ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 19, 2004

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and Section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Gordon Volume, Gerry and Janet Whiteside, Barbara Petrie, Barbara Fehr, David Drader, and Linda Vongrad, with respect to *Environmental Protection and Enhancement Act* Approval No. 198159-00-00 and *Water Act* Approval No. 0019839-00-00 issued to the Word of Life Tabernacle by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Stay Decision: *Volume et al.* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Word of Life Tabernacle* (19 November 2004), Appeal Nos. 03-127-137-ID1 (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudey, Board Member and Panel Chair.

WRITTEN SUBMISSIONS:

Appellants: Mr. Gordon Volume, Mr. Gerry and Ms. Janet Whiteside, Ms. Barbara Petrie, Ms. Barbara Fehr, Mr. David Drader, and Ms. Linda Vongrad.

Approval Holder: Word of Life Tabernacle, represented by Mr. Mervin Goldsney.

Director: Mr. Park Powell, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued two approvals to the Word of Life Tabernacle for the construction of storm water management works and the construction, operation, and reclamation of a storm outfall structure at SW 5-52-22-W4M and SE6-52-22-W4M in Strathcona County, Alberta.

The Board received Notices of Appeal from six appellants regarding the approvals. Five of the appellants also requested Stays of the approvals.

After reviewing the parties' submissions, the Board granted the Stay applications, primarily since the Word of Life Tabernacle had placed the property up for sale.

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I. BACKGROUND

[1] On August 29, 2003, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued Approval No. 00198139-00-00 (the "Water Management Approval") under the *Water Act*, R.S.A. 2000, c. W-3, to the Word of Life Tabernacle (the "Approval Holder"), for the construction of storm water management works at SW 5-52-22-W4M and SE 6-52-22-W4M in Strathcona County, Alberta. On September 4, 2003, the Director issued Approval No. 198159-00-00 (the "Storm Outfall Approval")[1] under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, (the "Act" or "EPEA") to the Approval Holder for the construction, operation, and reclamation of a storm outfall structure.

[2] On September 16 and 17, 2003, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Gordon Volume (Appeal Nos. 03-127 and 03-128), Mr. Gerry and Ms. Janet Whiteside (Appeal Nos. 03-129 and 03-130), Ms. Barbara Petrie (Appeal Nos. 03-131 and 03-132), Ms. Barbara Fehr (Appeal Nos. 03-133 and 03-134), and Ms. Linda Vongrad (Appeal Nos. 03-136 and 03-137), appealing both Approvals. The Board also received a Notice of Appeal from Mr. David Drader, appealing the Storm Outfall Approval (Appeal No. 03-135) (collectively the "Appellants"). Ms. Linda Vongrad included a Stay request with her Notice of Appeal.

[3] The Board wrote to the Approval Holder and the Director notifying them of the appeals and wrote to the Appellants acknowledging receipt of their Notices of Appeal. The Board requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

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[1] Collectively, the Water Management Approval and the Storm Outfall Approval will be referred to as the "Approvals."

[5] On September 18, 2003, the Board requested Ms. Vongrad answer the following questions with respect to her Stay application:

> "1. What are the serious concerns of Ms. Vongrad that should be heard by the Board?
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> 2. Would Ms. Vongrad suffer irreparable harm if the Stay is refused?
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> 3. Would Ms. Vongrad suffer greater harm if the Stay was refused pending a decision of the Board than the Word of Life Tabernacle would suffer from the granting of a Stay?
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> 4. Would the overall public interest warrant a Stay?
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> 5. Is Ms. Vongrad directly affected by Alberta Environment's decision to issue Approval No. 00198139-00-00 and Approval No. 198159-00-00 to the Word of Life Tabernacle? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected."

[6] On September 19, 2003, the Board received a request for a Stay from Ms. Barbara Petrie, and on September 22, 2003, the Board received Stay requests from Mr. Gordon Volume, Ms. Barbara Fehr, and Mr. Gerry and Ms. Janet Whiteside. Each of the Appellants was requested to answer the questions above, substituting their own name for Ms. Vongrad's name.

