application on May 20 and 21, 2025.

III. **Decision under Review**

[39] As previously noted, the NOA in this matter states that the application challenges section 7.1 and Appendix C of the Amended Recovery Strategy, which together identify critical habitat for Plover. The portions of section 7.1 and Appendix C upon which the parties' arguments rely have been set out earlier in these Reasons and will be revisited in the course of the Court's analysis below. As further elements of the record before the Court, which appear to assist in informing an understanding of the reasons for the Decision, the parties also rely on the Comments, the Response Letter, and the Memorandum.

IV. **Issues**

[40] The parties raise the following preliminary issues for the Court's determination:

- A. Should portions of the Bancroft Affidavit and the Mitchell Affidavit be struck or otherwise given no weight?
- B. Should portions of the McKnight Affidavit and the Wren Affidavit be struck or otherwise given no weight?

[41] As to the merits of this application, the parties' submissions raise the following issues for the Court's determination:

- A. Is the Decision reasonable?
- B. If the Court concludes that the Decision is not reasonable, which remedy or remedies should the Court grant?

[42] As contemplated by the articulation of the first substantive issue listed above, the merits of the Decision are to be assessed on the reasonableness standard of review, as informed by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov].

V. **Analysis**

- A. *Should portions of the Bancroft Affidavit and the Mitchell Affidavit be struck or otherwise given no weight?*

[43] The Respondent argues that each of the following paragraphs (and exhibits referenced therein) of the Bancroft Affidavit and the Mitchell Affidavit [the Impugned Applicants' Evidence] should be struck, or alternatively given no weight, because the Impugned Applicants' Evidence is irrelevant, engages in advocacy, represents legal opinion, was not before the administrative decision-maker when the Decision was made, or represents hearsay:

- A. Bancroft Affidavit: paragraphs 10, 11 (and Exhibit D), 14 (and Exhibit F), 15 (and Exhibit H), 16 (and Exhibit I), 17, 18, 19 (and Exhibit J), 20, 21, 23, and 28–32 (and Exhibits N–W); and
- B. Mitchell Affidavit: paragraphs 7–16 (and Exhibits C–E), 17 (and Exhibit F), and 18–19.

[44] At the hearing of this application, the Applicants' counsel explained that, other than paragraphs 28–32 (and related Exhibits N–W) of the Bancroft Affidavit, all the Impugned Applicants' Evidence was filed in order to demonstrate that the Applicants meet the test for public interest standing necessary to present this application. The Applicants do not rely on this evidence for any other purpose.

[45] The Applicants' Impugned Evidence was not before the administrative decision-maker. The Respondent's counsel confirmed at the hearing that the Respondent does not contest the Applicants' standing. As such, the Impugned Applicants' Evidence (other than paragraphs 28–32 and Exhibits N–W of the Bancroft Affidavit, to which I will turn momentarily) is not relevant to a live issue before the Court and should be struck (see *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 21–27). It is therefore unnecessary to address the Respondent's other arguments as to why this evidence is improper.

[46] Paragraphs 28–32 of the Bancroft Affidavit provide information related to recovery strategies for threatened and endangered species listed under the SARA other than Plover, as well as ministerial orders for protecting critical habitat. Exhibits N–T are copies of the referenced recovery strategies, and Exhibits U–W are copies of the referenced orders. The Applicants argue that this evidence is relevant to the broader form of declaratory relief that they seek, i.e., a general declaration (extending beyond the Amended Recovery Strategy related to Plover) that the bounding box approach to critical habitat identification is contrary to the SARA.

[47] I accept that post-decision evidence, while not relevant to the reasonableness of an administrative decision under review, can be admissible as relevant to the remedial discretion of the reviewing Court (*Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 10). I also accept that paragraphs 28–32 and Exhibits N–W of the Bancroft Affidavit are relevant for this purpose. The Applicants adduce this evidence in an effort to demonstrate: (a) that the Minister has used the bounding box approach in recovery strategies related to species other than Plover; and (b) that ministerial orders for protecting critical habitat rely on the identification of critical habitat by recovery strategies for purposes of affording the protections provided therein.

[48] I therefore find this evidence admissible, with the exception of the last three sentences in paragraph 28 of the Bancroft Affidavit. Those sentences are argumentative and should be struck.

[49] My Judgment in this application will reflect these conclusions with respect to the Impugned Applicants' Evidence.

B. *Should portions of the McKnight Affidavit and the Wren Affidavit be struck or otherwise given no weight?*

[50] The Applicants argue that each of the following paragraphs (and exhibits referenced therein) of the McKnight Affidavit and the Wren Affidavit [the Impugned Respondent's Evidence] should be struck, or alternatively given no weight, because the Impugned Respondent's Evidence is irrelevant, engages in advocacy, represents legal opinion, was not

before the administrative decision-maker when the Decision was made, constitutes an attempt to bootstrap the decision-maker's reasons after the fact, or represents hearsay:

- A. McKnight Affidavit: paragraphs 31 (every sentence except the first), 32, 71 (second sentence), 73, 75, and 79 (and Exhibit F); and
- B. Wren Affidavit: paragraphs 59 (second sentence), 78, and 79.

