
ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 14, 2015

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-

IN THE MATTER OF an appeal filed by 1370996 Alberta Ltd. with respect to Environmental Protection Order No. EPO-2015/02-SSR issued under the *Environmental Protection and Enhancement Act* to 1370996 Alberta Ltd. by the Director, South Saskatchewan Region, Alberta Environment and Parks.

Cite as: Stay Decision: *1370996 Alberta Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Parks* (14 October 2015), Appeal No. 15-020-ID1 (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Panel Chair.

SUBMISSIONS BY:

Appellant: 1370996 Alberta Ltd., represented by Mr. Harry Dahme and Mr. Kenneth Warren, Gowling Lafleur Henderson LLP.

Director: Mr. Stephen Mathyk, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Shannon Keehn, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

On July 20, 2015, Alberta Environment and Parks (AEP) issued an Environmental Protection Order (the EPO) to 1370996 Alberta Ltd. (the Appellant) under the *Environmental Protection and Enhancement Act* because of a release of a substance (liquid urea ammonium nitrate fertilizer) on lands northeast of Carmangay, Alberta, and into the adjacent Little Bow River. The EPO required the Appellant to take immediate action to address the release.

On July 24, 2015, the Appellant appealed the EPO, and on July 29, 2015, the Appellant applied to the Board for a stay of the EPO. The Board asked the Appellant to provide written submissions on certain questions on the stay. Based on these submissions, the Board asked AEP to provide a written response. The Appellant was then provided an opportunity to submit final comments. In determining if the stay should be granted, the Board reviewed the submissions of both parties and applied the four-step test used by the Board and the principles set down by the courts.

The Board found the test for the granting of a stay was not met in this case. There is a serious issue to be heard in this appeal, as the Appellant raised concerns regarding the terms and conditions of the EPO, and whether AEP was correct in issuing the EPO only to the Appellant and not to other parties.

The Board did not find the Appellant would suffer irreparable harm if the stay was not granted. The value of any work completed under the EPO can be calculated. AEP also has the ability to modify the work required under the EPO as more data become available. The balance of convenience did not favour the Appellant or AEP. However, when assessing the public interest, the Board found the public interest favoured not granting the stay. The work required under the EPO is to protect the environment from any further harm.

Since the Appellant did not meet the requirements of the stay test, the Board denied the stay request. The Appellant's appeal of the EPO remains in place.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's reasons for denying the application for a stay in respect of Environmental Protection Order No. EPO-2015/02-SSR (the "EPO") issued to 1370996 Alberta Ltd. (the "Appellant"). Alberta Environment and Parks ("AEP") issued the Order to the Appellant under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. W-3 ("EPEA"), in response to the release of a substance (liquid urea ammonium nitrate fertilizer) from a ruptured storage tank located at W1/2-11-14-23-W4M (the "Site") and the migration of the substance to the Little Bow River. 1370996 Alberta Ltd. appealed the EPO and requested a stay.

[2] The Environmental Appeals Board (the "Board") received submissions from the Appellants and AEP on whether the stay should be granted.

[3] Based on its review of the submissions and its analysis of the issues, the Board denied the stay. Although there was a serious issue to be heard, the Board found the Appellant would not suffer irreparable harm. In addition, the public interest warranted the stay being denied to ensure impacts to the environment would be minimized.

II. BACKGROUND

[4] On or about July 15, 2015, a 3000-gallon aboveground storage tank containing liquid urea ammonium nitrate fertilizer ruptured, releasing a significant quantity of its contents. The tank was located on farmland northeast of Carmangay, Alberta, owned by the Appellant. The liquid fertilizer migrated from the lands into the adjacent Little Bow River.

[5] On July 20, 2015, the Director, South Saskatchewan Region, Alberta Environment and Parks (the "Director"), issued the EPO to the Appellant requiring the Appellant to submit a Delineation and Excavation Plan to the Director by July 24, 2015. The work under the Delineation and Excavation Plan was to be completed by August 14, 2015. The EPO also

required the Appellant to provide an Aquatic Environmental Assessment Plan¹ by July 24, 2015, with the work under the plan to be completed by September 30, 2015.

[6] On July 24, 2015, the Board received a Notice of Appeal from the Appellant appealing the EPO.