[7] The Appellants provided their responses between September 29 and October 1, 2003. The Approval Holder and Director responded on November 1 and 5, 2003, respectively. The Appellants provided final comments between November 12 and 14, 2003.

[8] On November 12, 2003, the Board asked the Approval Holder whether it was, in fact, in the process of selling the land associated with these appeals, and if this was correct, "…whether, as a result of the sale of the land, the Word of Life Tabernacle intends to make a request to Alberta Environment to cancel the Approvals or whether they intend to transfer the approvals to a new purchaser."

[9] On November 17, 2003, the Approval Holder notified the Board that its property was for sale. It stated it was willing to halt the proceedings, but it "…would like to retain our right to reactivate this process if we choose to do so…" and to retain the right for the next owner if they want to reactivate the process.

[10] After reviewing the submissions, the Board notified the Parties[2] on November 18, 2003, that it had decided to grant a Stay of the Approvals.

II. STAY SUBMISSIONS

A. Appellants

[11] Ms. Barbara Petrie argued her concerns relate to the flooding of her property due to the "…enormous amount of water generated by this project…" and she already experiences flooding in years of normal precipitation. She stated pollutants are also a concern to her, as the health of her cattle could be affected as well as the loss of pasture. She submitted that she would suffer irreparable harm, since the construction of the system would place a heavy burden on the existing drainage system, causing it to back up and flood her property. She stated she would not have full enjoyment of her property. Ms. Petrie also stated there were many issues that still needed to be resolved, and a Stay "…would give the County of Strathcona and the residents a chance to resolve some of the concerns. To proceed with this project would be very premature."[3] The Appellant argued she would suffer the greater harm, as the project will jeopardize her way of life, the natural habitat, and her quiet country living. She stated the overall public interest warrants a Stay, because there are still issues that need to be resolved, such as right of ways, zoning, placement of the structure, and traffic concerns. She also stated the area is residential and not physically structured to accommodate the demands of the project. Ms. Petrie argued she is directly affected, and the approval was premature since the placement of the facility has not been determined and the actual placement could change the anticipated drainage on the site.[4]

[12] Mr. Gordon Volume stated the runoff from the Approval Holder's property would drain into a natural drainage system that crosses the pasture portion of his property. He continued, stating the "…system has limited flow capacity due to the absence of a well defined

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2 The "Parties" in these appeals are the Appellants, Approval Holder, and Director.

3 Ms. Barbara Petrie's submission, dated September 29, 2003.

4 See: Ms. Barbara Petrie's submission, dated September 29, 2003.

channel and a very low gradient to the flood plain taking the water north of my property."[5] He submitted that any additional water would worsen an already bad situation, as his property has been subject to flooding every spring and frequently during the summer. The Appellant stated the proposed reservoir would retain water, providing a large water surface for mosquito larvae and increasing the risk of exposure to the West Nile disease.[6]

[13] Ms. Barbara Fehr identified her concerns as noise pollution, undesirable landscape of a commercial complex, value of her property, and loss of wildlife in her backyard. She queried who would compensate her for the total loss of enjoyment of her land and the mental stress of living in such close proximity to the facility. According to Ms. Fehr, she would suffer irreparable harm due to the mental cruelty of the facility being constructed so close to her home and due to safety concerns for her family. She argued the only harm the Approval Holder would suffer is a delay. She submitted the public interest warrants a Stay, as it "…would be an environmental travesty to the wildlife and natural landscape of the area…" and "…it poses a threat to potential flooding of my neighbours and the disruption of my community's tranquility."[7]

[14] Ms. Linda Vongrad stated the Approval Holder had drained, leveled, sloped, ditched, and placed a culvert on the land without an approval in 1997. According to the Appellant, prior to the ditching, the drainage on the land was from the northeast to the southwest, and she received little or no drainage from the Approval Holder's property. She stated that after the ditching, the drainage flow changed to east to west, draining all excess water to a culvert under Range Road 225 and onto her property, including water that would have remained in sloughs on the Approval Holder's property. Ms. Vongrad stated this has turned three acres of what was once a hay field into a marshy area filled with weeds and willows. According to Ms. Vongrad, Alberta Environment had issued a letter instructing the Approval Holder to fill in the ditch and to apply for an approval and licence, but the conditions were not complied with. The Appellant argued the drainage system proposed would cause all of the excess water to eventually drain onto her property, and if it does not flow onto her land through the culvert under Range

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5 Mr. Gordon Volume's submission, dated September 29, 2003.