[51] In the impugned portions of paragraphs 31, 32, 73, and 75 of the McKnight Affidavit, Ms. McKnight provides evidence as to the approach to the identification of critical habitat taken by the Recovery Strategy and refers to deficiencies in that approach and how those deficiencies were addressed through the Amended Recovery Strategy. The Applicants argue that this evidence represents an effort to introduce impermissible opinion and to bolster the reasons for the Decision and, in the alternative, argue that the evidence is presumptively inadmissible hearsay.

[52] The Respondent submits that this evidence is admissible as background information that will assist the Court in understanding the history of the development of the Amended Recovery Strategy. The Respondent also refers to this evidence as being simply a restatement of information contained in the CTR, noting that the Amended Recovery Strategy refers to its purpose of providing clarity on the specific locations of critical habitat and that the Response Letter refers to certain deficiencies in the manner in which the geographic location of critical habitat was identified in the Recovery Strategy.

[53] While I agree with the Respondent that portions of this evidence can also be found in the CTR, the evidence extends to additional points such as whether the Recovery Strategy identified entire beaches as critical habitat for the Plover and whether local beach names identified in the Recovery Strategy were reflected on maps available to the public. To the extent the evidence is already available in the CTR, its inclusion in the McKnight Affidavit provides no additional assistance to the Court. Moreover, by speaking to the rationale for the Amended Recovery Strategy's revised approach to identification of critical habitat, the impugned portions of paragraphs 31, 32, 73, and 75 engage with the issue to be determined by the Court. This evidence reads as an effort to interpret the Recovery Strategy and explain the reasoning underlying the Amended Recovery Strategy, constituting both impermissible opinion and an effort to bolster the reasons for the Decision. I agree with the Applicants' position that this evidence should be struck.

[54] In paragraph 71 (second sentence) of the McKnight Affidavit, Ms. McKnight refers to revisions to Table 5 of the Amended Recovery Strategy as having been directed by ECCC's Enforcement Branch, to assist them in determining whether there has been, or could be, destruction of critical habitat. The Applicants argue that this evidence represents information that was not before the Minister when the Decision was made, an effort to bolster the reasons for the Decision, and inadmissible argument, opinion, and hearsay.

[55] Again, I agree with the Applicants' position that this evidence is inadmissible. Ms. McKnight is deposing not just to information from the Enforcement Branch received by the administrative decision-maker before the Decision was made but to that information having been "directed" by the Enforcement Branch, which strays into an inadmissible explanation of the

reasons for the Decision. As this evidence should be struck on this basis, I need not address the Applicants' arguments on other bases for inadmissibility.

[56] Finally, in relation to the McKnight Affidavit, paragraph 79 provides evidence as to a November 2022 email communication from Nova Scotia's Department of Natural Resources and Renewables to CWS, expressing concerns surrounding the definition of critical habitat in the Recovery Strategy. This email is attached as Exhibit F to the McKnight Affidavit. The Applicants argue that this evidence is inadmissible for multiple reasons, including that it postdates the Decision and is hearsay.

[57] The Respondent submits that paragraph 79 and Exhibit F are admissible, because the communication in Exhibit F is a business record and therefore an exception to the exclusionary rule that applies to hearsay evidence. I find no merit to the Respondent's position. Regardless of whether there is a hearsay issue with this evidence, which might be resolved by the business records exception, the Respondent has raised no basis on which the Court could conclude that a communication that postdates the Decision could be relevant to the Court's consideration of the reasonableness of the Decision and therefore admissible in this application. As such, paragraph 79 and Exhibit F of the McKnight Affidavit will be struck.

[58] Turning to the Wren Affidavit, the impugned portions of paragraphs 59, 78, and 79 contain evidence provided by ECCC and its Enforcement Branch on what it considered to be necessary improvements to the definition of critical habitat. The Applicants raise the same concerns as with respect to paragraph 71 of the McKnight Affidavit.

[59] To the extent that these paragraphs of the Wren Affidavit simply set out a process by which input was received by the administrative decision-maker before the Decision was made, I do not find them problematic. However, paragraph 79 and the second and third sentences of paragraph 78 stray into commentary on the Enforcement Branch's input and its influence on the Decision. I agree that those portions of the Wren Affidavit represent bolstering of the reasons for the Decision and should be struck.

[60] My Judgment in this application will reflect the above conclusions with respect to the Impugned Respondent's Evidence.