[7] On July 24, 2015, the Board wrote to the Appellant and the Director (collectively, the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board asked the Director to provide a copy of the documents upon which his decision was based (the “Record”).

[8] On July 29, 2015, the Appellant applied for a stay of the EPO. The Board asked the Director if he was prepared to consent to any form of a stay.

[9] On July 30, 2015, the Director advised the Board he would not consent to a stay in any form.

[10] On July 30, 2015, the Board wrote to the Parties, noting the Appellant’s stay application indicated that additional evidence would be provided when the stay application was heard by way of an oral hearing or conference call. The Board explained its normal practice with respect to a stay application was to deal with it through written submissions only. The Board asked the Parties to confirm how they wanted to proceed to address the stay.

[11] On July 31, 2015, the Director asked the Board to proceed to deal with the stay application by written submissions only. The Appellant did not provide a response. The Board requested the Appellant provide a written response to four questions the Board asks each time it considers an application for a stay (the “stay questions”).²

[12] On August 5, 2015, the Appellant provided its responses to the stay questions.

¹ The Delineation and Excavation Plan and Aquatic Environmental Assessment Plan will be referred to collectively as the “Plans.”

² The Appellant was asked to answer the following questions:

1. What are the serious concerns of the Appellant that should be heard by the Board?
2. Would the Appellant suffer irreparable harm if the stay is refused?
3. Would the Appellant suffer greater harm if the stay was refused pending a decision of the Board, than the Director would suffer from the granting of a stay?
4. Would the overall public interest warrant a stay?

[13] On August 6, 2015, the Board requested the Director provide a response submission by August 10, 2015, and the Appellant provide a rebuttal submission by August 12, 2015.

[14] On August 6, 2015, the Board received the Director's response submission.

[15] On August 11, 2015, the Board received the Appellant's rebuttal submission.

[16] On August 12, 2015, the Board notified the Parties that the stay was denied with reasons to follow. These are the Board's reasons.

III. STAY SUBMISSIONS

A. Appellant

[17] The Appellant stated there is a serious issue to be decided in that the Director refused to consider other "persons responsible" for the substance as defined in EPEA.³ The Appellant explained the storage tank is owned by South Country Co-op, and the liquid urea ammonium nitrate fertilizer was delivered and placed into the tank by employees or agents of South Country Co-op. Therefore, according to the Appellant, South Country Co-op is a "person responsible" under EPEA to whom the EPO should have been issued.

³ Section 1(tt) of EPEA states:

"'person responsible', when used with reference to a substance or a thing containing a substance, means

- (i) the owner and a previous owner of the substance or thing,
- (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
- (iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and
- (iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii)...."

[18] The Appellant argued the extent of the work required under the EPO is excessive and unnecessary. The Appellant said full delineation of the substance released from the tank is not required since there is no regulatory remediation guideline for ammonia or nitrate in soils.

[19] The Appellant said the excavation of soil containing concentrations in exceedance of the water guidelines fails to account for natural processes, such as biodegradation and attenuation, which act to reduce concentrations to levels where there will be no adverse effects to receiving waters.

[20] The Appellant explained that a visual inspection of the site showed the impacted area to be limited to approximately 670 m², and the contamination appeared to be contained within the first metre below the soil surface, with the highest concentration at the surface and down to 30 centimetres below the surface.

[21] The Appellant explained the results of the water quality sampling confirmed that, since July 19, 2015, there was no discharge of ammonium nitrate to the Little Bow River in excess of the applicable standards and guidelines.

[22] The Appellant said a number of containment and remediation measures have already been implemented at the site to remove the source of the contamination and contain the contamination to mitigate further impacts outside the containment area.

[23] The Appellant submitted it would suffer irreparable harm if the stay was not granted.

[24] The Appellant stated it would be put to significant hardship and expense in complying with the EPO, as it requires excessive and unnecessary work that is more than what is reasonably required.

[25] The Appellant said there is no evidence to suggest further adverse environmental impacts will occur pending the hearing of the appeal. The Appellant stated it has taken steps to contain and remediate the impacts caused by the release.

[26] The Appellant explained the precautionary advisory against using water from the Little Bow River for cooking, bathing, and drinking had been lifted by AEP since Alberta Health

Services and Alberta Agriculture and Forestry determined there was no risk to human or animal health.