6 See: Mr. Gordon Volume's submission, dated September 29, 2003.

Road 225, it will flow onto her land from the ditch on Township Road 520 and damage another good hay field. Ms. Vongrad argued that if flooding occurs, it will endanger fences, land, livestock, and people. She argued the Approval Holder does not have the right to damage her property in order to build the facility. The Appellant explained Strathcona County has not given third reading to the proposal, and therefore, the building may not be built where proposed and the drainage flow may be completely different than currently anticipated.[8]

[15] Ms. Vongrad expressed concerns the culvert on Township Road 520 will not be able to handle a large amount of runoff, as it has flooded when there has been a heavy rainfall event. She also expressed safety concerns regarding the holding pond that is to be built in the ditch.[9]

[16] Ms. Vongrad stated she would suffer irreparable harm if the Stay is not granted as her land would be affected, and she does not have the money to re-ditch her own land. She also stated she would suffer mentally from the stress and worry. The Appellant argued the Stay should be granted because the Approval Holder did not comply with the 1997 Alberta Environment letter or the stop work order issued by the County of Strathcona.[10]

[17] Ms. Vongrad expressed concerns that Alberta Environment did not visit the area and the surrounding acreages. She argued the aerial photographs used by the Director in making his decision did not show where the drainage ran or other people's land, and there was no indication that the natural drainage on her property is very shallow and completely blocked in some areas.[11]

[18] Ms. Vongrad argued she would suffer the greater harm, as the re-zoning application had not yet been approved, and therefore, the Approval Holder cannot get a development permit at this time. According to Ms. Vongrad, her land would be further damaged by excess drainage and the potential for pollution being carried onto her property. She argued

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7 Ms. Barbara Fehr's submission, dated September 30, 2003.

8 See: Ms. Linda Vongrad's submission, dated September 29, 2003.

9 See: Ms. Linda Vongrad's submission, dated September 29, 2003.

10 See: Ms. Linda Vongrad's submission, dated September 29, 2003.

11 See: Ms. Linda Vongrad's submission, dated September 29, 2003.

the public interest warrants a Stay as a number of surrounding landowners have serious concerns that need to be addressed before the Approval Holder is allowed to proceed.[12]

[19] Ms Vongrad submitted she is directly affected as the drainage from the proposed facility will drain onto her property, endangering pasture, crops, fencing, and livestock.[13]

[20] Mr. Gerry and Ms. Janet Whiteside stated they had concerns regarding the effect of the water drainage from the site would have on the surrounding ecological and drainage systems. They argued the drainage could cause flooding on their land, resulting in loss of pasture, affecting their cattle, quality of life, and value of their property. They stated the location of the building had not been determined, and questioned how the environmental effect on the Approval Holder's property and adjacent properties can be predicted? Mr. and Ms. Whiteside questioned whether the Director would be able to enforce the conditions because, in 1997, the Approval Holder was ordered to correct drainage problems from unauthorized work done on the property, but the work was never done. They expressed concern regarding stagnant water causing excess mosquito populations. Mr. and Ms. Whiteside stated they would suffer irreparable harm if the project proceeds, as there would be no reversing the damage done to the environment, ecological systems, and their land. They stated their quality of life and their enjoyment of the rural setting would be reduced. Mr. and Ms. Whiteside argued they would suffer the greater harm if the Stay is not granted, and the Approval Holder has no guarantee of developing on the site. They submitted the public interest warrants a Stay, since the surrounding properties would be adversely affected, and the environmental impact after the water leaves the Approval Holder's property has not been addressed. Mr. and Ms. Whiteside stated they would be directly affected as they live across the road from the site and have "…this 'natural' drainage system running through the back of our property." They further stated any excess water could result in flooding of their front property.[14]

B. Approval Holder

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12 See: Ms. Linda Vongrad's submission, dated September 29, 2003.