C. *Is the Decision reasonable?*

(1) Applicants' arguments

[61] As summarized earlier in these Reasons, the Applicants take issue with the bounding box approach to critical habitat identification being used in the Amended Recovery Strategy. In part, they argue that the grid squares employed in the Amended Recovery Strategy arbitrarily exclude portions of the beaches that were previously identified in the Recovery Strategy as critical habitat in their entirety. However, the Applicants' principal argument is that the Amended Recovery Strategy dramatically reduces the amount of critical habitat identified for the Plover, because the bounding box approach uses vague and technical criteria to describe the actual, narrower locations of critical habitat within the areas mapped by the grid squares employed in Appendix C.

[62] To better understand the Applicants' position, it is useful to have recourse to a document, referenced by both parties in their respective submissions, entitled "Species at Risk Act Implementation Guidance for Recovery Practitioners - Critical Habitat Identification Toolbox", Version 2.3 (updated February 2016) [the Toolbox]. Ms. Wren describes the Toolbox as intended to be used by recovery practitioners to ensure a common understanding and use of terminology. She explains that the objectives of the Toolbox are to provide a national framework and associated guidance on critical habitat identification and tracking materials to improve consistency and transparency in the critical habitat identification process.

[63] Both parties draw the Court's attention to the following paragraph in the Toolbox (in which the term "CH" refers to critical habitat):

The identification and presentation of CH in a recovery document must be clear with respect to whether the geospatial representation "is" CH or "contains" CH. In some cases, all of the mapped or described geospatial representation will "be" CH. More commonly, the mapped or described geospatial representation will "contain" CH. That is, CH will exist within the mapped or described geospatial representation where certain criteria are met - for example, occupancy and/or presence of certain biophysical attributes / suitable habitat. Regardless of the approach taken, the goal should be to present critical habitat as clearly as possible in the recovery document so that its location can be determined, thus supporting protection efforts.

[64] The Applicants take the position that the Recovery Strategy employed the first of the two methodologies described in the above paragraph, i.e., providing a geospatial representation that is critical habitat. In other words, the attributes or criteria relevant to the determination of whether a particular piece of geography is critical habitat had been considered by the authors of the Recovery Strategy, resulting in a conclusion that the geography identified in the combination

of section 7.1 and Appendix C is critical habitat. More simply put, the Applicants say that the Recovery Strategy provided that each of the beaches identified in Appendix C to the Recovery Strategy is critical habitat.

[65] In contrast, the Applicants take the position that the Amended Recovery Strategy employs the second methodology, i.e., providing a geospatial representation that contains critical habitat. In other words, the grid squares identify the outer limits of geography in which critical habitat can be found. However, not all geography within those grid squares is necessarily critical habitat. Rather, critical habitat is only those portions of such geography that represent suitable habitat for the Plover, with suitable habitat to be determined based on the presence of biophysical attributes identified in Table 5 of section 7.1.

[66] At the hearing of this application, the Applicants clarified that they do not take issue *per se* with the use of the second methodology identified in the Toolbox, i.e., employing a geospatial representation that contains (rather than is) critical habitat. It is not the use of grid squares in the Amended Recovery Strategy to which the Applicants object. Nor do the Applicants necessarily object to the need to have recourse to biophysical attributes as criteria to determine which portions of the geography within the grid squares actually represent critical habitat. Rather, their concern is that the Amended Recovery Strategy employs vague and technical terms for those attributes, resulting in insufficient clarity in the identification of critical habitat.

[67] In elaborating upon this concern, the Applicants reference particular examples of biophysical attributes that they consider to be too vague or technical, such as: “gently sloping foreshore (< 9% Boyne et al. 2014)”; “sparsely vegetated” (footnoted to mean “having areas

containing continuous vegetation density < 20% within at least 25 m² (Gieder et al. 2014)”; “relatively wide backshore”; and “presence of suitable invertebrate prey resources”. The Applicants also emphasize the following language preceding Table 5 as adding to the uncertainty as to whether a particular area is critical habitat:

Note that not all attributes in Table 5 must be present in order for an area to be identified as critical habitat. If the area is capable of supporting Piping Plover, it is considered critical habitat for the species, even though some of the associated attributes might be missing

[68] Against the backdrop of the Applicants’ concern as to a resulting lack of clarity in the identification of critical habitat, they present several arguments in support of their position that the Decision is unreasonable. First, the Applicants rely on the requirements of the SARA, the governing statutory scheme underlying the Decision, which requirements the Applicants submit represent the principal legal constraints upon the Minister’s decision-making authority.