[27] The Appellant submitted the balance of convenience favours the Board granting a stay.

[28] The Appellant argued that requiring the Delineation and Excavation Plan include full delineation of the impacted area is excessive and unreasonable. The Appellant stated the delineation of soil impacts should be limited to an area in which concentrations exceed applicable standards or guidelines or where concentrations may have an adverse effect on surface water. The Appellant noted there are no standards or guidelines for ammonia or nitrate in soils, and current surface water monitoring did not show detectable concentrations of ammonia or nitrate in the surface water at the point of entry. The Appellant argued that, without a standard or guideline for ammonia or nitrate in soil, full delineation is almost impossible. It stated that use of ammonium nitrate as a fertilizer makes it difficult to fully delineate the impacted area.

[29] The Appellant said the requirement for excavation of all impacted soils does not account for natural processes, such as biodegradation and attenuation, which reduces concentrations so that no adverse effects may be experienced in the receiving waters.

[30] The Appellant argued the deadlines by which the work under the EPO is to be completed are unreasonable.

[31] The Appellant stated that, given the absence of a standard or guideline for ammonia or nitrate in soil, and that the Director has not provided direction as to the acceptable concentrations to which remediation is to be completed, the Appellant did not know how much more, if any, remediation of soil would be required to satisfy the EPO.

[32] The Appellant explained it submitted the Aquatic Environmental Assessment Plan as required by the EPO, but it disputed the scope and extent of the work required as set out in the EPO. The Appellant noted the EPO requires the Aquatic Environmental Assessment Plan be completed no later than September 30, 2015, but it will take more time than what was allotted to complete the work. The Appellant stated the September 30, 2015 deadline did not allow

sufficient time to submit amendments to alter the scope and for the Director to consider and approve any amendments.

[33] The Appellant noted the Aquatic Environmental Assessment Plan must address potential downstream impacts as far as the Travers Reservoir, which is located a considerable distance from the site. The Appellant explained that surface water sampling of the Little Bow River did not identify any impacts of the release further than five kilometres from the site. The Appellant said the Little Bow River is impacted by numerous agricultural operations between the Site and Travers Reservoir. The Appellant argued it was unreasonable to complete the full scope of the Aquatic Environmental Assessment Plan as required by the EPO where there is no evidence of any impact of the release beyond a certain distance and where there are likely other sources of ammonium nitrate, which may be impacting the Little Bow River.

[34] The Appellant submitted it was unreasonable to require the Appellant to comply with the deadlines for completion of the Aquatic Environmental Assessment Plan as set out in the EPO.

[35] The Appellant argued it would suffer irreparable harm if the stay is not granted. The Appellant said it would be put to significant hardship and expense in complying with the EPO as it requires work in excess of what is reasonably required, and there are other persons responsible, namely South Country Co-op, who would be more appropriately named in the EPO.

[36] The Appellant stated it may not be able to complete the Delineation and Excavation Plan, and cannot complete the Aquatic Environmental Assessment Plan, by the dates specified in the EPO.

[37] The Appellant stated that it was unlikely the appeal would be heard prior to the completion dates set out in the EPO and, therefore, if the Board refuses to grant the stay, the appeal would effectively be moot.

[38] The Appellant stated there was no evidence at the time to suggest any further adverse environmental impacts will occur pending the hearing of the appeal.

[39] The Appellant argued the public interest warrants a stay.

[40] The Appellant said it has taken significant effort to remediate and mitigate any and all adverse effects associated with the release, and there was no evidence to suggest any further adverse effects would occur pending the hearing of the appeal.

[41] The Appellant submitted it was in the public interest to grant the stay for the following reasons:

- (a) granting the stay would allow the Appellant and Director sufficient time to derive a site specific standard or guideline for ammonia and nitrate in the soil which can be used to guide further remedial efforts;
- (b) it would put the administration of justice in disrepute if the Appellant was required to do certain remedial work when even AEP does not know whether the work is required because there are no standards or guidelines;
- (c) work required under the EPO should be based on data generated by the monitoring conducted in respect to the release;
- (d) granting the stay would allow sufficient time for the Appellant and Director to discuss and agree on the Aquatic Environmental Assessment Plan that reflects the circumstances of the release; and
- (e) it would put the administration of justice in disrepute if the Appellant was required to investigate potential downstream impacts due to the release where there is no evidence the release had any impact beyond five kilometres from the site.