13 See: Ms. Linda Vongrad's submission, dated September 29, 2003.

14 See: Mr. Gerry and Ms. Janet Whiteside's submission, dated September 30, 2003.

[21] The Approval Holder argued there are no serious concerns that should be heard. According to the Approval Holder, two of the Appellants, Ms. Linda Vongrad and Mr. Gordon Volume, "…have minor concerns in that water passing through our property does flow on through theirs. This is naturally occurring water flow."[15] The Approval Holder stated that, in a year with normal rainfall, there is not a significant amount of water that flows through its property, and in years of heavy rainfall, everyone is affected by excess water. It also stated it has made a sincere effort to address every concern raised. The Approval Holder stated the prolonged delay in rebuilding its church has been emotionally and financially draining. It argued the public interest does not warrant a Stay, as the amount of water that is at issue is minimal. The Approval Holder stated that, from time to time, Mr. Gordon Volume and Ms. Linda Vongrad will have some flooding on their lands, but it has taken measures to mitigate the concerns of its downstream neighbours. The Approval Holder submitted that only two of the Appellants are in a location where they would receive runoff from the site. It argued the remaining Appellants have zoning concerns and are using the appeal process to delay the rebuilding of the church.[16]

C. Director

[22] In response to the question whether there is a serious question to be heard, the Director stated as, "… the Board has found that a prima facie case has been met, it would appear that the question has been answered."[17] The Director submitted that the Appellants' concerns appear to be related to the physical placement of the church rather than concerns regarding the conditions that have been placed on the Approval Holder under the Approvals. The Director stated the concerns are "…more one of the local municipality determining whether or not the Word of Life Tabernacle should be issued a development permit to construct its facility as opposed to an environmental or drainage issues (*sic*)…."[18]

[23] The Director argued the two Approvals issued ensure the impacts of the construction and operation of the church do not unreasonably impact the neighbours, and the

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15 Approval Holder's submission, dated November 1, 2003.

16 See: Approval Holder's submission, dated November 1, 2003.

17 Director's submission, dated November 5, 2003.

18 Director's submission, dated November 5, 2003.

storm water management created by the project did not produce an unacceptable risk to the adjacent property owners. The Director submitted the Appellants would suffer greater harm if the construction of the church proceeded without the mitigative measures required under the Approvals.

[24] The Director took no position as to who would suffer the greater harm. With respect to the issue of whether the public interest warrants a Stay, the Director stated that, in this case, it is the local municipality, in deciding whether to issue a development permit, that makes the determination of the public interest, and he would not dispute that decision.

[25] The Director submitted that only Ms. Linda Vongrad is downstream of the drainage pattern that includes the Approval Holder's property, and therefore, she is the only Appellant who is directly affected. The Director stated the remaining Appellants would not be adversely affected by the mitigative measures proposed under the Approvals.[19]

D. Rebuttal Submissions

[26] Ms. Barbara Fehr argued the Approval Holder is not interested in building on the site, as it has placed the property up for sale. She questioned why the Approval Holder had not stopped the appeal process. Ms. Fehr stated she hoped "…the sale of this property will alleviate my concerns and should another application or transfer arise I would like my concerns addressed."[20]

[27] In response to the Approval Holder's submission, Ms. Barbara Petrie argued the Approval Holder changed the natural flow of the water in 1997 and disturbed the wetlands. According to the Appellant, the proposed culverting system will funnel water from the 42.5 hectares upstream of the site directly onto Ms. Linda Vongrad's property, unless the municipality

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[19] See: Director's submission, dated November 5, 2003.

[20] Ms. Barbara Fehr's submission, dated November 11, 2003.

approves deepening and berming the ditches. She submitted the Approval Holder's property acted like a "sponge" to absorb and collect the drainage from the area upsteam, but if the property is replaced by buildings and asphalt paving, there could be a detrimental effect on the surrounding area. Ms. Petrie stated the County of Strathcona is widening the road next to the flood plain, which could alter the proposed plan. She stated the drainage flowing to the floodplain could possibly back up, flooding several properties, including those owned by Ms. Linda Vongrad, Mr. Gordon Volume, and herself. Ms. Petrie stated the Approval Holder's property had been put up for sale, and therefore the appeals should be granted and the Approvals reversed. She stated this, along with the sale of the property, would alleviate all of the landowners' concerns, but if another application or transfer of the Approvals occurs, she would like her concerns addressed.[21]

