ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 13, 2020

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 West Fraser Mills Ltd., with respect to the decision of the Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks, to issue Approval No. 108-03-00 under the *Environmental Protection and Enhancement Act* to West Fraser Mills Ltd.

Cite as: Stay Decision: *West Fraser Mills Ltd.* v. *Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks* (13 March 2020), Appeal No. 18-019-ID1 (A.E.A.B.), 2020 ABEAB 9.

PRELIMINARY MOTIONS HEARING BEFORE: Mr. Alex MacWilliam, Board Chair.

SUBMISSIONS BY:

Appellant: West Fraser Mills Ltd., represented by Ms. Janice Walton, Blake, Cassels & Graydon LLP.

Director: Mr. Muhammad Aziz, Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks, represented by Ms. Alison Altmiks and Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

West Fraser Mills Ltd. (the Appellant) applied for a renewal of an Approval to operate a pulp mill issued by Alberta Environment and Parks (AEP) under the *Environmental Protection and Enhancement Act* (EPEA). AEP issued a renewed Approval, which included changes to some conditions contained in the prior Approval. The Appellant filed a Notice of Appeal with the Environmental Appeals Board (the Board), appealing several of the new conditions, and requested the Board grant a stay of those conditions pending the determination of its appeal.

The Board applied the test for granting stays established by the Supreme Court of Canada in *RJR-MacDonald* v. *Canada (Attorney General)*, and asked the parties to answer the 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 on the appeal, than the harm that could occur from the granting of a stay? and
4. Would the overall public interest warrant a stay?

The Board received written submissions from the Appellant and AEP regarding the stay application.

The Board found the Appellant's appeal raised serious issues to be heard by the Board, which satisfied the first part of the *RJR-MacDonald* test. In considering the second part of the test, the Board found the restrictions included in the Approval, on the use of the incinerator, could cause the Appellant to suffer irreparable harm from potential environmental, health, and safety risks unless a stay was granted. The Board found the Appellant would not be able to recover damages from AEP if it was successful in the appeal. The Board found the balance of convenience favoured the Appellant, as the Appellant would suffer greater harm if a stay were refused than AEP would suffer if a stay were granted. The Board found the public interest also favoured the Appellant as the concerns over potential risks to the environment, health, and safety of the Appellant's employees was a public interest sufficient for the Board to determine the Appellant met the fourth part of the test.

The Board ordered a stay of the appealed conditions until the Board heard the appeal and the

Minister of Environment and Parks issued his order, or until the Board directed otherwise.

TABLE OF CONTENTS

I. INTRODUCTION

[1] This is the decision of the Environmental Appeals Board (the "Board") regarding a preliminary motion by West Fraser Mills Ltd. (the "Appellant") requesting the Board grant a stay of certain conditions of Approval No. 108-03-00 (the "Approval"), issued to the Appellant by the Director, Upper Athabasca Region, Operations Division, Alberta Environment and Parks (the "Director").

II. BACKGROUND

[2] The Appellant operates the Slave Lake Pulp Mill, a bleached chemithermomechanical pulp manufacturing plant (the "Plant") near Slave Lake, Alberta. Operation of the Plant is authorized by the Approval, issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), on November 30, 2018, to replace Approval No. 108-02-00 (the "Previous Approval"), which expired on the same date. The Plant has been in operation since 1990.

[3] On January 6, 2016, the Appellant applied for renewal of the Previous Approval and submitted an amended renewal application on August 2, 2016.

[4] On September 9, 2018, staff from Alberta Environment and Parks ("AEP") provided a draft of the Approval to the Appellant. On October 12 and November 16, 2018, the Appellant met with AEP staff and discussed concerns it had with the draft Approval.

[5] On November 30, 2018, the Director issued the Approval.

[6] On December 28, 2018, the Appellant filed a Notice of Appeal with the Board appealing the following conditions of the Approval:

- 2.4.4 – the requirement for emissions controls on storages tanks;
- 4.2.14 – the requirement to cease operation of the olivine wood waste incinerator not later November 30, 2021;
- 4.2.16 and Table 4.2-D – downtime limit for pollution abatement equipment due to maintenance;
- 4.2.18 and Table 4.2-E – reporting requirements of the air emission source

monitoring;

- 4.3.15(b) – downtime limits for inspection or repair of each continuous monitoring system associated with the industrial wastewater control system;
- 4.3.44 to 4.3.47 and Table 4.3-H – wetland assessment and operational monitoring requirements;
- 4.4.18 – requirements for the disposal of mechanical pulp mill sludge from the industrial wastewater control system;
- 4.4.20 to 4.4.23 – requirements for a Cadmium Monitoring and Management Plan; and
- 4.6.9 – the requirement for a Groundwater Monitoring Report.