[69] In particular, the Applicants reference a requirement to identify critical habitat comprehensively, as paragraph 41(1)(c) of the SARA mandates such identification to the extent possible, based on the best available information. The Applicants also reference the statutory incorporation of the precautionary principle into section 38, which provides that, in preparing a recovery strategy or action plan, the Minister must consider the principle that, if there are threats of serious or irreversible damage to listed wildlife species, cost-effective measures to prevent reduction or loss of the species should not be postponed due to a lack of full scientific certainty.

[70] The Applicants argue that the Decision contravenes the Minister’s duty to identify critical habitat comprehensively and in accordance with the precautionary principle, because the

Amended Recovery Strategy captured less geography (i.e., not entire beaches) than the Recovery Strategy and employed a methodology with unclear criteria for determining where on each beach critical habitat exists.

[71] Second, the Applicants argue that the Decision is unreasonable because it undermines the SARA's scheme to ensure meaningful and effective legal protection of critical habitat. The Applicants refer to tools provided by the SARA intended to achieve such protection. These include prohibitions against the destruction of critical habitat (ss 58(1), 61(1)); the requirement for the Minister to recommend an order legally protecting critical habitat for migratory bird species within 180 days of a recovery strategy's publication (ss 58(5.2)); the ability of the Governor in Council to make orders protecting critical habitat on the Minister's recommendation (ss 58(5.1), 61(2)); the requirement to monitor and report on steps taken to protect critical habitat (s 63); and the requirement to obtain permits for activities that may result in destruction of critical habitat (ss 73, 74, 77). Moreover, orders protecting critical habitat under the SARA make it a quasi-criminal offence to destroy any part of the critical habitat described in the order (s 97(1)).

[72] The Applicants emphasize that all these protections depend on the identification of critical habitat in recovery strategies. For instance, orders protecting critical habitat do not themselves contain a map or description of the relevant critical habitat. Rather, such orders reference the critical habitat as identified in the relevant species' recovery strategies. The Applicants refer to examples of such orders, attached as exhibits to the Bancroft Affidavit, to illustrate this relationship between the orders and the relevant recovery strategies. They argue that none of the tools provided by the SARA to achieve critical habitat protection can function

effectively if it is unclear whether any given geographic location, within a grid square employed in Appendix C of the Amended Recovery Strategy, is indeed critical habitat.

[73] In raising concern about enforceability of orders prohibiting the destruction of critical habitat as identified in the Amended Recovery Strategy, the Applicants argue that such orders would face a substantial risk of a successful challenge under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. They identify this risk as arising from the principle of fundamental justice that requires members of the public to have fair notice of prohibited conduct where penal consequences may ensue (*R v Levkovic*, 2013 SCC 25 at paras 10, 32, 71; *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at paras 46–49, 79, 1995 CanLII 112 (SCC)).

[74] To illustrate this risk, the Applicants ask the Court to contemplate the sort of signage that enforcement officials might post at an Atlantic Canadian beach to advise potential beachgoers of the presence of critical Plover habitat and a resulting prohibition against its destruction. The Applicants submit that, if the relevant critical habitat were identified through the methodology employed in the Recovery Strategy, the sign could simply say that the beach at which it is posted is critical habitat, the destruction of which is prohibited.

[75] In contrast, the Applicants submit that, under the Amended Recovery Strategy, the sign would have to refer to the presence of critical habitat at the beach and instruct the beachgoer and to avoid destroying areas at the beach demonstrating attributes such as gently sloping foreshore (< 9%), sparse vegetation (< 20% within at least 25 m²), relatively wide backshore, and presence of suitable invertebrate prey resources. The Applicants argue that, without a biology degree, the

beachgoer would be unable to understand whether any particular part of the beach is indeed critical habitat.

[76] The Applicants therefore submit that the Decision is unreasonable because the Minister failed to consider the adverse effect that the Amended Recovery Strategy's new methodology for identifying critical habitat would have upon the Minister's ability to fulfil his statutory duties or the enforceability of ministerial orders prohibiting the destruction of critical habitat.

[77] Finally, the Applicants argue that the Decision is unreasonable because the Minister's reasons, as evidenced by the Amended Recovery Strategy, the Memorandum, and the Response Letter, do not demonstrate any meaningful engagement with the concerns that the Applicants raised in the Comments. The Applicants emphasize that the Comments raised their concerns (as summarized above) through extensive submissions. However, they submit that neither the Response Letter nor any of the other documentation evidencing the reasons for the Decision demonstrates that the Minister grappled with the issues raised by the Applicants or provided any intelligible explanation as to how an order protecting Plover critical habitat could be enforced despite the vague and technical criteria employed by the Amended Recovery Strategy to identify such habitat. The Applicants therefore take the position that the Decision is not justified, transparent, or intelligible, as required by the principles explained in *Vavilov*.

