

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – April 28, 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 section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** appeals filed with respect to the decision of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 00406489-00-00 to Badlands Recreation Development Corp.

Cite as: *Andrew Reiffenstein et. al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks* (28 April 2020), Appeal Nos. 19-059-085-ID1 (A.E.A.B.), 2020 AEAB 16.

**BEFORE:**

Mr. Alex MacWilliam, Board Chair.

**SUBMISSIONS BY:**

**Appellants:** Mr. Andrew and Ms. Laurie Reiffenstein, Ms. Joan Reiffenstein, Ms. Angela Chevrier, Ms. Ann Gray-Elton, Mr. John Elton, Ms. Debbie Schwartz, Mr. Miles Schwartz, Mr. Derek McMillan, Ms. Linda Skibsted, Mr. Rick Skibsted, Spruce Coulee Farms Ltd., Mr. Richard Clark, Ms. Wendy Clark, Half-Diamond HD Limited, Ms. Ruth Bellamy, Will Farms Ltd., Ms. Samantha Andersen, Mr. Vincent Andersen, H&A Andersen Farms Ltd., Ms. Shauna Kenworthy, Mr. Barry Pallesen, Ms. Pauline Pallesen, Dalbey Farms Ltd., Mr. George Comstock, Ms. Jacqueline Skytt, 1688732 Alberta Ltd., Mr. Jim Eskeland, Ms. Julie Eskeland, Mr. Jonathan Groves, Mr. Patrick Murphy, Ms. Shauna Murphy, Mr. Stanley Riegel, Ms. Della Poulsen, and Cactus Coulee Farms Inc., represented by Mr. Richard E. Harrison, Wilson Laycraft LLP.

**Director:** Mr. Todd Aasen, Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, represented by Ms. Nicole Hartman and Mr. Paul Maas, Alberta Justice and Solicitor General.

**Approval Holder:** Badlands Recreation Corp., represented by James Zelazo, CA, CPA, CFO & Development Manager, Badlands Recreation Development Corp.

## EXECUTIVE SUMMARY

The Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (the Director) issued an Approval under the *Water Act* to Badlands Recreation Development Corp. (Badlands) allowing Badlands to infill two wetlands, modify three wetlands, and construct, operate, and carry out maintenance of a stormwater management system near Rosebud, Alberta, for the Badlands Motorsport Resort.

The Environmental Appeals Board (the Board) received 27 notices of appeal of the Approval, accompanied by requests for a stay. The Board requested, received, and reviewed submissions on whether the appellants were directly affected and whether a stay should be granted.

The Board found the following appellants were directly affected by the project that was the subject matter of the Approval: Mr. Rick Skibsted, Ms. Linda Skibsted, Spruce Coulee Farms Ltd., Mr. Richard Clark, Ms. Wendy Clark, Half-Diamond HD Limited, and Mr. Derek McMillan (collectively the Directly Affected Appellants). These Directly Affected Appellants own land or operate agricultural operations adjacent to the parcel of land owned by Badlands. Surface water flows from the Directly Affected Appellants' lands into the lands owned by Badlands. Therefore, the surface water drainage from their lands is potentially impacted by Badlands Recreation Development Corp.'s proposed stormwater management system. The appeals of the remaining appellants were dismissed for not being directly affected. The remaining appellants and the lands owned by the remaining appellants are too distant from the proposed project to be affected by any work conducted under the Approval.

In considering the stay application, the Board asked the appellants, Badlands, and the Director (collectively, the "Parties") to answer the following questions based on the test for granting stays established by the Supreme Court of Canada in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 SCC 117:

1. What are the serious concerns of the Appellants 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 is refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay?

4. Would the overall public interest warrant a stay?

The Board received written submissions from the Parties regarding the stay application. The Board only considered the appeals of the Appellants for the purposes of the stay application. The Board found that the appeals of the Appellants raised serious issues to be heard by the Board, satisfying the first part of the *RJR-Macdonald* test.

However, despite these Appellants having raised a serious issue regarding the possibility of their lands being impacted, they did not provide enough information or evidence to demonstrate they would suffer irreparable harm if the stay were not granted. Additionally, the harm claimed by the Appellants could be compensated for monetarily. The balance of convenience and public interest did not favour one party over the other. Based on the foregoing reasons, the Board declined to grant a stay.