[7] The Appellant also requested the Board grant a stay of these Approval conditions pending the determination of its appeal.

[8] On December 29, 2018, the Board acknowledged receipt of the Notice of Appeal and requested the Director advise if he was prepared to consent to a stay being issued or undertake not to enforce some or all of the conditions under appeal.

[9] On January 9, 2019, the Director consented to a temporary stay of the following conditions:

- 2.4.4 – the requirement for emissions controls on storages tanks;
- 4.2.14 – the requirement to cease operation of the olivine wood waste incinerator not later November 30, 2021;
- 4.2.18 – reporting requirements of the air emission source monitoring;
- 4.4.20 to 4.4.23 – requirements for a Cadmium Monitoring Plan and Management Plan; and
- 4.6.9 – the requirement for a Groundwater Monitoring Report.

[10] The Director stated his consent for a temporary stay would end upon the conclusion of a mediation meeting or June 28, 2019, whichever was earlier.

[11] On January 11, 2019, the Board requested the Appellant respond to the following questions if it wanted to proceed with the stay application:

"1. What are the serious concerns of West Fraser Mills that should be heard

by the Board?

2. Would West Fraser Mills suffer irreparable harm if the stay is refused?

3. Would West Fraser Mills suffer greater harm if the stay was refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay; and

4. Would the overall public interest warrant a stay?"

[12] The Appellant provided a written submission in support of its application on January 21, 2019. In its submission, the Appellant rejected the Director's offer of a temporary stay. The Director provided a written response on February 5, 2019. On March 4, 2019, the Appellant provided a written rebuttal to the Director's response.

[13] On April 9, 2019, the Board issued a letter granting a stay of the following conditions of the Approval until the Board hears the appeal and the Minister issues an order, or the Board directs otherwise:

- 2.4.4 – the requirement for emissions controls on storages tanks;
- 4.2.14 – the requirement to cease operation of the olivine wood waste incinerator not later November 30, 2021;
- 4.2.16 and Table 4.2-D – downtime limit for pollution abatement equipment due to maintenance;
- 4.2.18 and Table 4.2-E – reporting requirements of the air emission source monitoring;
- 4.3.15(b) – downtime limit for inspection or repair of each continuous monitoring system associated with the industrial wastewater control system;
- 4.3.44 to 4.3.47 and Table 4.3-H – wetland assessment and operational monitoring requirements;
- 4.4.18 – requirements for the disposal of mechanical pulp mill sludge from the industrial wastewater control system;
- 4.4.20 to 4.4.23 – requirements for a Cadmium Monitoring and Management Plan; and
- 4.6.9 – the requirement for a Groundwater Monitoring Report.

The letter stated the Board would provide its reasons for granting the stay at a later date.

[14] On April 12, 2019, the Board sent a follow up letter clarifying that the stay of

tables 4.2-E and 4.3-H applied only to those portions of the tables that were subject to appeal.

[15] This Decision sets out the reasons the Board granted the stay.

III. SUBMISSIONS

A. Appellant

[16] The Appellant acknowledged the Board's test for a stay was established by the Supreme Court of Canada in *RJR-MacDonald Inc.* v. *Canada (Attorney General)* ("*RJR-MacDonald*").[1]

[17] The Appellant stated the Director issued the Approval without adequately consulting the Appellant on some of the new or modified conditions.

[18] The Appellant submitted the first part of the *RJR-MacDonald* test, being whether there is a serious issue to be heard, was satisfied by the concerns the Appellant had with the Approval. The Appellant stated the conditions of the Approval it objected to were related to the following issues:

1. materials that may be burned in the incinerator;
2. downtime for pollution control (Biogas Scrubbers and industrial wastewater control system) and monitoring equipment;
3. additional monitoring for industrial wastewater; and
4. wetland assessment and monitoring.

The Appellant identified these conditions as the "Contested Provisions," and explained they either related to how the Plant was operated or the type of monitoring to be conducted.

[19] The Appellant submitted the question before the Board in the appeal was whether the additional requirements of the Approval, compared to the Previous Approval, were necessary for the protection of the environment and, by extension, the public interest.

[20] The Appellant stated the expenses it would incur in complying with the Contested

[1] *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] S.C.R. 311 (SCC). Although the test was originally used for interlocutory injunctions, the Courts have stated the application for a stay should be assessed using the same test. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 ("*Metropolitan Stores*") and *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

Provisions would cause it irreparable harm. The Appellant said even if it were to be successful in the appeal before the Board, it could not recover these costs from AEP.

[21] The Appellant referenced the following quote from the Supreme Court of Canada in *RJR-MacDonald*:

> "At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interest that the harm could not be remedied even if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[2] [Emphasis added by the Appellant]

[22] The Appellant also referenced the Board's decision in *Wiebe et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, Re: *Atco Electric Limited* ("*Wiebe*").[3] The Appellant noted, in *Wiebe*, the Board found that should an appellant ultimately be successful in an appeal, irreparable harm would occur if that appellant were adversely affected by the conduct the stay was meant to prevent.