(2) Respondent's arguments

[78] The Respondent rejects the Applicants' arguments and submits that the revisions to the identification of Plover critical habitat effected by the Amended Recovery Strategy comply with

the requirements of the SARA and facilitate, rather than detract from, the performance of ministerial duties and enforcement activities. The Respondent also argue that the documentation evidencing the reasons for the Decision, in particular the Response Letter and Amended Recovery Strategy itself, provide an intelligible explanation of the rationale underlying the changes to the critical habitat identification methodology from that of the Recovery Strategy. The Respondent emphasizes the position that the inquiry into the identification of critical habitat is a science-based exercise, to which judicial deference is owed.

[79] The Respondent notes that the SARA entitles the competent minister to amend a recovery strategy at any time (s 45(1)). In response to the Applicants' position that the particular amendments represented by the Amended Recovery Strategy fail to account for the precautionary principle, the Respondent observes that the Executive Summary in the Amended Recovery Strategy expressly references this principle and explains that it addresses the unknowns around feasibility of recovery for the Plover, which unknowns are further described in a later section of the document. The Respondent argues that there is no evidence that such unknowns were used as a basis for avoiding or postponing recovery measures, such as would violate the precautionary principle.

[80] As explained below, the Respondent also argues that the Recovery Strategy, the Response Letter, the Memorandum, and the Amended Recovery Strategy demonstrate that the Amended Recovery Strategy addressed deficiencies in the critical habitat identification methodology employed in the Recovery Strategy.

[81] The Respondent submits that the biophysical attributes set out in Table 5 of section 7.1 of the Amended Recovery Strategy are consistent with those found in section 7.1 of the Recovery Strategy but are refined to more accurately and precisely describe the habitat used by Plover. For instance, while the Recovery Strategy qualitatively referenced “gently sloping foredune”, the Amended Recovery Strategy employs that qualitative language in combination with a quantitative reference to a slope of $< 9\%$. Similarly, the reference to foredune vegetation density described qualitatively in the Recovery Strategy as “sparsely vegetated or relatively free of vegetation” has been replaced with qualitative language combined with a quantitative reference to continuous vegetation density of $< 20\%$ within at least 25 m^2 .

[82] The Respondent emphasizes the importance of such biophysical attributes for purposes of identification of critical habitat, as explained in *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878 at paragraph 58.

[83] The Respondent also argues that the approach to geographic representation has been improved, as the Recovery Strategy’s use of a single set of coordinates to identify a relevant beach, without fully identifying the geographic limits of the beach, has been replaced with the Amended Recovery Strategy’s use of grid squares to accurately identify the geographic limits of an area containing critical habitat. While the Applicants argue that the portion of section 7.1 of the Recovery Strategy under the heading “Boundaries of critical habitat” (set out earlier in these Reasons) supplements the coordinates by providing relevant boundaries, the Respondent submits that the start and end of a particular beach could not be ascertained from the description in the Recovery Strategy. (Although I am striking the statement in paragraph 31 of the McKnight Affidavit that the start and end of the beach could not be ascertained from the Recovery Strategy,

it remains available to the Respondent to argue this point based on the language of the Recovery Strategy itself.)

[84] The Respondent submits that this new approach to geographic representation reflects the ecological reality of dynamic habitats that cannot be precisely delineated at a single point in time. For instance, the beach areas on which Plover nest and feed shift naturally due to coastal processes such as storms, erosion, and tidal changes. The grid-square approach, identifying the limits of an area containing critical habitat, facilitates the capture of such areas as such changes occur.

[85] Significantly, the Respondent's counsel explained at the hearing of this application the Respondent's position that both the Recovery Strategy and the Amended Recovery Strategy are intended to identify entire beaches as Plover critical habitat. In that respect, the Respondent argues that the Applicants have misunderstood or misinterpreted the Amended Recovery Strategy's approach to critical habitat identification. In the Respondent's submission, the material differences in the methodologies employed by the two documents are simply that the Amended Recovery Strategy defines with more precision: (a) the biophysical attributes that have been used to identify which beaches represent a critical habitat; and (b) the geographic limits of those beaches.

[86] The Respondent therefore argues that the Amended Recovery Strategy is intended to protect as much geography as the Recovery Strategy, but does so with improved precision and therefore better achieves the objectives of the SARA, including facilitation of the performance of ministerial duties and enforcement activities.

(3) Analysis

[87] The unusual feature of this application is the fact that it became apparent, through the Respondent's submissions at the hearing, that the parties are aligned in taking the position that entire beaches should be identified as Plover critical habitat. Their disagreement surrounds whether the Amended Recovery Strategy accomplishes this intended result. However, as the Applicants argued in their reply submissions, the apparent alignment in the parties' intentions does not itself address the Applicants' concerns, as it is the interpretation of the Amended Recovery Strategy as written and published that will inform the dimensions of ministerial duties and available enforcement under the SARA.