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## I. INTRODUCTION

[1] This is the Environmental Appeals Board’s reasons for its decisions regarding the stay application in respect of appeals of Approval No. 00419723-00-00 (the “Approval”) issued under the *Water Act*, R.S.A. 2000, c. W-3, to Badlands Recreation Development Corp., (the “Approval Holder”) by the Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, (the “Director”) for the purposes of infilling two wetlands, modification of three wetlands, and the construction, operation, and maintenance of a stormwater management system at 22-027-21-W4M, near Rosebud, Alberta, for the Badlands Motorsport Resort (the “Activity”).

[2] The Board received Notices of Appeals from:

- Mr. Andrew and Ms. Laurie Reiffenstein,
- Ms. Joan Reiffenstein,
- Ms. Angela Chevrier,
- Ms. Ann Gray-Elton,
- Mr. John Elton,
- Ms. Debbie Schwartz,
- Mr. Miles Schwartz,
- Mr. Derek McMillan,
- Ms. Linda Skibsted and Spruce Coulee Farms Ltd.,
- Mr. Rick Skibsted and Spruce Coulee Farms Ltd.,
- Mr. Richard Clark and Half-Diamond HD Limited,
- Ms. Wendy Clark and Half-Diamond HD Limited,
- Ms. Ruth Bellamy and Will Farms Ltd.,
- Ms. Samantha Andersen and H&A Andersen Farms Ltd.,
- Mr. Vincent Andersen and H&A Andersen Farms Ltd.,
- Ms. Shauna Kenworthy,
- Mr. Barry Pallesen and Dalbey Farms Ltd.,
- Ms. Pauline Pallesen and Dalbey Farms Ltd.,
- Mr. George Comstock,
- Ms. Jacqueline Skytt and 1688732 Alberta Ltd.,
- Mr. Jim Eskeland,
- Ms. Julie Eskeland,
- Mr. Jonathan Groves,
- Mr. Patrick Murphy,
- Ms. Shauna Murphy,
- Mr. Stanley Riegel, and
- Ms. Della Poulsen and Cactus Coulee Farms Inc. (collectively, the “Appellants”).

[3] The preliminary matter before the Board was whether a stay of the Approval should be granted until the appeals had been heard and determined.

[4] The Board received and reviewed submissions from the Appellants, and the Approval Holder. The Director did not take a position with respect to the stay.

[5] As a part of the application for the stay, the Board looked at the Appellants that had filed Notices of Appeal to determine whether or not they are directly affected by the Approval. This is because the Board can only grant a stay to an applicant that is directly affected by the decision being appealed.

[6] Based on the submissions before the Board, the Board determined that Mr. Rick Skibsted, Ms. Linda Skibsted, Spruce Coulee Farms Ltd., Mr. Richard Clark, Ms. Wendy Clark, Half-Diamond HD Limited, and Mr. Derek McMillan were directly affected by the Approval (the “Directly Affected Appellants”). The Directly Affected Appellants own lands or run agricultural operations on land adjacent to the land owned by the Approval Holder. In the Board’s view, the Activity authorized by the Approval could interfere with the flow and drainage of water from lands of the Directly Affected Appellants. The lands of the remaining Appellants are not adjacent and not reasonably likely to suffer these impacts so these landowners are not to be directly affected by the Activity authorized by the Approval.

[7] In assessing the Stay application, the Board found that the appeals raised serious issues to be heard by the Board, satisfying the first part of the test for a stay provided for in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 SCC 117 (“*RJR-MacDonald*”). In considering the second part of the test, the Board found that the Directly Affected Appellants had failed to demonstrate that they would suffer irreparable harm if the stay were not granted. The evidence submitted to the Board suggested that the Directly Affected Appellants’ lands would not suffer irreparable harm. Any harm that may result from the Activity on the land of the Directly Affected Appellants could be compensated monetarily.

[8] In considering the balance of convenience and the public interest, the balance of convenience and public interest did not favour one party over the other. Based on the foregoing reasons, the Board declined to grant the stay of the Approval.