[23] The Appellant said the *Wiebe* decision referenced the following definition of irreparable harm from the Alberta Court of Appeal's decision in *Ominayak* v. *Norcen Energy Resources*:

> "[b]y 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."[4]

[24] The Appellant quoted the following passage from *Wiebe*:

> "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."[5]

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[2] *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] S.C.R. 311 (SCC), at paragraphs 63 and 64.

[3] Preliminary Motions: *Wiebe et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *ATCO Electric Ltd.* (29 July 2016), Appeal Nos. 15-033-034, 036-038-D (A.E.A.B.).

[4] *Ominayak* v. *Norcen Energy Resources*, 1985 ABCA 12 (CanLII) at paragraph 31.

[5] Preliminary Motions: *Wiebe et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *ATCO Electric Ltd.* (29 July 2016), Appeal Nos. 15-033-034, 036-038-D (A.E.A.B.) at paragraph 76.

[25] The Appellant stated the British Columbia Environmental Appeal Board ("BCEAB") in *North Fraser Harbour Commission et al*. v. *Deputy Director of Waste Management*,[6] noted the Supreme Court of Canada in *RJR-MacDonald* found potential financial loss by an applicant for a stay may be considered irreparable harm if it is unclear if the loss could be recovered at the time a decision on the merits was made. In the *North Fraser Harbour Commission* decision, the BCEAB found that even though the financial loss the applicants would suffer was quantifiable, the applicants would still suffer irreparable harm if made to comply with an order that was under appeal, as it was not certain if a financial remedy was available.

[26] The Appellant acknowledged some of the harm it would suffer was financial, and it may be possible to estimate the cost. However, the harm was not quantifiable because it could not be satisfied in monetary terms, as there is no mechanism to collect damages from AEP.

[27] The Appellant stated it would suffer irreparable harm if the Contested Provisions restricting the use of the incinerator were not stayed, as it would have to increase the resources needed to handle potential stockpiles of sludge, wood, and paper waste, that it could no longer burn.

[28] The Appellant claimed there was a risk of harm to the environment, and the health and safety of its employees, arising from stockpiling of the sludge, wood waste, and waste paper products.

[29] The Appellant submitted it would suffer irreparable harm if the Contested Provisions that shortened maximum downtimes for maintenance of pollution control and monitoring equipment were not stayed. According to the Appellant, there would be potential for harm to the environment and the health and safety of its employees. The Appellant stated shorter maximum downtimes would pressure the Appellant to complete repair work in as short a time as possible, which would limit the Plant's ability to operate safely and efficiently and would leave no room for unscheduled maintenance issues.

[30] The Appellant said the Approval requires the Plant's industrial wastewater control system to be continuously monitored. The Appellant submitted that if the monitoring equipment

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[6] *North Fraser Harbour Commission et al*. v. *Deputy Director of Waste Management*, Appeal No. 97-WAS-05(a), June 5, 1997, at pages 5 to 6.

needed repairs and needed parts were on hand, the Appellant would be in jeopardy of being in noncompliance with the maximum downtime permitted under the Approval.

[31] The Appellant said the Director did not explain why the Approval shortened the downtime for pollution control and monitoring equipment.

[32] The Appellant stated the additional monitoring required under Table 4.3-H and conditions 4.3.44 to 4.3.47 of the Approval is unnecessary as no problems regarding industrial wastewater have been identified. The Appellant said industrial wastewater is discharged into two ponds before being released into a wetland, and industrial wastewater is already regularly tested and not released if the testing indicates any problems. The Appellant stated baseline data has never been collected, and conducting a comparative analysis will be difficult.

[33] The Appellant submitted it would suffer irreparable harm if a stay of the Contested Provisions regarding industrial wastewater and wetland assessment were not granted, as additional testing and monitoring will require resources in terms of costs for sampling and testing, retaining an appropriate professional, and reporting the results to the Director.

[34] Addressing the third part of the test, the Appellant said it would suffer greater harm if the stay application were refused than the Director would suffer if the stay were granted.

[35] The Appellant noted if a stay of the Contested Provisions were granted, it would be able to continue to incinerate wood waste, sludge, and waste paper products. The Appellant stated it was not aware of any evidence of increased risk of harm to the environment if it was permitted to continue using the incinerator as it has done since 1990.

[36] The Appellant submitted no harm would occur from increasing the downtime for the repair and maintenance of the Plant's Biogas Scrubbers and industrial wastewater control system. The Appellant explained it has two Biogas Scrubbers, and when one is shut down for maintenance, all gases are diverted to the other operational one, with no increase in emissions during maintenance.