[88] The Applicants' interpretation of the Amended Recovery Strategy turns significantly on the first paragraph of section 7.1, which I reproduce as follows for ease of reference:

Critical habitat for the [Plover] is identified as all areas of suitable habitat (Table 5) within the defined 1 x 1 grid squares (Appendix C). Suitable habitat relates to areas possessing a specific set of biophysical attributes required for [Plover's] life processes as summarized in Table 5. Note that not all attributes in Table 5 must be present in order for an area to be identified as critical habitat. If the area is capable of supporting [Plover], it is considered critical habitat for the species, even though some of the associated attributes might be missing.

[Emphasis added.]

[89] As the Applicants read the first sentence of this paragraph, and in particular the language highlighted above, the critical habitat contained within a particular grid square is only the portion of the geographic area within the grid square that represents suitable habitat, i.e., only the portion where the requisite biophysical attributes from Table 5 (or at least some of them) are met.

[90] I note that similar language appears in section 7.1.1, which describes the identification of critical habitat as follows:

In [Atlantic Canada and Québec], suitable habitat (Table 5) within the 1x1 km grid representations is identified as critical habitat under SARA and provides enough habitat to meet the long-term population and distribution objectives.

Due to the dynamic nature of coastal ecosystems, critical habitat mapping is represented by 1 x 1 km grid squares where the habitat occupancy criteria (above) and suitable habitat (Table 5) are met. Grid representation is created based on the site scale (1 x 1 km) and best characterizes the extent and nature of critical habitat. In Quebec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador there are 163, 313, 223, 180 and 75 grid square units, respectively, identified as critical habitat (totaling 954 grid square units). These are presented in Appendix C.

[Emphasis added.]

[91] At the hearing, the Respondent's counsel clarified the Respondent's position that this language in section 7.1.1 is not intended to suggest that the entirety of the geography represented by the grid squares (which includes both land and surrounding water) is critical habitat. Indeed, the language beneath each of the maps (showing the relevant grid squares) in Appendix C reads as follows (using the Oak Island map as an example):

Grid squares containing critical habitat for [Plover] in Oak Island, Nova Scotia. Critical Habitat for [Plover] occurs within these 1km x 1km UTM grid squares (yellow shaded squares), where the criteria and methodology set out in section 7.1 of the recovery strategy are met. Areas outside of the shaded polygon do not contain critical habitat.

[Emphasis added.]

[92] Consistent with the Applicants' position, it is readily available to read the language in each of these portions of the Amended Recovery Strategy as requiring an assessment of the

relevant biophysical attributes in order to determine which, if any, geography of the Appendix C grid squares is actually identified as critical habitat. Of course, the Applicant does not object to the notion that it is assessment of the biophysical attributes that drives the determination that critical habitat is present. Their point is that the language employed in the Amended Recovery Strategy does not read as if the Minister has already performed that assessment and made the necessary determination.

[93] In contrast, I understand the Respondent's position to be that the language of the Amended Recovery Strategy canvassed above should be read as reflecting (as did the original Recovery Strategy) that the Minister has already performed this assessment of the relevant biophysical attributes and, based thereon, has identified that entire beaches within the Appendix C grid squares meet those criteria for suitable habitat and therefore are critical habitat. With respect, I struggle with that interpretation of the language as drafted.

[94] However, for the reasons explained below, I decline to arrive at a definitive conclusion on this dispute over the interpretation of the Amended Recovery Strategy. The Respondent argues that the identification of critical habitat is a science-based process. While I accept this characterization, I also find that the dispute between the parties does not relate to the underlying science. Rather, the dispute appears to relate to the drafting of the document. However, I also appreciate that, while the Amended Recovery Strategy has certain statutory effect for purposes of the legislative scheme created by the SARA, it is not itself a piece of legislation, and it may be that there is some art involved in the work of recovery practitioners in drafting documentation of this nature, which would bear upon its interpretation. However, the Decision does not provide the Court with any analysis that could bring such expertise to bear on the interpretive dispute.

[95] Therein lies the difficulty with the reasonableness of the Decision. I agree with the Applicants' position that the Decision entirely fails to engage with the key issues that they raised in the Comments. Consistent with their submissions in this application, the Applicants explained in the Comments their concern that the Proposed Amended Recovery Strategy had adopted a new methodology for critical habitat identification, the effect of which was to completely redefine critical habitat for the Plover. The Comments explained the Applicants' interpretation of the Proposed Amended Recovery Strategy, as identifying as critical habitat only those areas within the grid squares that possessed the Table 5 biophysical attributes, and the Applicants' concern about the vague language employed in articulating those attributes.

