

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – November 7, 2013

**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 David and Donna Hanson and Roy and Gordon Lindberg with respect to the decision of the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, to issue *Water Act* Approval No. 00297021-00-00 to the County of St. Paul.

Cite as: Stay and Issue Decision: *Hanson and Lindberg v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource*

*Development*, re: County of St. Paul (07 November 2013), Appeal Nos. 13-005 and 006-ID1 (A.E.A.B.).

**BEFORE:**

Ms. A.J. Fox, Panel Chair; Mr. Eric McAvity, Q.C., Board Member; and Dr. Dave Evans, Board Member.

**SUBMISSIONS BY:**

**Appellants:** Mr. David and Ms. Donna Hanson; and Mr. Roy Lindberg and Mr. Gordon Lindberg.

**Approval Holder:** County of St. Paul, represented by Ms. Daina Young, Reynolds Mirth Richards & Farmer.

**Director:** Mr. Patrick Marriot, Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Aurelia Nicholls, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval under the *Water Act* to the County of St. Paul (the County) to fill in a water body to construct a road.

Mr. David and Ms. Donna Hanson and Mr. Roy Lindberg and Mr. Gordon Lindberg (collectively, the Appellants) appealed the decision to issue the Approval and requested a stay. The Environmental Appeals Board (the Board) granted a temporary stay and asked AESRD and the County to respond to the stay request.

The Board requested, received, and reviewed the written submissions on whether the appellants are directly affected, whether to grant the stay, and the issues to be considered at a hearing of the appeals.

AESRD and the County took no issue with finding the Appellants directly affected. The Board found the Appellants are directly affected because they own lands adjacent to the water body that is proposed to be filled.

The County took no issue with the stay and AESRD made no comments on the stay. The Board granted the stay because it found there was a serious issue to be heard and there would be irreparable harm to the water body if the stay was not granted.

The Board determined the issues for the hearing will be:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's decision and reasons regarding preliminary matters raised in respect of appeals of Approval No. 00297021-00-00 (the "Approval") issued to the County of St. Paul (the "Approval Holder" or the "County"). Alberta Environment and Sustainable Resource Development ("AESRD") issued the Approval to the County under the *Water Act*, R.S.A. 2000, c. W-3, for the purpose of filling in a water body to build a road. Mr. David and Ms. Donna Hanson, and Mr. Roy Lindberg and Mr. Gordon Lindberg (collectively, the "Appellants") appealed the decision to issue the Approval and requested a stay. The Environmental Appeals Board (the "Board") issued a temporary stay to receive submissions from the County and AESRD on the issue of the stay. The Board also received submissions on the directly affected status of the Appellants and issues to be considered at a hearing of the appeals, if one is held.

[2] The Board found the Appellants are directly affected by the decision to issue the Approval. The Board upheld the stay because of the irreparable harm that could occur to the wetland during the time the appeals are heard.

[3] The issues for the hearing are:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

## **II. BACKGROUND**

[4] On April 26, 2013, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued Approval No. 00297021-00-00 under the *Water Act* to the Approval Holder. The Approval allows for the filling of a water body on an unnamed lake and wetlands at W1/2 04-59-10 W4M in the County of St. Paul to build a road within a road allowance.

[5] On May 6, 2013, the Board received Notices of Appeal from the Appellants appealing the Approval and requesting a stay.

[6] On May 7, 2013, the Board wrote to the Appellants, Approval Holder, and the Director (collectively, the “Participants”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and Director of the appeals. The Board asked the Director for a copy of the documents upon which the Director made his decision (the “Record”).

[7] On May 8, 2013, the Board acknowledged a telephone call received from Ms. Hanson requesting a stay of the Approval. The Board asked the Appellants to respond to the Board’s questions regarding their stay request.<sup>1</sup>

[8] On May 13, 2013, the Board received a request from the Appellants to put the stay request on hold pending the mediation meeting. The Board granted the request.

[9] On June 4, 2013, the Board confirmed the mediation meeting would be held on July 24, 2013.

[10] On June 14, 2013, the Board received a copy of the Record, and copies were provided to the Participants on June 17, 2013.

[11] The mediation meeting was held on July 24, 2013, in St. Paul. No resolution was reached.

[12] On July 26, 2013, the Board asked the Appellants to answer the stay questions if they wanted the Board to consider their stay request. The Appellants provided their responses on August 8, 2013.