[37] The Appellant stated its industrial wastewater control system has four monitors in different locations, and when one monitor is down for maintenance, the other three are still operational. The Appellant submitted it was not aware of any evidence showing an increase in

the allowable downtime for the monitors would increase the risk of harm to the environment.

[38] The Appellant stated test results indicated testing wastewater and industrial wastewater for sulphate, chloride, and ammonia-nitrogen, as required in the Approval, is not necessary for the protection of the environment.

[39] The Appellant submitted current testing of industrial wastewater is sufficient to protect the wetland, and a stay of the Contested Provisions related to the wetland assessment and monitoring would not harm the environment.

[40] The Appellant submitted there is no harm to the environment or the public interest if the Board granted a stay of the Contested Provisions until the appeal is resolved, but if the Board did not grant a stay, the Appellant would suffer irreparable harm. The Appellant argued the balance of convenience favoured issuing a stay.

[41] The Appellant noted the Board, in *Northcott* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.*,[7] referenced the Supreme Court of Canada's approval in *RJR-MacDonald* of the statement in *American Cyanamid Co.* v. *Ethicon Limited*, [1975] A.C. 396 (H.L.), that, all things being equal, the status quo should be preserved. The Appellant argued that in this appeal, the stay would maintain the status quo until the Board hears the matter.[8]

[42] The Appellant stated the Director did not provide evidence to justify the changes in the operations of the Plant, which would be required by the Contested Provisions.

[43] The Appellant submitted the Director's offer of a temporary stay of specific Contested Provisions does not provide any relief to the Appellant. The Appellant stated the Director's temporary stay expires before any of the compliance requirements arise, and it fails to take into account the planning, capital, investment, engineering, approval process, and construction of new technology, which will be necessary to comply with the Approval deadlines.

[44] The Appellant noted if a temporary stay is implemented and it expired during the appeal process, the Appellant would have to apply for an extension of the stay, involving the

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[7] *Northcott* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Lafarge Canada Inc.* (23 December 2005), Appeal Nos. 04-009, 04-0011, and 04-012-ID1 (A.E.A.B.).

expenditure of additional resources and time by the Appellant, the Director, and the Board.

[45] The Appellant submitted any stay by the Board should continue until the appeal is resolved, either through mediation or by order of the Minister.

B. Director

[46] The Director requested the Board deny the Appellant's application to stay the Contested Provisions.

[47] The Director noted the Plant required an approval under EPEA since it began operations in 1990, and the approval has been renewed three times and amended frequently.

[48] The Director agreed the Appellant's appeal of the Approval is sufficient to satisfy the first part of the *RJR-MacDonald* test.

[49] The Director stated the Appellant failed to satisfy the second part of the *RJR-MacDonald* test. The Director referenced the Board's decision in *Aurora Heights Management Ltd. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, where the Board stated an applicant for a stay "must show there is a real risk harm will occur."[9] The Director submitted the Appellant did not prove irreparable harm will occur if the stay was not granted.

[50] The Director argued the Appellant does not need continued authorization in the Approval in order to incinerate waste. The Director stated the Appellant's materials and annual waste reports demonstrate the Appellant has not been incinerating sludge from its industrial wastewater control system since 2005. The Director submitted the annual waste reports show 100 percent of the sludge is disposed offsite, and 100 percent of cardboard and paper waste is recycled offsite. The Director noted the Appellant could request authorization from the Director to incinerate waste if an emergency occurs.

[51] The Director stated the Appellant requested the downtime allowance in the

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8 *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] S.C.R. 311 (SCC) at paragraph 80.

9 *Aurora Heights Management Ltd. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (23 November 2018), Appeal Nos. 16-049-051-ID1 (A.E.A.B.) at paragraph 67.

Approval during consultations with AEP staff.

[52] The Director submitted the wastewater monitoring requirements in the Approval are consistent with other pulp mill approvals in Alberta. The Director stated consistent regulation of the industry provides certainty and promotes competitiveness by treating all pulp mills equally.

[53] The Director argued the Appellant was asking the Board to revive conditions from the expired Previous Approval.

[54] The Director submitted the Appellant had not provided evidence regarding irreparable harm attributed to the operation of Approval conditions 4.2.16, table 4.2-D, and 4.3.15 (b), which refer to downtimes for the Biogas Scrubbers and the industrial wastewater control system.

[55] The Director stated the standard practice is to include a requirement to monitor sulphate, chloride, and ammonia-nitrogen in an approval for industrial facilities such as the Appellant's pulp mill. The Director submitted it was essential to monitor the release of these substances, particularly when the discharge from the Plant was into a wetland. The Director said the Approval required the monitoring of the wastewater to understand the impact of the substances being discharged into the wetland.