[96] The Comments identified the Applicants' resulting concern that the new methodology in the Proposed Amended Recovery Strategy offended the precautionary principle, because it did not identify critical habitat to the greatest extent possible or with geographic precision and resulted in a reduction of the identified Plover critical habitat from the entire beaches that had been identified in the Recovery Strategy. The Comments further argued that the Proposed Amended Recovery Strategy was too vague to constitute the basis for enforceable legal protections for critical habitat.

[97] The Response Letter demonstrates no material engagement with the Applicants' concerns. Consistent with the Respondent's submissions in this application, the Response Letter refers to a need to update the Recovery Strategy to provide clarity on the specific locations of critical habitat, in the interests of its legal protection. The Response Letter explains that the Recovery Strategy was deficient in its identification of specific geographic areas, because the sites identified as critical habitat in Appendix C included point locations only without any

indication of the specific area of extent, and that the changes were reviewed and approved by ECCC enforcement staff. The Response Letter also explains that the biophysical attributes employed in the Amended Recovery Strategy include clarifications to make them more accurate and precise than those in the Recovery Strategy.

[98] However, none of these points engage with the substance of the Comments, i.e., that the Proposed Amended Recovery Strategy employed a new methodology under which the identified geographic areas did not represent critical habitat, absent demonstration of the Table 5 biophysical attributes (or some of them), creating the attendant legal difficulties articulated above. Certainly, the Response Letter does not include the position that the Applicants had misinterpreted the Proposed Amended Recovery Strategy or articulate or explain an interpretation comparable to that now advanced by the Respondent in this application.

[99] The Respondent argues that there is no obligation on the part of an administrative decision-maker to address every concern raised by a party. The Respondent further emphasizes that a recovery strategy should be science-based, not consensus-based (*Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, 2014 FC 148 at para 70). While I agree with those principles, it is also clear that the principles of justification and transparency informing reasonableness review require that an administrative decision-maker's reasons meaningfully account for the central issues and concerns raised by the parties, in order to demonstrate that the decision-maker has actually listened to the parties and has been alert and sensitive to the matter before it (*Vavilov* at paras 127–128). Such engagement with the central issues raised before an administrative decision-maker thereby assists a reviewing court in understanding the decision-maker's reasoning.

[100] In my view, the Applicants' concerns were clearly articulated in the Comments. Taking into account the record before the Court, including the Amended Recovery Strategy itself, the Memorandum, and in particular the Response Letter that is intended to be directly responsive to the Comments, I find that the Decision is unreasonable, because it does not demonstrate any meaningful engagement with the central issues and concerns raised by the Applicants.

[101] The absence of any such engagement with the Applicants' interpretation of the Amended Recovery Strategy leaves the Court without any reasoning provided by the administrative decision-maker that might assist the Court in assessing the interpretation for which the Respondent now advocates. Moreover, regardless of which interpretation of the document as currently drafted is to be preferred, the parties appear to be in substantial agreement as to how the identification of critical habitat should be approached. There would therefore be little value in the Court adopting the Applicants' interpretation and then adjudicating the Applicants' arguments surrounding the failure of the Amended Recovery Strategy's approach to critical habitat identification to comply with the SARA's requirements (to be sufficiently comprehensive or precautionary) or its failure to represent reasonable consideration of the Minister's duties or the enforceability of resulting ministerial orders. All those arguments are premised on an interpretation of the Amended Recovery Strategy that, even if it is the better interpretation of the document as drafted, is not an interpretation that the Respondent seeks to defend.

[102] It may be (and, indeed, appears likely) that the present dispute is a function of nothing more than inelegant drafting of the impugned portions of the Amended Recovery Strategy and that, with the benefit of the required consideration of the Applicants' concerns, improved drafting would eliminate the dispute between the parties. Alternatively, it remains possible that,

after considering the Applicants' concerns, the administrative decision-maker would arrive at a conclusion that the present drafting reflects the interpretation advanced by the Respondent in this application and be able to intelligibly articulate a justification for that interpretation that would withstand reasonableness review.

D. *If the Court concludes that the Decision is not reasonable, which remedy or remedies should the Court grant?*

[103] Having concluded that the Decision is unreasonable, I must consider the appropriate remedies.

[104] Consistent with the above analysis, clearly it is appropriate that the Court quash the Decision (which, for emphasis, I note represents only section 7.1 and Appendix C of the Amended Recovery Strategy) and return it to the Minister for reconsideration in accordance with the Court's reasons.

[105] However, at the hearing of this application, the Respondent raised concern that, if the Decision were to be quashed with immediate effect and sent back to the Minister for reconsideration, there could be a gap in the legislative protection for the Plover under the SARA. The Respondent argued that it could take at least nine months for ECCC to do the work, including conducting necessary public consultation associated with such reconsideration, and requested that the Court consider suspending the operation of its order quashing the Decision to allow that the completion of such work. In reply submissions, the Applicants advised that they did not strenuously object to such a result.