[28] Mr. Gordon Volume did not agree with the Approval Holder's statement that the amount of water was minimal and his legitimate interest was small. He reiterated many of the concerns expressed in his initial submission. He further stated the sale of the Approval Holder's property would alleviate his concerns regarding the project, but if another application or transfer arises, he would like his concerns addressed.[22]

[29] Mr. and Ms. Whiteside argued the naturally occurring water flow runs just a few metres west of their property line, and any overflow or excess water can back up onto their property. These Appellants stated they share several low places with Ms. Linda Vongrad, and any overflow into those areas can flow onto their property. Mr. and Ms. Whiteside acknowledged the Approval Holder's property had been put up for sale, and therefore, they see no reason why their appeals should not be granted and the Approvals reversed, thereby alleviating all the concerns of the local landowners. However, they further stated that should another application or transfer arise, they would like their concerns addressed through the appeal process.[23]

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21 See: Ms. Barbara Petrie's submission, dated November 12, 2003.

22 See: Mr. Gordon Volume's submission, dated November 10, 2003.

23 See: Mr. Gerry and Ms. Janet Whiteside's submission, dated November 13, 2003.

[30] Ms. Linda Vongrad restated many of the same concerns referred to in her initial submission. She disagreed that "more than just a little bit of water" is involved, as the Approval Holder's consultant stated in his report the storage area would have to hold 1300 cubic metres of water to make up for the leveling and filling in of the sloughs. She argued the small natural drainage ditch running through her property cannot handle the drainage from the Approval Holder's property now and definitely will not be able to handle the water if the Approval Holder is allowed to put in its building and parking lot, thereby increasing the amount of runoff. She stated it would cost her $20,000.00 to $40,000.00 to have the ditch deepened, sloped, and widened to handle the runoff. According to Ms. Vongrad, the drainage problem started in 1997 when the Approval Holder sloped and put in a ditch without an approval, and when she reported to Alberta Environment the Approval Holder was not going to fill in the ditch as required in the letter sent by Alberta Environment, she was told she "…was too small a fish to be bothered with." Ms. Vongrad stated her property has suffered irreparable harm and she will have to cut the willows every year as well as reseed the area to try to save her field from being destroyed as pasture land. She reiterated her concerns regarding the proposed solution to the drainage problem, including whether or not the plan would be feasible and if the change in the drainage flow would cause flooding in her west field. Ms. Vongrad stated the battle over the drainage is affecting her financially, physically, and emotionally. She argued the drainage system in the area currently cannot handle a heavy rainfall event over a few days and certainly would not be able to handle extra drainage resulting from the Approval Holder's development.

[31] Ms. Vongrad stated she realizes the Approval Holder has put its property up for sale, but "…the drainage issue needs to be settled, it has been going on since 1997," and therefore, in order to protect her property, she would like to have the Approval Holder comply with the letter issued to it in 1997 by Alberta Environment prior to the sale of the land. She further stated she hoped the sale of the property would alleviate her concerns, but if another application or transfer arises, she would like her concerns addressed.

[32] In response to the Director's submission, Ms. Vongrad stated the issue is a serious one for her and her neighbours, and more people than just herself will be affected by the drainage

flow. She stated, "Once again I feel that I am being told that I am a small fish not worth bothering with."[24]

III. DISCUSSION

A. Statutory Background

[33] The Board is empowered to grant a Stay pursuant to section 97 of the EPEA. This section provides, in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."[25]

[34] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*[26] and *Stelter*,[27] is based on the Supreme Court of Canada case of *RJR MacDonald.*[28] The steps in the test, as stated in *RJR MacDonald*, are:

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[24] Ms. Linda Vongrad's submission, received November 14, 2003.

[25] Section 97 of EPEA also provides:

> "(3) Where an application for a stay relates to the issuing of an enforcement order or an environmental protection order or to a water management order or enforcement order under the Water Act and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out,
>
> (a) order the Director under this Act or the Director under the *Water Act* to take whatever action the Director considers to be necessary to carry out those terms and conditions and to determine the costs of doing so, and
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> (b) order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the *Water Act* in the form and amount the Board considers necessary to cover the costs referred to in clause (a)."