[56] The Director submitted the cost to the Appellant of sampling and testing, reporting results, and retaining a professional to prepare and implement a plan to assess and monitor the wetland, can be quantified in monetary terms and, therefore, does not constitute irreparable harm as contemplated by the second part of the *RJR-MacDonald* test. The Director stated the cost of sampling is modest and does not require specialized equipment and professional qualifications.

[57] The Director submitted the Appellant had provided insufficient evidence to establish that compliance with the Contested Provisions would be unduly onerous or of such a cost that the Appellant would be unable to carry the burden. The Director stated if irreparable harm is caused by an approval requiring an expenditure of money, then any potential cost could be considered irreparable harm, which the Supreme Court of Canada could not have intended when it issued its decision in *RJR-MacDonald*. The Director noted the Appellant conceded the harm it alleges it will suffer could be quantified.

[58] The Directed disagreed with the Appellant's contention that there is no mechanism to recover the costs from AEP should the appeal succeed. The Director stated there are alternative forums for the Appellant to recover any alleged damages.

[59] The Director stated the third part of the test, the balance of convenience, is fact-specific and requires the Board to weigh the impact granting a stay would have on the public interest in the administration of EPEA versus the benefit to the Appellant if the stay is granted.

[60] The Director argued granting a stay of the Contested Provisions would negatively impact the Director's authority to regulate industrial activities consistent with the purposes of EPEA.

[61] The Director submitted as the Board considers the balance of convenience, it should err on the side of protecting the environment and preventing environmental harm from development.

[62] The Director noted earlier approvals authorizing the Plant's activities have been amended and renewed on multiple occasions. The Director submitted a stay would enable the Appellant to continue to operate its facility in accordance with requirements that are mostly the same as in the Previous Approval, which would be contrary to the principles of continuous improvement and consistency.

[63] The Director stated the Appellant did not provide evidence to support its claims that it would suffer financial costs and have to expend additional resources if the stay is not granted.

[64] The Director submitted the harm to the public interest if a stay was granted was greater than any potential harm to the Appellant if the stay was refused.

[65] The Director stated when a private sector applicant, such as the Appellant, alleges the public interest will be harmed if a stay is not granted, the onus is on that applicant to demonstrate the harm, as it is generally assumed private applicants are pursuing their own interests rather than the public interest. The Director quoted from *RJR-MacDonald*:

> "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. This is partly a function

> of the nature of the public authority, and partly a function of the action sought to be enjoined. 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. Once these minimal requirements have been met, the Court should, in most cases assume that irreparable harm to the public interest would result from the restraint of that action."[10]

[66] The Director argued the Appellant has failed to prove it would be in the public interest to grant its request for a stay of the Contested Provisions.

[67] The Director stated his duty is to promote and protect the public interest consistent with the purposes of EPEA and AEP's environmental policy. The Director submitted there is a greater public interest in safeguarding the Director's ability to effectively regulate industrial development consistent with EPEA than there is in allowing the Appellant to continue to operate its facility based on the Previous Approval, which does not meet current AEP environmental standards.

[68] The Director stated the Appellant failed to prove it met the stay test and requested the Board deny the Appellant's request of a stay of the Contested Provisions.

C. Appellant's Rebuttal

[69] The Appellant submitted that where it has been unable to identify any harm that will arise from the imposition of a stay, the onus necessarily shifts to the Director to provide evidence that there will be such harm.

[70] The Appellant stated the Director had not provided any basis upon which the Board can conclude there would be harm to the public interest if the stay is granted, which outweighs the harm to the Appellant's interest if the stay is not issued.

[71] The Appellant submitted treating every facility the same can result in unequal impacts.

[72] The Appellant disputed the Director's claim a stay would allow the Appellant to operate the Plant exactly as it did under the Previous Approval. The Appellant noted it is

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[10] *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] S.C.R. 311 (SCC) at paragraph 76.

implementing the conditions of the Approval that are not under appeal, and many of those conditions are different from the Previous Approval.

[73] The Appellant agreed with the Director's statement that the Appellant could apply for an emergency authorization from the Director should issues regarding the use of the incinerator arise. However, an application for authorization does not guarantee the authorization will be granted. If the authorization were not granted, the Appellant would be at risk, both operationally and in terms of its reputation, if it cannot comply with some of the conditions in the Approval.

[74] The Appellant stated it was able to dispose of excess sludge offsite in beehive burners at other facilities. However, because beehive burners are being phased-out, the Appellant anticipated it would continue to require the flexibility to have the option to incinerate sludge. The Appellant submitted storing sludge can result in the generation of hydrogen sulphide (H_2S), which is a dangerous gas that would put the health of its employees at risk.