[106] I accept the logic of the Respondent's submission. During the period between quashing the Decision and completion of the required reconsideration, there could be a gap in legislative protection. At a minimum, uncertainty in the legislative protections for the Plover could result if such protections were to be informed by a combination of the Recovery Strategy (in the event the effect of quashing the Decision were to resurrect portions of the Recovery Strategy) and the portions of the Amended Recovery Strategy that are unaffected by the Court's judgment.

[107] My Judgment will therefore suspend the operation of the order quashing the Decision. As noted above, the Respondent referred to a period of "at least" nine months being required to complete the required reconsideration. Recognizing the uncertainty inherent in that estimate, my Judgment will suspend the operation of the order quashing the Decision for 10 months from the date of the Judgment.

[108] As previously noted, the Applicants also seek a declaration that the critical habitat identification in the Amended Recovery Strategy is unreasonable and contrary to the SARA, as well as a more general declaration that the bounding box approach to critical habitat identification is contrary to the SARA. As explained below, I decline to grant either form of declaratory relief requested.

[109] These Reasons reflect my conclusion that the Decision is unreasonable. However, as explained in the supporting analysis, I have arrived at this conclusion based on the failure of the Decision to be responsive to the principal issues and concerns raised by the Applicants and have reached no conclusion on whether the Decision is contrary to the SARA.

[110] Similarly, I have reached no conclusion on whether the bounding box approach (within the meaning ascribed to that phrase by the Applicants) to critical habitat identification is contrary to the SARA. I also note that, while the record before the Court included (as exhibits to the Bancroft Affidavit) several recovery strategies applicable to species other than Plover, the Court has received no detailed submissions on the language that those strategies employ for the identification of critical habitat. I therefore express no views on whether those strategies suffer from the same possible drafting deficiencies that appear to have given rise to the dispute between the parties surrounding the Amended Recovery Strategy for Plover.

[111] However, if the reconsideration of the Amended Recovery Strategy that results from the Judgment in this matter confirms that improved drafting of that document is necessary in order to reflect the Minister's intentions surrounding critical habitat identification for Plover, the Respondent may consider it prudent to review other recovery strategies to the same end.

VI. Costs

[112] Each of the parties claims costs in the event of its success in this application, although the Applicants also take the position that, because they are public-interest litigants with a genuine interest in the protection and recovery of species at risk, they should not face costs consequences in the event that their application fails. It is unnecessary for the Court to consider that position, as the Applicants have been materially successful in this application in challenging the Decision under review.

[113] At the Court's request (while recognizing the Applicants' principal position that they should bear no costs even if unsuccessful), the parties consulted with each other in an effort to agree on a lump-sum all-inclusive figure that would represent an appropriate costs award, in the event the Court determined that costs should be awarded to either party. In post-hearing written submissions, dated May 23, 2025, the parties advised that they had agreed on the amount of \$1,500.00, inclusive of disbursements, as such a figure. I agree that this amount is appropriate and, given the Applicants' success in this application, my Judgment will award them this amount.

JUDGMENT IN T-2278-22

THIS COURT’S JUDGMENT is that:

1. Paragraphs 10, 11 (and Exhibit D), 14 (and Exhibit F), 15 (and Exhibit H), 16 (and Exhibit I), 17, 18, 19 (and Exhibit J), 20, 21, 23, and 28 (last three sentences only) of the Bancroft Affidavit are hereby struck.
2. Paragraphs 7–16 (and Exhibits C–E), 17 (and Exhibit F), and 18–19 of the Mitchell Affidavit are hereby struck.
3. Paragraphs 31 (every sentence except the first), 32, 71 (second sentence), 73, 75, and 79 (and Exhibit F) of the McKnight Affidavit are hereby struck.
4. Paragraphs 78 (second and third sentences only) and 79 of the Wren Affidavit are hereby struck.
5. This application for judicial review is allowed, the Decision (being section 7.1 and Appendix C of the Amended Recovery Strategy) is quashed, and the Decision is referred back to the Minister for reconsideration in accordance with the Court’s reasons.
6. The operation of paragraph 5 of this Judgment is suspended until the date that is 10 months from the date of this Judgment.

7. The Applicants are awarded costs of this application in the lump-sum amount of \$1,500.00, inclusive of disbursements.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2278-22

STYLE OF CAUSE: FEDERATION OF NOVA SCOTIA NATURALISTS and
EAST COAST ENVIRONMENTAL LAW
ASSOCIATION (2007) v MINISTER OF
ENVIRONMENT AND CLIMATE CHANGE CANADA

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: MAY 20 AND 21, 2025

ORDER AND REASONS: SOUTHCOTT J.

DATED: JUNE 2, 2025

APPEARANCES:

Sarah MacDonald FOR THE APPLICANTS
Kacie Oliver

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