[26] *Pryzbylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* re: *Cool Spring Farms Dairy Ltd.* (6 June 1997), E.A.B. No. 96-070.

[27] *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (14 May 1998), E.A.B. No. 97-051.

[28] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 ("*RJR MacDonald"*). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon*, [1975] 1 All E.R. 504 ("*American Cyanamid"*). Although the steps were originally used for interlocutory injunctions, the Courts have stated that the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 ("*Metropolitan Stores"*) and *RJR MacDonald*

> "First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."[29]

[35] The first step of the test has a very low threshold. Based on the evidence submitted, the applicant has to have some basis on which to present an argument. The applicant must show that there is a serious issue to be tried. As not all of the evidence will be before the Board at the time the decision is made regarding a Stay application, "…a prolonged examination of the merits is generally neither necessary nor desirable."[30]

[36] The second step in the test to determine whether a Stay is warranted requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.[31] Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, *not its magnitude*. The harm must not be quantifiable, the harm to the applicant *could not be satisfied in monetary terms*, or one party could not collect damages from the other. In *Ominayak* v. *Norcen Energy Resources*,[32] the Alberta Court of Appeal defined irreparable harm by stating:

> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be denial of justice."[33]

The party claiming that damages would be inadequate compensation must show that there is a real risk that harm will occur. It cannot be mere conjecture.[34] The damage that may be suffered by third parties may also be taken into consideration.[35]

Inc. v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

29 *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

30 *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 50.

31 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110.

32 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

33 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

34 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

35 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

[37] The third step in the test is the balance of convenience – "…which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[36] The decision-maker is required to weigh the burden that the remedy would impose on the defendant against the benefit the plaintiff would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The courts have considered factors such as the cumulative effect of granting a Stay,[37] third parties that may suffer damage,[38] or if the reputation and goodwill of a party will be affected.[39]

[38] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. In *Metropolitan Stores*, it was recognized that the public interest is a special factor in constitutional cases.[40]

[39] The environmental mandate of this Board requires the public interest be considered in appeals before the Board, and therefore the public interest will be considered in the balance of convenience.[41] The Board has, therefore, stated that the public interest is a separate step in the test when applying for a Stay. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "…concerns of society generally and the particular interests of identifiable groups."[42] The effect on the public may sway the balance for one party over the other.[43]

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36 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

37 *MacMillan Bloedel* v. *Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

38 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

39 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

40 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 90.

41 The Court in *RJR MacDonald*, at paragraph 64, stated:

"The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants."

42 *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

43 The Court in *RJR MacDonald*, at paragraph 68, stated:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

IV. ANALYSIS

A. Serious Issue

[40] As indicated in *RJR MacDonald,* the first step in determining if a Stay should be granted has a low threshold – there needs to be a serious issue to be tried and the claim is not frivolous or vexatious.

[41] Based on the Parties' submissions, the Board accepts there is a serious issue to be tried, and the first part of the test for a Stay has been met. The Appellant raised a valid issue, namely the change in water flow as a result of the ditch constructed by the Approval Holder.

[42] The appeal is not frivolous or vexatious, and the Appellants raised a valid concern, a concern that was recognized by the Director as far back as 1997. Therefore, the Appellants have succeeded at the first step of the Stay test.

B. Irreparable Harm

[43] In assessing irreparable harm, the Supreme Court of Canada states that it must be determined "…whether the refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."[44]

[44] The onus is on the Appellants to demonstrate that they will suffer irreparable harm if the Stay is not granted. The Appellants argued any increase in the flow of water over their lands would cause even further deterioration of their pasture than what has already occurred as a result of the ditch. However, if the flow of water does increase as a result of the Approvals being issued and the project being built, the effects can be reversed if the water is prevented from flowing over the land by requiring additional storage or alterations are made to the proposed project to control the rate and duration of the drainage from the site. Any willows can be removed, and if necessary, the land reseeded. Although perhaps an inconvenience to the Appellants, the harm is not irreparable in the long term.