[75] The Appellant noted the records produced by the Director referring to waste cardboard packaging that is recycled do not include confidential office papers that are burned in the incinerator.

[76] The Appellant disagreed with the Director’s statement that other forums are available for the Appellant to recover damages. The Appellant stated the only option available to recover damages would be through civil action, however, in addition to the court’s imposition of strict limitations on actions that can be brought against agents of the Crown, EPEA contains a provision which provides statutory protection from liability for the Director while carrying out his duties.

[77] The Appellant submitted the Director did not identify any harm that may arise from the imposition of a stay pending resolution of the appeal, other than a stay will negatively impact the Director's ability to regulate. The Appellant argued there could be no harm to the Director, nor the public interest, by the Board exercising the authority granted to it under EPEA.

[78] The Appellant noted the Director suggested because it is his job to make decisions related to the purposes of EPEA, such decisions must necessarily be in the interest of protecting

those purposes. The Appellant submitted this implies that any decision made by the Director is in furtherance of EPEA's statutory mandate. The Appellant stated it is not a certainty that any decision made by the Director will have the purposes of EPEA in mind.

[79] The Appellant withdrew its application for a stay of condition 4.2.16 and Table 4.2-D of the Approval, which provided for 72 hours of downtime for maintenance of the Biogas Scrubbers. The Appellant acknowledged the Previous Approval did not provide for any downtime, and the 72 hours were added to the Approval by the Director at the request of the Appellant. The Appellant stated it would prefer a longer downtime period, but recognized the Board did not have the authority to grant an increase of the maintenance time limits.

IV. LEGAL BASIS FOR A STAY

[80] The Board is empowered to grant a stay under 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."

[81] The Board's test for a stay, as stated in its previous decisions of *Pryzbylski*[11] and *Stelter*,[12] is adapted from *RJR-MacDonald*. The steps in that test 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."[13]

[82] The first step of the test requires the applicant for a stay to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is

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[11] *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.).

[12] *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.).

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

some basis on which to present an argument.

[83] 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. 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.

[84] In *Ominayak* v. *Norcen Energy Resources*, the Alberta Court of Appeal defined irreparable harm as follows:

> "[b]y irreparable injury 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."[14]

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.[15] Damage that may be suffered by third parties can also be considered.[16]

[85] The third step in the test is the balance of convenience, which is determined by asking "...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[17] The decision-maker is required to weigh the burden the stay would impose on the respondent against the benefit the applicant would receive. This weighing is not strictly a cost-benefit analysis but rather a consideration of significant factors. The courts have considered factors such as the cumulative effect of granting a stay,[18] third parties who may suffer damage,[19] or if the reputation and goodwill of a party will be affected.[20]

[86] The Courts have recognized that any alleged harm to the public is to be assessed

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14 *Ominayak* v. *Norcen Energy Resources*, 1985 ABCA 12 (CanLll) at paragraph 30.

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

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

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

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

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

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

at the third stage of the test. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."[21] The effect on the public may sway the balance for one party over the other.

V. ANALYSIS

[87] The first step of the *RJR-MacDonald* test requires the Appellant to show there is a serious issue to be tried. The Appellant has to demonstrate through the evidence submitted that there is some basis on which to present an argument. 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."[22]

[88] The Appellant raised concerns, in their submissions and in the Notice of Appeal, regarding the potential impact the Contested Provisions will have on the Plant's operations. The Director submitted the Appellant's appeal of the Approval was sufficient to satisfy the first part of the test. The Board finds the potential impacts resulting from the Contested Provisions are a serious issue, and therefore, the first step in the stay test has been met.

[89] The second step in the test requires the Board to decide whether the Appellant would suffer irreparable harm if the stay is not granted. Irreparable harm may occur when the Appellant would be adversely affected to the extent the harm could not be remedied if the Appellant should succeed at the hearing. 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 Appellant could not be satisfied in monetary terms, or one party could not collect damages from the other.

[90] As the Appellant is claiming that damages awarded as a remedy would be inadequate compensation for the harm done, the Appellant must show there is a real risk that harm will occur. It cannot be mere conjecture.[23]

[91] The Board found there was no fair and reasonable forum for the Appellant to address damages due to the legislative restrictions on obtaining compensation from the Crown.

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

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

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

It is unfair for the Appellant to incur potentially significant expenses in complying with the Contested Provisions when there is the possibility the Appellant's appeal could succeed, resulting in the reversal or variation of some, or all, of the Contested Provisions.