[42] The Appellant submitted it is not in the public interest to deny the stay for the following reasons:

- (a) it is unreasonable to require the Appellant to conduct and pay for investigative and remedial work, which may not be required, given there is no evidence of a continuing discharge of ammonium nitrate to the Little Bow River;
- (b) it is in the public interest that environmental protection orders are sufficiently narrow in scope to adequately address the impacts at issue without being so broad as to require unnecessary and excessive work; and
- (c) it is unreasonable to put the Appellant in noncompliance with the EPO when the EPO requires work to be done which cannot be completed within the specified timeframes.

B. Director

[43] The Director stated the Appellant submitted the Plans on July 24, 2015. The Director noted the EPO does not specify completion dates for work to be performed, but it requires the Plans to include a schedule of implementation with completion dates of no later than August 14, 2015, for the Delineation and Excavation Plan and no later than September 30, 2015, for the Aquatic Environmental Assessment Plan. The Director explained the EPO requires the Appellant to implement the Plans in accordance with a schedule of implementation approved by the Director.

[44] The Director submitted the Board should dismiss the stay application. The Director explained the purposes of the EPO are to ensure: (1) effects of the substance are confined; (2) the substance is managed in such a way as to prevent an adverse effect on the environment; and (3) the area affected by the release is restored to a condition satisfactory to the Director.

[45] The Director noted the issuance of an environmental protection order is appealable under section 91(1)(h) of EPEA, and this would be sufficient to meet the first part of the stay test.

[46] The Director explained he has broad discretion under section 113(1) of EPEA to issue an environmental protection order to the person responsible for the substance, but there is no requirement in the legislation for the Director to issue an environmental protection order to all potential persons responsible.

[47] The Director said the Appellant's submissions regarding the reasonableness of the Director's decision are more relevant when determining the actual merits of the appeal in a hearing.

[48] The Director stated the Appellant failed to prove that it would suffer irreparable harm if a stay is not granted. The Director said the Appellant did not provide any evidence of the financial harm the Appellant claimed. The Director noted the Appellant said it would be put to "significant hardship and expense" if it was forced to comply with the EPO, but this is not evidence of irreparable harm.

[49] The Director submitted the expense of complying with the EPO is not the type of irreparable harm required to meet the second part of the stay test. The Director noted the Appellant did not provide any evidence regarding how the financial harm claimed could not be remedied at the close of the hearing.

[50] The Director believed granting the stay may delay the Appellant's return of the Site to pre-release conditions, thereby delaying the Appellant's resumption of its normal use of the land and costing the Appellant the beneficial use of the land.

[51] The Director noted the Appellant stated it may not be able to complete the Plans by the specified date. The Director confirmed the Appellant completed the Plans and submitted them to the Director by the date specified in the EPO. The Director questioned why the Appellant would request a stay of the deadline to provide the Plans since they have already been submitted to the Director.

[52] The Director explained that, although the Appellant was required to provide the Plans to include specific completion dates, the EPO requires the Appellant to implement the Plans in accordance with the schedule of implementation approved by the Director. The Director submitted he has not approved the Plans, amended the EPO, or set a schedule of implementation for the Plans. The Director was uncertain as to what deadline the Appellant was requesting the Board to stay.

[53] In response to the Appellant's argument that the required content of the Plans was excessive, the Director said that he is not required to have definitive proof of all relevant facts prior to issuing an environmental protection order.

[54] The Director stated he has wide discretion to determine which persons responsible will be named in remedial orders, and he has the discretion to name additional persons responsible if evidence indicates other persons meet the definition of "person responsible" as set out in EPEA.

[55] The Director stated that arguments regarding "person responsible" are more properly before the Board in the course of the appeal and are not relevant to a stay application.

[56] The Director submitted the balance of convenience weighs against granting the stay.

[57] The Director disagreed with the Appellant's statement that it has already taken all steps necessary to prevent further environmental impacts resulting from the release.

[58] The Director explained the results of surface water analyses do not represent the total potential adverse impacts on the environment. The Director stated there has been no evidence provided to demonstrate there is no potential for further releases of the substance into the Little Bow River, flowing downstream to Travers Reservoir, or to groundwater. The Director said he has no information to satisfy him that precipitation falling on the Site would not cause further release of the substance into the Little Bow River or groundwater. The Director noted potential impacts to groundwater, soils, and aquatic sediments have not been adequately addressed.