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<sup>1</sup> The Appellants were asked to respond to the following questions:

1. What are the serious concerns of the Hansons and Lindbergs that should be heard by the Board?
2. Would the Hansons and Lindbergs suffer irreparable harm if the Stay is refused?
3. Would the Hansons and Lindbergs suffer greater harm if the Stay was refused pending a decision of the Board than the County of St. Paul would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are the Hansons and Lindbergs directly affected by AESRD’s decision to issue the Approval to the County?

[13] On August 9, 2013, the Board notified the Participants that, based on the information provided in the Appellants' responses, the Board granted a temporary stay of the Approval to allow time to receive comments from the Approval Holder and Director regarding the stay application. The temporary stay prohibited the Approval Holder from doing any work under the Approval that may affect the bed, bank, or shore of the lake and associated wetlands. The Approval Holder and Director provided their responses on August 23, 2013.

[14] The Board received submissions on the issues for the hearing between August 15, 2013, and September 5, 2013.

[15] On September 27, 2013, the Board notified the Participants that the hearing would be held on January 23, 2014.

### **III. DIRECTLY AFFECTED**

#### **A. Submissions**

##### **1. Appellants**

[16] The Hansons stated their main concern is the loss of the lake and the unique natural habitat that will needlessly be altered for the construction of the roadway. They stated there is already an existing road serving the minimal traffic through the area. The Hansons believed the application should have been rejected since a road already exists and it was not necessary to disturb the lake. The Hansons included a portion of the County map indicating landowners around the proposed road.

[17] The Lindbergs explained their family has lived on the property for 95 years, and they have maintained it in a near natural state, respecting the lake as an asset. They stated their property will be directly affected by the construction of the proposed road. The Lindbergs stated that if people do not consider the future, governments are unlikely to devote the necessary time and resources to ensuring sound, thoughtful planning.



2. Approval Holder

[18] The Approval Holder made no comments on the directly affected status of the Appellants.

3. Director

[19] The Director confirmed the Appellants filed Statements of Concern. The Director submitted the Appellants are directly affected based on their proximity to the wetland that is subject to the Approval.

**B. Analysis**

[20] Before the Board can determine whether a stay should be granted, it must determine whether the Appellants are directly affected. Under section 97(2) of EPEA, only a party to an appeal can request a stay.<sup>2</sup>

[21] The Board has discussed the issue of directly affected in numerous prior decisions. The Board received guidance on the matter of directly affected from the Court of Queen's Bench in *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*").

[22] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

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<sup>2</sup> Section 97(2) of EPEA states:

“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.”

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and

proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”<sup>3</sup>

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”<sup>4</sup>

[23] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.<sup>5</sup>

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<sup>3</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“Bildson”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

<sup>4</sup> *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

<sup>5</sup> See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

[24] The Court of Queen's Bench in *Court*<sup>6</sup> stated an appellant only needs to show there is a potential for an effect on that person's interests. This potential effect must still be within reason, plausible, and relevant to the Board's jurisdiction for the Board to consider it sufficient to grant standing.

[25] The Approval Holder did not provide any submissions on whether the Appellants are directly affected, and the Director made no comments other than to confirm the Appellants filed Statements of Concern and the Appellants own property adjacent to the proposed project.

[26] Construction of the proposed road will result in a portion of a wetland being filled. The Appellants own property adjacent to the wetland at issue, and they expressed concerns regarding the loss of the wetland and riparian ecosystems and soil erosion. As stated in *Court*, the Appellants need only demonstrate there is a potential of harm on the balance of probabilities. Given the location of the Appellants' properties in relation to the project site, there is a strong likelihood they will be affected if the wetland is impacted. The Approval Holder's consultant stated there would be an impact to the riparian areas of the wetland, and since the Approval allows for a portion of the wetland to be filled, there will be an impact. The extent of the impact and whether it was mitigated adequately by the terms and conditions of the Approval will be determined at the hearing.

[27] The Board finds the Appellants are directly affected by the Director's decision to issue the Approval. Therefore, the Board will consider the Appellants' stay request.

#### **IV. STAY APPLICATION**

##### **A. Legal Basis for a Stay**

[28] The Board is empowered to grant a stay pursuant to section 97 of 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.

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<sup>6</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

- (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.”

[29] The Board’s test for a stay, as stated in its previous decisions of *Pryzbylski*<sup>7</sup> and *Stelter*,<sup>8</sup> is adapted from the Supreme Court of Canada case of *RJR MacDonald*.<sup>9</sup> The steps in the test, as stated in *RJR MacDonald*, are:

“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.”<sup>10</sup>

[30] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is some basis on which to present an argument.