[92] Of concern to the Board is the potential risk to the environment and the health and safety of the Appellant's employees from the stockpiles of sludge and waste paper materials, which may develop if the Appellant is prohibited from incinerating. The Director noted the Appellant sent the Plant's sludge to other facilities for disposal and recycled the waste paper materials, but the Appellant argued the phase-out of beehive burners means it may require the use of the incinerator to burn sludge that cannot be disposed of elsewhere. The Board is concerned an application for an authorization to use the incinerator in an emergency may take too long to prevent stockpiling and may not be granted by the Director. A delay could result in a stockpile of sludge that the Appellant cannot incinerate. Such a stockpile may be a risk to the environment and the health and safety of the Appellant's employees.

[93] The Board noted the incinerator was approved for use in the Previous Approval, and any use of it during the appeal process, would not have any significant impact on the environment, and may even eliminate potential environmental and health and safety risks.

[94] Without making findings on the merits of the appeal, the Board finds the Appellant would suffer irreparable harm if the stay is not granted.

[95] The third part of the test is the balance of convenience. This test requires the applicant for a stay to demonstrate it would suffer greater harm from the refusal of a stay than the other parties would suffer if a stay were granted. The Board is required to weigh the burden a stay would impose on other parties against the benefit the applicant would receive. This is not strictly a cost-benefit analysis but rather a balancing of significant factors. Here, the Board must assess and compare the Appellant's position with that of the Director in assessing the balance of convenience. The effect on the public interest may sway the balance for one party over the other.

[96] In the circumstances, the Board finds the Appellant would suffer greater harm if the stay were not granted, compared to any harm the Director might suffer if the Board ordered a

stay. As stated above, the Board finds the harm to the Appellant could be irreparable, and potentially a risk to the environment and the health and safety of the Appellant's employees. The Board finds the Director's ability to regulate under EPEA would not be negatively impacted by a temporary stay of the Contested Provisions. The Appellant has said it will follow most of the Approval conditions and continue to operate under the Previous Approval for the remaining conditions. In this situation, the Board notes there is unlikely to be a negative impact from the Appellant's actions in the short time until the appeal is heard and the Minister makes his decision.

[97] The Board determined it is in the public interest to stay the Contested Provisions until the Board hears the appeal, and the Minister makes his decision, as a stay preserves the status quo and protects the environment and the Appellant's employees from potential risk.

VI. DECISION

[98] The Board finds the Appellant meets the requirements of the *RJR-MacDonald* stay test. The Board grants a stay of the following conditions of the Approval:

- 2.4.4 – the requirement for emissions controls on storages tanks;
- 4.2.14 – the requirement to cease operation of the olivine wood waste incinerator not later November 30, 2021;
- 4.2.16 and Table 4.2-D – downtime limit for pollution abatement equipment due to maintenance;
- 4.2.18 and Table 4.2-E – reporting requirements of the air emission source monitoring;
- 4.3.15(b) – downtime limits for inspection or repair of each continuous monitoring system associated with the industrial wastewater control system;
- 4.3.44 to 4.3.47 and Table 4.3-H – wetland assessment and operational monitoring requirements;
- 4.4.18 – requirements for the disposal of mechanical pulp mill sludge from the industrial wastewater control system;
- 4.4.20 to 4.4.23 – requirements for a Cadmium Monitoring and Management Plan; and

- 4.6.9 – the requirement for a Groundwater Monitoring Report.

[99] The stay will remain in effect until the Board hears the appeal in this matter, and the Minister issues an order with respect to this appeal, or the Board directs otherwise.

Dated on March 13, 2020, at Edmonton, Alberta.

"*original signed by*"
Alex MacWilliam
Board Chair

VII. Appendix - Appealed Conditions

Excerpt from Appendix A of Appellant's Notice of Appeal (Approval Terms and Conditions Subject to Appeal)

Section 2.4.4

Effective from January 01, 2020, all above ground storage tanks containing liquid hydrocarbons or organic compounds shall conform to the *Environmental Guidelines for Controlling Emissions of Volatile Organic Compounds from Aboveground Storage Tanks*, Canadian Council of Ministers of the Environment, PN 1180, 1995, as amended.

Section 4.2.14

The approval holder shall cease operation of the olivine wood waste incinerator not later than November 30, 2021.

Section 4.2.16 and Table 4.2-D

Downtime for the pollution abatement equipment due to maintenance shall not exceed the maximum cumulative allowable time limits as specified in TABLE 4.2-D

TABLE 4.2-D TIME LIMITS

Pollution Abatement Equipment	Maximum Cumulative Allowable Time Limits Due to Maintenance Down Time
Biogas Scrubbers	72 hours per quarter year per scrubber

Section 4.2.18 and Table 4.2-E

The approval holder shall report to the Director the results of the air emission source monitoring as required in TABLE 4.2-E, unless otherwise authorized in writing by the Director.