[59] The Director explained the work required by implementing the Plans is meant to assess all the potential adverse impacts to the environment and prevent the adverse impacts from occurring. The Director stated delaying the implementation of the Plans will allow potential impacts to occur unchecked.

[60] The Director stated the purpose of EPEA and the provisions giving the Director the discretion to issue environmental protection orders is to prevent any and all potential adverse effects on the environment. The Director argued delaying the steps necessary to assess and prevent potential adverse impacts cannot cause more irreparable harm to the Appellant than to the Director, whose interest is to protect the environment. The Director submitted that delaying the implementation of the Plans would result in a greater irreparable harm to the interests the Director represents than to the Appellant's interests.

[61] The Director stated the public interest would be best served in refusing to grant the stay.

[62] The Director explained he decided to issue the EPO in the time and manner that he did because time-sensitive steps were needed to protect the environment and mitigate

potential impacts to the environment. The Director stated these goals are in the public interest and he has a duty to protect the environment.

[63] The Director explained that even though the limited surface water quality results indicate that concentrations of the substance in the water have dissipated, there is the potential for re-release of the substance into the Little Bow River from the Site, there are potential impacts on the aquatic environment from the possible uptake and re-release from the sediment or substrate of the Little Bow River, and there are possible impacts on Travers Reservoir. The Director said possible impacts to groundwater have not been addressed. The Director stated that requiring the potential impacts to be assessed and mitigated sooner rather than waiting until the possible resolution of the appeal is in the best interests of the aquatic environment and, therefore, the public.

[64] The Director noted that, although the EPO requires the Appellant to include specific completion dates in the proposed implementation schedules for the Plans, the EPO allows the Director to approve an implementation schedule separate and apart from clauses 4(f) and 7(h) of the EPO.⁴ The Director stated that it appeared the Appellant was prematurely applying for a stay of the Director's future decisions with respect to the approved implementation schedules for the Plans. The Director did not understand how the EPO requires work to be done "which cannot be completed within the timeframes as set out in the [EPO]" given the EPO does not require work to be completed, only that plans for future work to protect the environment are submitted by certain dates with certain details.

[65] The Director noted the Appellant requested a stay of the complete EPO, including Clauses 1 and 2.⁵

⁴ Clauses 4(f) of the EPO states:
"A schedule for implementing the Delineation and Excavation Plan with a completion date of no later than August 14, 2015."
Clause 7(h) of the EPO provides:
"A schedule for implementing the Aquatic Environmental Assessment Plan with a completion date of no later than September 30, 2015."

⁵ Clauses 1 and 2 of the EPO provide:
"1. The Company shall immediately and continuously prevent any and all amounts of the Substance from entering the water, bed or shore of the Little Bow River."

[66] The Director said it is not in the public interest to stay the requirements that no further substance enter the water, bed, or shore of the Little Bow River or for the Director to stop receiving the information necessary to make informed decisions regarding the remedial work that is necessary to protect the environment.

[67] The Director submitted the Appellant did not show the overall public interest warrants a stay.

C. Rebuttal Submission

[68] The Appellant noted the EPO specifically sets out completion dates for the work required under the Delineation and Excavation Plan (August 14, 2015) and the Aquatic Environmental Assessment Plan (September 30, 2015), and compliance with these dates is required by the EPO. The Appellant stated the wording of the EPO clearly requires that, unless otherwise advised by the Director, the deadlines set out in the Plans must be met.

[69] The Appellant said it must now ask for an extension of the August 14, 2015, deadline to avoid being in non-compliance with the EPO. The Appellant stated it cannot comply with the deadline given the absence of:

- (a) a standard or guideline for ammonia or nitrite in soil;
- (b) direction from the Director as to the acceptable concentrations to which remediation is to be completed; and
- (c) written comments from the Director with respect to the Delineation and Excavation Plan.

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2. The Company shall, as the information described below becomes available, immediately and continuously, until advised otherwise in writing by the Director, submit in writing to the Director at least all of the following:
- a. raw data;
 - b. analytical results;
 - c. field results;
 - d. written Reports; and
 - e. verbal Reports
- that contain any information related to the July 15, 2015 release of the Substance.”