[31] The second step in the test requires the decision maker to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted.<sup>11</sup> Irreparable harm will occur if the applicant will be adversely affected by the activity the stay is meant to prevent, should the applicant ultimately be successful in its appeal. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from

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<sup>7</sup> *Pryzbylski v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd.* (6 June 1997), Appeal No. 96-070 (A.E.A.B.).

<sup>8</sup> *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (14 May 1998), Appeal No. 97-051 (A.E.A.B.).

<sup>9</sup> *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. Although the steps were originally used for interlocutory injunctions, the Courts have stated 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 and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

<sup>10</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

<sup>11</sup> *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

the other. In *Ominayak v. Norcen Energy Resources*,<sup>12</sup> 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 of 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 a denial of justice.”<sup>13</sup>

The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.<sup>14</sup> The damage that may be suffered by third parties may also be taken into consideration.<sup>15</sup>

[32] 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.”<sup>16</sup> The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the applicant 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,<sup>17</sup> third parties who may suffer damage,<sup>18</sup> or if the reputation and goodwill of a party will be affected.<sup>19</sup>

[33] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. Public interest includes the “...concerns of society generally and the particular interests of identifiable groups.”<sup>20</sup> The effect on the public may sway the balance for one party over the other.

[34] Each step has to be met. In most circumstances, if any of the steps are not met, then the stay is denied.

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<sup>12</sup> *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

<sup>13</sup> *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

<sup>14</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>15</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>16</sup> *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

<sup>17</sup> *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

<sup>18</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>19</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

<sup>20</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

**B. Step 1 - Serious Issue to be Tried**

1. Appellants' Submission

[35] The Appellants stated they are concerned the Approval was based on incomplete and inaccurate field studies regarding the species known to inhabit the area that are listed as endangered, threatened, or at risk under AESRD's Sensitive Species Inventory Guidelines and the *Federal Species at Risk Act*, S.C. 2002, c. 29. The Appellants noted the environmental assessment completed by the Approval Holder's consultant, EnviroMak Inc. ("EnviroMak"), confirmed no site specific studies were conducted to determine if threatened or endangered wildlife species inhabit the site, but assumptions were made based on the FWMIS Internet Mapping Framework 2011, even though AESRD states it is not to be used as a substitute for on-site surveys.

[36] The Appellants argued there is no justification for disturbing the lake. The Appellants stated the Approval Holder has never done an actual study on the amount of traffic that uses the road, but a private electronic count showed an average of 11 vehicles per day use Range Road 104.

2. Approval Holder's Submission

[37] The Approval Holder took no position with respect to the stay application.

[38] The Approval Holder explained the Approval allows for the construction of a new road within the statutory road allowance designated as Range Road 104. The Approval Holder stated EnviroMak, prepared an environmental assessment of the potential effects of the road construction on the aquatic and terrestrial ecosystems, and EnviroMak noted the road would likely influence the riparian edge of one wetland area.

3. Director's Submission

[39] The Director acknowledged the Appellants appeared to have raised a serious concern, specifically the impacts to the aquatic environment caused by the Approval.

4. Appellants' Rebuttal

[40] The Appellants noted that, under the *Water Act*, the Director may consider "...any other matters applicable to the approval that, in the opinion of the Director, are relevant."<sup>21</sup>

[41] The Appellants questioned why the Director would relinquish control with respect to endangered species to the Federal Government given AESRD's Alberta Strategy for the Management of Species at Risk states the province is given the first opportunity to protect listed species, and the federal government assumes management responsibility when the province's management is perceived as not being done effectively.

[42] The Appellants did not feel the Director's decision was based on good science since the environmental assessment was inadequate and incomplete regarding endangered and at risk species. The Appellants stated there are at least three species that are protected provincially and federally that can be found in the area if properly surveyed by a qualified specialist.

[43] The Appellants stated the Director has the right and obligation to reject an application or withdraw an approval based on past performance of an applicant for an approval under the *Water Act*. The Appellants stated there have been numerous occasions where the Approval Holder disrupted and sometimes permanently damaged wetlands.

[44] The Appellants questioned why the Director was reluctant to work within the scope of AESRD's own policies, procedures, guidelines, and provincial regulations to protect a sensitive wetland and endangered and threatened species from irreparable harm for a needless project.