TABLE 4.2-E SOURCE MONITORING AND REPORTING

Emission Source	Parameter	Frequency	Method of Monitoring	Reporting Frequency
Biogas Incinerator Stack	Sulphur dioxide, Oxygen, Carbon monoxide, Hydrogen Sulfide, Air Effluent Stream Flow, and Temperature	Once per Year (from 2020)	Manual Stack Survey	The month following the month in which the survey is done

Section 4.3.15(b)

The approval holder shall limit the downtime for inspection or repair of each continuous monitoring system associated with the industrial wastewater control system to the following maxima:

(a) 24 consecutive hours; and

(b) 5% of plant operating time in any month

TABLE 4.3-H

Monitoring				Reporting
Parameter	Prior to Release (except discharge volume)			
	Frequency	Sample Type	Sample Location	
Sulphate (mg/l)	Once	Representative grab	C, D	As per Table 4.3-C Monthly-industrial Wastewater and Industrial Runoff Control Report and Annually-Industrial Wastewater and Industrial Runoff Control Report
Chloride (mg/l)	Once	Representative grab	C, D	
Ammonia-nitrogen (mg/l)	Once	Representative grab	C, D	

Section 4.3.44

The approval holder shall develop an industrial runoff receiving wetland assessment and operational monitoring plan completed by a professional who meets requirements set forth in: Professional Responsibilities in Completion and Assurance of Wetland Science, Design, and Engineering Work in Alberta, unless otherwise authorized in writing by the Director.

Section 4.3.45

Unless otherwise authorized in writing by the Director, the approval holder shall submit the plan in 4.3.44 to the Director by July 31, 2019, and shall contain, at a minimum, all of the followings:

(a) wetland delineation following the Alberta Wetland Identification and Delineation Directive, Alberta Environment and Parks, 2015, as amended;

(b) wetland class, form and type following the Alberta Wetland Classification System, Alberta Environment and Parks, 2015, as amended;

(c) description of dominant vegetation species in each stratum (i.e., tree, shrub, herbaceous and moss);

(d) description of wetland soils;

(e) mapping of the receiving wetland's inflows, outflows and surface catchment;

(f) characterization of quality of industrial runoff, including major anions and cations, nutrients, pH and TSS;

(g) characterization of water quality in the receiving wetland, including major anions and cations, nutrients, pH and TSS at both inflows and outflows;

(h) assess potential for impacts to the wetlands through the discharges of industrial runoff including potential changes to hydro-period and potential changes from ionic and nutrient loadings;

(i) assess potential for contamination of groundwater through recharge in the wetland;

(j) proposed discharge schedule;

(k) proposed ongoing monitoring and reporting of the wetland for changes to water quality and vegetation community, and adaptive management responding to detected changes; and

(l) any other information requested in writing by the Director.

Section 4.3.46

If the plan in 4.3.44 and 4.3.45 is found deficient by the Director, the approval holder shall correct all deficiencies identified in writing by the Director by the date specified in writing by the Director.

Section 4.3.47

The approval holder shall implement the plan in 4.3.44 and 4.3.45 as authorized in writing by the Director.

Section 4.4.18

The approval holder shall dispose of MP sludge from the industrial wastewater control system, only as follows:

(a) by land application to agricultural lands in accordance with 4.4.19 to 4.4.24; or

(b) to a waste management facility approved or registered under the Act to accept such waste; or

(c) as authorized in writing by the Director.

Section 4.4.20

The approval holder shall develop and submit a Cadmium (Cd) Monitoring and Management Plan to the Director by December 31, 2019, for the purpose of land application of MP sludge, unless otherwise authorized in writing by the Director.

Section 4.4.21

Unless otherwise authorized in writing by the Director, the Cadmium Monitoring and

Management Plan referred to in 4.4.20 shall contain, at a minimum, all of the followings:

(a) application rate in dry tonnes per hectare including calculation showing how that rate was derived;

(b) projected Cd concentrations in the soil following the land application of MP sludge to ensure that they do not exceed 80% of Alberta Tier 1 Soil and Groundwater Remediation Guidelines, Alberta Environment and Parks, 2016, as amended;

(c) a monitoring plan that includes:

i. sampling and analytical methods;

ii. number and the location of receiving soil monitoring sites; and

iii. monitoring schedule (pre and post application);

(d) the reporting frequency and the method; and

(e) any other information as requested in writing by the Director.

Section 4.4.22

If the Cadmium Monitoring and Management Plan is found deficient by the Director, the approval shall correct all deficiencies as outlined in writing by the Director, within the timeline specified in writing by the Director.

Section 4.4.23

The approval holder shall implement the Cadmium (Cd) Monitoring and Management plan as authorized in writing by the Director.

Section 4.6.9

The approval holder shalt submit the Groundwater Monitoring Report, formatted in a normal (native) PDF standard, (allowing searching, text highlighting and inserting comments), to the Director on or before March 31 of every third year commencing in the year 2021, unless otherwise authorized in writing by the Director.