[70] The Appellant stated that, if the Director does not grant an extension for the Aquatic Environmental Assessment Plan, it would not be able to comply with the deadline for completion of the work required under the plan.

[71] The Appellant submitted it would suffer irreparable harm if the stay is not granted because it cannot complete the Plans by the dates specified.

[72] The Appellant distinguished the Board's decision in *McColl*,⁶ noting South Country Co-op is an ongoing active business, and there is evidence to show South Country Co-op is the owner of the tank that ruptured and caused the release. The Appellant submitted that the fact there are other "persons responsible" who are more appropriately named in the EPO is a relevant consideration for the Board as part of the stay application. The Appellant stated that, due to the Director's failure to issue the EPO to South Country Co-op, the Appellant will incur the cost of complying with the EPO and the cost of litigation with South Country Co-op in order to recover the expenses it incurred to comply with the EPO.

[73] The Appellant submitted the necessity of engaging in litigation with South Country Co-op in the absence of a stay is a consideration in whether the Appellant will suffer irreparable harm if the stay is not granted.

[74] The Appellant asked the Board to consider the nature of the substance that was released in assessing whether the balance of convenience and public interest weighs in favour of granting the stay.

[75] The Appellant said that even though 9,800 litres of the substance may have been in the tank, it does not necessarily follow that the entire contents of the tank entered the Little Bow River because of the release. The Appellant submitted the majority of the substance is in the soil, which has been excavated and placed in secure temporary storage.

[76] The Appellant stated that, given there have been no detections of increased concentrations of the substance in the Little Bow River downstream of the Site since July 19, 2015, the site is not currently impacting the quality of water in the Little Bow River. The

⁶ *McColl Frontenac Inc.* (2002), 44 CELR (N.S.) 209 (Alta. Env. App. Bd.), (*sub nom. McColl Frontenac Inc. v. Director, Enforcement and Monitoring Bow Region, Environmental Service, Alberta Environment* (7 December 2001) Appeal No. 00-067-R (A.E.A.B.)).

Appellant explained the ongoing monitoring at the Site has not identified any further discharge from surface water or groundwater into the Little Bow River. The Appellant noted surface water monitoring following the release showed there were no impacts of the release on the quality of the water in the Little Bow River more than five kilometres downstream of the site.

[77] The Appellant stated the substance is regularly applied to farm lands along the Little Bow River and, therefore, discharge of the substance into the Little Bow River by persons other than the Appellant will also likely occur on a regular basis. The Appellant stated there is no evidence that AEP monitors for these discharges.

[78] The Appellant argued the urgency in conducting the work required under the EPO is unfounded given: (1) there is no evidence of an ongoing impact from the Site on the quality of the water in the Little Bow River; (2) other persons are likely continuing to discharge a similar substance (urea fertilizer) into the Little Bow River; and (3) the limited distance downstream of the Site where elevated concentrations of the substance were found.

[79] The Appellant submitted the potential impacts to soil and groundwater have been adequately addressed by:

- (a) the rapid excavation of impacted soils at the Site; and
- (b) confirmatory soil sampling at the Site indicates there is no impact on groundwater.

[80] The Appellant stated that, with respect to the potential impact on aquatic sediments, it is impossible to address the potential impacts related to the release given other persons discharge a similar substance into the Little Bow River on a regular basis.

[81] The Appellant stated it has taken significant steps, including the excavation of the majority of the impacted soil, to return the Site to pre-disturbance conditions as soon as possible. The Appellant said it is only the absence of guidance from the Director with respect to the completion of the work that is preventing the return of the Site to pre-disturbance conditions.

[82] The Appellant explained it did not intend to request a stay of clauses 1 and 2 of the EPO.

IV. ANALYSIS

[83] 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.
- (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.”

[84] The Board’s test for a stay, as stated in its previous decisions of *Pryzbylski*⁷ and *Stelter*,⁸ is adapted from the Supreme Court of Canada case of *RJR MacDonald*.⁹ 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.”¹⁰

[85] 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.

[86] The Appellant raised concerns regarding the terms and conditions of the EPO and whether the EPO should have listed other persons responsible for the substance release. These

⁷ *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.).

⁸ *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.).