C. Balance of Convenience

[45] For the third part of the test, the Board must look at whether any of the Parties could not be compensated for any damages that may result from the granting of, or the refusing to grant, a Stay. When assessing balance of convenience, the Board looks at whether the party can be compensated monetarily, and it is not merely the person seeking the Stay that is considered.

[46] If the Appellants' properties need to be reseeded and brushing done to control the growth of the willows, these costs can be easily determined and thereby, they could be compensated for any damages that may occur.

[47] Some of the Appellants argued the value of their lands would decrease if the project was allowed to proceed. The value of their lands can be determined through the market place, and therefore they could be compensated monetarily. By stating this, the Board does not intend to trivialize the intrinsic and personal value of the Appellants' properties, but it must look at the situation objectively and realistically.

[48] The Approval Holder in this situation stated its property has been put up for sale. This indicates to the Board the Approval Holder does not consider the existing property unique or irreplaceable, as it is looking for alternative sites for the project, and therefore, it could be compensated monetarily. At worse, even if the property was not for sale, the Approval Holder would be faced with a delay of proceeding with the construction on the site.

[49] Both Parties can be compensated monetarily. Therefore, this step of the test does not favour one party over the other. Because the Approval Holder is seeking alternatives and selling the property, granting the Stays will not harm it. By choosing to vacate the property, the Approval Holder has already determined the Approvals are no longer required for its use. Any new purchaser would be aware of the Approval applications, the resulting appeals, and the Stays

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[44] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 58.

issued. Therefore, the new owner would not suffer any harm that could not be compensated for monetarily via the sales agreement.

[50] As a result, the Board does not see any harm to the Approval Holder if the Stays are granted.

D. The Public Interest

[51] On the question of the public interest, the Supreme Court in *RJR MacDonald* stated:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large…. Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

[52] Further, in determining the public interest, the Supreme Court directs us to look to the "…authority that is charged with the duty of promoting or protecting the public interest…." The Federal Court of Canada in *North of Smokey Fishermen's Association* v. *Canada (Attorney General)*, [2003] F.C.J. No. 40, stated, "an action taken by the Crown is prima facie deemed to be in the public interest." The Court continued:

> "When a public authority is prevented from exercising its statutory powers, it can be said that the public interest, of which the authority is the guardian, suffers irreparable harm….
>
> In view of the role and responsibility of the Minister in authorizing a certain fishery and the inherent public interest in the Minister's decision, the public policy component of the Minister's decision is paramount and must prevail over

> the more private, and at this point, somewhat speculative concerns of the applicant."[45]

[53] In this case, the Director argued it was up to the local municipality to decide whether to issue a development permit, and therefore the local municipality makes the determination of the public interest. He stated he would not dispute the local municipality's decision. The Board agrees the local municipality has the authority to issue the development permits, but it is also the Director's mandate to consider environmental effects of projects, whether or not they require a development permit. Part of the environmental effects considered by the Director should be, what is the best decision taking into consideration the public interest?

[54] In this situation, the public interest warrants the Stays being granted. The Appellants are concerned about a ditch that was constructed without an approval, and the Director failed to follow up on the issue during the past six years. Although the Director believes it is to the Appellants' benefit to have the Approvals in place, without the Approvals, the Approval Holder cannot start construction of the project, thereby preventing the possibility of water runoff from the site increasing.

[55] The Board intends to hear the appeals prior to spring runoff, and by placing a Stay on the Approvals, the status quo will remain in effect until the Minister releases his decision, reducing the possibility of additional harm to the Appellants.

V. CONCLUSION

[56] Although it is arguable whether the Appellants will suffer irreparable harm if the Stays are not granted, the circumstances in this case, specifically the fact that the Approval Holder had put its property up for sale, warrants the Board granting the Stay applications. Therefore, pursuant to section 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board grants the Stay applications, and they are to remain in effect until the Board hears the appeals and the Minister releases his decision.

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[45] *North of Smokey Fishermen's Association* v. *Canada (Attorney General)*, [2003] F.C.J. No. 40 at paragraphs 24 to 26.

Dated on November 19, 2004, at Edmonton, Alberta.

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Dr. Steve E. Hrudey
Board Member and Panel Chair