5. Analysis

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<sup>21</sup> Section 38(2)(c)(ii) of the *Water Act* states:

"In making a decision under this section, the Director may consider ...

(ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant."



[45] The Approval Holder took no position on the stay request, and the Director acknowledged the Appellants had raised a serious concern regarding the impacts on the aquatic environment.

[46] The first step in the stay test is to determine whether there is an issue that should be heard. The Appellants raised concerns regarding the impacts on the aquatic environment that will occur as a result of the proposed road being built. They also raised concerns regarding soil erosion and the adequacy of the studies relied on by the Director when making his decision to issue the Approval. These are serious issues that are relevant to the Approval and are within the Board's jurisdiction to consider.

[47] As the Appellants have raised relevant concerns, the Board finds there is a serious issue to be determined, and the first part of the stay test has been met.

**C. Step 2 - Irreparable Harm**

1. Appellants' Submission

[48] The Appellants argued they would suffer irreparable harm, because if construction proceeds there will be irreversible damage to the wetland and surrounding habitat.

2. Approval Holder's Submission

[49] The Approval Holder took no position with respect to the stay application.

3. Director's Submission

[50] The Director had no comment.

4. Analysis

[51] The second step is to determine whether the Appellants would suffer irreparable harm if the stay is not granted.

[52] In determining if the Appellants will suffer irreparable harm if the stay is not granted, the Board looks at whether the Appellants could be compensated monetarily for any damages that may occur.

[53] In this case, the major concern presented by the Appellants was the impacts of the proposed project on the aquatic environment and the existing wetland would be irreparably harmed.

[54] When there is the potential for impacts to a wetland, the Board considers whether the wetland could be restored. If the Board recommends and the Minister orders an approval be reversed, it is the responsibility of the proponent to restore the impacted site if any work has been completed. When it is a wetland that has been disturbed, it is often difficult and sometimes impossible to restore the wetland without causing further environmental impacts. Although the costs of restoring the wetland could be determined, the harm to the wetland may be irreparable.

[55] Therefore, although harm to the Appellants, such as land values, may be compensated for monetarily, the harm to the environment, which is the major concern of the Appellants, cannot be effectively compensated for if the Approval is reversed or if amendments result in changes to the proposed design.

[56] The Board assures the Participants that it has not made any decision regarding the issuance of the Approval at this stage of the process. It is only after the Board has heard all of the evidence at the substantive hearing that it will determine whether it should recommend the Approval be confirmed, reversed, or varied.

[57] The Board finds there will be irreparable damage to the wetland during the time the appeals are heard if the Approval Holder proceeded with the construction of the road and, thereby, the Appellants' use of the wetland. The second test of the stay application has been met.

[58] As the Approval Holder and Director took no position regarding the stay, and given the Board found irreparable harm would occur if the stay was not granted, the Board does not consider it necessary to assess the final step in the stay test.

[59] Therefore, the Board considers it appropriate the stay remain in place until the Minister issues her decision or the Board orders otherwise. Under the stay, the Approval Holder

is prohibited from doing any work under the Approval that may affect the bed, bank, or shore of the lake and associated wetlands.

## **V. ISSUES FOR HEARING**

### **A. Submissions**

#### 1. Appellants

[60] The Hansons stated there are issues outside of the Director's control but are relevant to the appeal and have been accepted as part of the Notice of Appeal.

[61] The Hansons raised the following issues:

1. There is no justification for disturbing the wetland and surrounding natural habitat since there is an existing roadway within 350 metres of the proposed road that has an average traffic volume of 11 vehicles per day.
2. Insufficient studies have been conducted to ensure endangered and threatened species known to inhabit the area will not be adversely affected. Common species in the area are listed in the AESRD Sensitive Species Inventory Guidelines and the Federal *Species At Risk Act* as endangered, threatened, or at risk.
3. Past performance shows the Approval should not be granted given the Approval Holder's lack of erosion control, respect for wetlands, and respect for adjacent landowners' properties in other projects.
4. Destruction of the wetland will cause irreparable harm and providing funds to replicate what already exists is reprehensible.
5. An alternate route was offered that would address the Approval Holder's concerns but not affect the wetland.
6. Protection of the environment, especially wetlands and lakes from unnecessary destruction, should be one of the Director's priorities.