⁹ *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.

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

are serious concerns that relate directly to the issuance of the EPO and are issues that can be heard by the Board. Therefore, the first step in the stay test has been met.

[87] 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.¹¹ Irreparable harm will occur if the applicant will be adversely affected by the conduct 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 the other. In *Ominayak v. Norcen Energy Resources*,¹² the Alberta Court of Appeal defined irreparable harm in the context of an application for an injunction 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.”¹³

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.¹⁴ The damage that may be suffered by third parties may also be taken into consideration.¹⁵

[88] The Appellant submitted it would suffer irreparable harm if the stay was not granted, because it would incur significant hardship and expense in complying with the EPO as it requires work in excess of what is reasonably required in relation to the substance release. It is the view of the Board that this argument does not demonstrate the Appellant will suffer irreparable harm.

[89] The Appellant submitted it would suffer irreparable harm if the stay was not granted because it must bear the costs incurred to comply with the EPO and for any future litigation against those it believes to be other “persons responsible.” These costs are easily determined and do not fall within the meaning of irreparable harm. In addition, given the

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

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

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

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

Appellant is seeking to have others named in the EPO, there are potentially other parties from whom the Appellant can seek compensation for such costs.

[90] All costs associated with completing the required work under the EPO can be calculated. The Appellant will not incur any losses or costs that cannot be evaluated monetarily. Therefore, the Appellant has not met the second step of the stay test and the stay request is denied.

[91] The third step in the test is the balance of convenience, involving consideration of: "...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."¹⁶ 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,¹⁷ third parties who may suffer damage,¹⁸ or if the reputation and goodwill of a party will be affected.¹⁹

[92] In this case, it is not the impact to the Director that needs to be considered, but rather the impact to the environment. In determining which will suffer the greater harm, the Board considers the timeframe in which the appeal would be resolved. Essentially, who would suffer the greater harm during the time the appeals are considered and the Minister's decision issued? It is only after the Board hears all of the arguments at the hearing, will it determine if there will be actual harm to the environment and if the EPO adequately reflects what must be done to minimize the impacts.

[93] 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

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

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

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

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

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

particular interests of identifiable groups.”²⁰ The effect on the public may sway the balance for one party over the other.

[94] Although the Board will not grant the stay because the Appellant will not suffer irreparable harm, the Board will go on to address the Appellant’s arguments regarding the balance of convenience and the public interest.

[95] In this case, the Director is representing the public interest. Therefore, the Board must assess and compare the Appellant’s position with that of the public in assessing the balance of convenience.

[96] 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 will 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.”

[97] 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.

[98] The Board considers the public interest important in this case. Although the Board recognizes the Director did not provide much time for the Appellant to retain consultants to prepare the required reports, the Board notes the Appellant provided the Plans to the Director as required under the EPO and by the date specified. The Appellant has also taken steps to contain the impacts of the release.

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

[99] The Director, in issuing the EPO, was taking steps to ensure the environment and the public were protected from adverse effects from the release. Although the Appellant may have taken some steps to mitigate the concerns, issuing the EPO with short timeframes would minimize the environmental impacts of the release and ensure the work was completed in a timely manner.

[100] The EPO requires the delineation of the substance in the soil, groundwater, and the Little Bow River. The purpose of the EPO is to ensure the environment is protected, which in this case includes the protection of the Little Bow River. Given the potential for the substance entering groundwater aquifers that may be used for domestic purposes by other users and potentially the Appellant, the protection of the public from potentially adverse impacts caused by the substance release is of major importance. The Little Bow River is also used by the public for other purposes and provides habitat for fish. These concerns indicate the public interest would be best protected if the stay was not granted and the Appellant proceed to provide the information and take the necessary actions required under the EPO.

[101] The Board dismisses the stay request because, even though there are serious issues to be heard, the Appellant has not demonstrated it would suffer irreparable harm. Furthermore, the public interest favours the denial of the stay.

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

V. CONCLUSION

[103] The Board denies the stay request because the Appellant did not demonstrate it would suffer irreparable harm and the public interest did not warrant the granting of the stay. The Board will proceed to work with the Parties to schedule a mediation meeting.

Dated on October 14, 2015, at Edmonton, Alberta.

"original signed by"
Alex MacWilliam
Panel Chair