[62] The Lindbergs stated they are aware of the different animals, birds, and amphibians that use the wetland area, and efforts should be taken to ensure the survival of endangered species that use the wetlands. The Lindbergs stated the trees and shrubs around the wetlands reduce the rate of soil loss, convert carbon dioxide to oxygen, and provide an aesthetically pleasing environment. The Lindbergs argued the construction of the road will ruin

the local ecosystem, change the landscape, and destroy habitat for wildlife. The Lindbergs described the site as a historically important site, and explained the trees have not been cut for over 40 years except for firewood. The Lindbergs stated there is no reason to build the road since there is a county road 0.4 kilometres east of the proposed road.

2. Approval Holder

[63] The Approval Holder stated matters not within the Board's jurisdiction include road safety and traffic issues, land use decisions including the decision to proceed with a project at a particular location, alternatives to the project, and the compliance history of the approval holder. The Approval Holder noted matters potentially within the Board's jurisdiction under other statutes other than the *Water Act*, such as the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), are not within the Board's jurisdiction with respect to an appeal pursuant to the *Water Act*. The Approval Holder noted the *Species At Risk Act* was referred to in the Notices of Appeal, and compliance with federal legislation is not a matter within the Board's jurisdiction.

[64] The Approval Holder stated the following matters raised by the Appellants are not within the Board's jurisdiction:

1. construction of the road within the statutory road allowance because it is a land use decision;
2. alternatives to the construction and proposed project including location of the road;
3. the preservation of historically significant homesteads;
4. matters with respect to illegal hunting;
5. compliance history and past projects; and
6. road safety and traffic issues.

[65] The Approval Holder stated the following matters raised by the Appellants are within the Board's jurisdiction:

1. the impacts on the aquatic environment; and
2. wetland compensation.

[66] The Approval Holder stated the Approval contains terms and conditions to address the impacts of the authorized activity on the aquatic environment, human health, and public safety. The Approval Holder stated the Approval also provides for siltation and erosion control and wetland compensation.

3. Director

[67] The Director stated that municipal land use planning decisions, matters related to the *Species At Risk Act*, and matters within the jurisdiction of Fish and Wildlife (poaching) are outside of the Director's and the Board's jurisdiction, and most of the issues raised by the Appellants fall within these broad categories.

[68] The Director stated the primary issues raised by the Appellants appear to be land use planning decisions which are within the jurisdiction of the Approval Holder under the *Municipal Government Act*, R.S.A. 2000, c. M-26. The Director explained he cannot take into consideration the proximity of other roads or the possibility of using private lands, and he is limited to the considerations set out in the *Water Act*. The Director submitted there are other forums to address these concerns under the *Municipal Government Act*.

[69] The Director stated he has no obligation to require studies under the *Species At Risk Act* and is not required to review these studies prior to issuing the Approval. The Director stated he has no jurisdiction over federal legislation and he does not have the ability to assess the adequacy of any study conducted pursuant to the federal legislation. The Director explained *Species At Risk Act* studies are only required where the land has been designated critical habitat for a recovery strategy for a listed species, and there is no evidence to suggest the lands where the proposed road is to be built are designated as critical habitat. The Director stated the studies proposed by the Appellants go beyond what is required in the *Water Act* and the Director's authority. The Director stated it is the Approval Holder's obligation to ensure compliance with the *Species At Risk Act*.

[70] The Director explained past behaviour is not a reason in and of itself to deny an approval, nor is the length of time from the time of application to the actual receipt of the

approval a reason to deny an approval. The Director stated the appropriate documentation along with additional studies and plans were reviewed.

[71] The Director stated he cannot change a municipal planning decision and cannot receive or approve a *Species At Risk Act* study. The Director explained he cannot take the possibility of poaching into account.

[72] The Director noted the Appellants expressed their dislike towards the Approval, but they did not elaborate on the specific terms and conditions with which they take issue. The Director stated the Appellants did not indicate where he failed to consider the requirements of the *Water Act*. The Director explained a disturbance to a wetland is not necessarily sufficient reason in and of itself to deny an approval. The Director noted the *Water Act* considers disturbances and it provides for the management and mitigation of such disturbances.

[73] The Director submitted the issue for the hearing should be: Do the terms and conditions of the Approval adequately address the impacts caused by the proposed activity to the aquatic environment?

[74] The Director stated an assessment of the adequacy of the terms and conditions is constrained by the considerations contained in the *Water Act*. Issues such as erosion and siltation control would be included.

## **B. Analysis**

[75] Based on the submissions, all of the Participants agree that one of the issues that should be heard by the Board is the impacts the proposed road will have on the wetland and if the conditions of the Approval adequately mitigate the impacts. The Approval allows for the filling in of a wetland, thereby changing the aquatic ecosystem in that part of the wetland.

[76] The Board recognizes the impacts to the wetland are a major issue that needs to be heard at the hearing. The proposed road will impact a portion of the existing wetland, and it is this area that submissions from the Participants must focus on. The impacts extend to the wetland itself as well as the plant and animal species that use the area of the wetland that will be disturbed by the proposed project.

[77] As stated by the Director, the *Water Act* acknowledges there will be projects that will impact wetlands. However, these impacts need to be mitigated, often through the terms and conditions in the Approval. Therefore, the Board considers it appropriate to include as an issue whether the anticipated impacts from the proposed project on the aquatic environment have been adequately considered and mitigated through the terms and conditions of the Approval. The aquatic environment includes but is not limited to the vegetation and wildlife species that are dependent on the area of the wetland that will be disturbed by the project.

[78] The issue of the impacts to the aquatic environment as a result of the proposed road is clearly within the Board's jurisdiction and is relevant to the Approval. Therefore, the first issue the Board will consider at the hearing is: Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?

[79] The Board notes that, since the Director made his decision on the Approval, AESRD issued the Alberta Wetland Policy ("Wetland Policy"). This policy clearly states that when a wetland could be impacted by a proposed project, the proponent should take steps to avoid the wetland whenever possible. If the wetland cannot be avoided, then steps must be taken to mitigate any impacts. The final alternative, if there is no other feasible choice, is to compensate for any destroyed wetlands. Although the Wetland Policy was released in September 2013, similar concepts existed when the Director made his decision.<sup>22</sup>

[80] The Board, when preparing its recommendations, must consider existing legislation, policies, and guidelines that are in force at the time of the Board's decision, which may be different than what existed at the time the Director made his decision. Therefore, an issue the Board will hear is whether the terms and conditions in the Approval adequately consider all of the relevant legislation, policies, and guidelines that currently pertain to dealing with wetlands. This would include the Wetland Policy.

[81] In previous decisions the Board stated it does not have the jurisdiction to consider alternate routes or locations. Although that may be applicable to land based projects, when dealing with a project that impacts water bodies, the Board is required to consider the Wetland

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<sup>22</sup> See Director's Record Tab 89: Alberta Environment Provincial Wetland Restoration/Compensation Guide, Revised February 2007.

Policy, which specifically refers to siting a project in order to avoid or mitigate impacts to water bodies. Compensation or wetland replacement can be considered when negative wetland impacts could not be avoided or minimized. Given that siting a proposed project is a consideration under the Wetland Policy, the location of the road and alternate routes is a factor the Board will consider at the hearing. Assessing alternatives is only in relation to the application of the Water Policy.

[82] Therefore, the second issue the Board will hear is: Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

[83] The Board does not have the jurisdiction to consider traffic or road safety issues. These matters are within the jurisdiction of Alberta Transportation.

[84] The Appellants raised concerns regarding poaching that may occur when the wetland area is disturbed by the road. Poaching is not an issue that is within the Director's or Board's jurisdiction. Matters regarding poaching, if they occur, should be reported to the appropriate authorities.

[85] The *Species At Risk Act* is not within the Director's or the Board's jurisdiction to ensure compliance. However, the *Species At Risk Act* may be referred to identify species that are endangered or at risk. The *Species At Risk Act* can only be used as a reference to identify species that should be considered; it cannot be used to determine what the Director should or should not consider when issuing the Approval.

[86] The Board will hear two issues at the hearing:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

## **VI. CONCLUSION**

[87] The Board finds the Appellants are directly affected by the issuance of the Approval.



[88] The Board grants the stay request. The stay will remain in place in accordance with the same terms set out when the interim stay was granted, and shall remain in place until the Minister makes her decision respecting these appeals or the Board orders otherwise.

[89] The issues for the hearing will be:

1. Do the terms and conditions of the Approval adequately address the impacts of the proposed project on the aquatic environment?
2. Do the terms and conditions of the Approval take into consideration the applicable legislation, policies, and guidelines?

Dated on November 7, 2013, at Edmonton, Alberta.

"original signed by"

A.J. Fox  
Panel Chair

"original signed by"

Eric McAvity, Q.C.  
Board Member

"original signed by"

Dave Evans  
Board Member