## II. BACKGROUND

[9] On January 8, 2020, the Director, issued the Approval to the Approval Holder. As stated, the Approval allows for the infilling of two wetlands, modification of three wetlands, and the construction, operation, and maintenance of a stormwater management system at 22-027-21-W4M, near Rosebud, Alberta, for the Badlands Motorsport Resort.<sup>1</sup>

[10] On January 20, 2020, the Board received 27 Notice of Appeals of the Approval, from the Appellants. At the same time as they filed the Notices of Appeal, the Appellants requested the Board grant an interim stay of the Approval and a procedural order setting out a timeline for submissions with respect to a permanent stay pending a final determination of the Approval.<sup>2</sup>

[11] On January 21, 2020, the Board wrote the Appellants, Approval Holder, and Director (collectively, the “Parties”), acknowledging receipt of correspondence from the Appellants’ counsel dated January 20, 2020, and notifying the Approval Holder and the Director that the Board had received 27 appeals of the Approval requesting that the Approval be cancelled. The Board advised the Parties that it was in the process of acknowledging the appeals. The Board further advised the Approval Holder and the Director that the Appellants had requested an interim stay and sought comments from them both regarding the status of the work under the Approval. The Board also asked the Approval Holder if it was prepared to agree to a temporary stay until full legal arguments could be received and the Board could make a decision on the stay request.

[12] On January 22, 2020, the Board wrote the Parties acknowledging all 27 filed Notices of Appeal and advising the Approval Holder and the Director that the Board had received 27 appeals of the Approval. The Board further requested the Director provide the Director’s Record related to the Approval. The Director’s Record was received on March 13, 2020 and provided to the Appellants and the Approval Holder.

[13] On January 21, 2020, the Approval Holder wrote the Board and advised that construction was not currently underway and was not expected to commence for at least three

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<sup>1</sup> Water Act Approval No. 00406489-00-00, issued January 8, 2020, at the Purpose and Condition 3.0.

<sup>2</sup> Appellants’ Correspondence, January 20, 2020.



months. The Approval Holder further agreed to a temporary stay until the Board had decided on a issuing a stay of the Approval.<sup>3</sup>

[14] On January 22, 2020, the Board received correspondence from the Appellants dated January 21, 2020, advising that “a surveyor has been present recently” and requesting that the interim stay be in place for one month.<sup>4</sup>

[15] On January 22, 2020, the Board received correspondence from the Director advising that the Director took no position on the request for an interim stay.

[16] On January 23, 2020, the Board acknowledged the Appellants’ motion for a stay and issued a letter setting out a process for receiving submissions from the Parties with respect to the stay application. The Board further acknowledged the Approval Holder’s comments that the Approval Holder was not planning on commencing work for three months and had agreed to a temporary stay. Based on the foregoing information, the Board declined to grant a temporary stay of the Approval.

[17] The Board asked the Director for copies of the Reports referred to in the Approval. The Director provided these Reports to the Board on January 29, 2020.<sup>5</sup>

[18] Between February 21, 2020 and March 27, 2020, the Board received submissions from the Parties regarding the stay application and the directly affected status of the Appellants.

[19] On April 1, 2020, the Board wrote to the Parties informing them the Board had reviewed the written submissions, and had concluded that Mr. Rick Skibsted, Ms. Linda Skibsted and Spruce Coulee Farms Ltd., Mr. Richard Clark, Ms. Wendy Clark, and Half-Diamond HD Limited, and Mr. Derek McMillan were directly affected by the Approval. The basis for this decision was that the work authorized by the Approval may interfere with the flow of surface water and drainage from lands owned by these Directly Affected Appellants. These Directly Affected Appellants own lands or run agricultural operations immediately adjacent to the land on which the Activity is to be located. The Board concluded that the remaining Appellants were not

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<sup>3</sup> Approval Holder’s Correspondence, January 21, 2020.

<sup>4</sup> Appellants’ Correspondence, January 21, 2020, received January 22, 2020.

<sup>5</sup> Report Number 04406489-R001, Badlands Motorsport Resort Stormwater Management Plan within Sec 22-27-21-W4M, Kneehill County, Alberta, November 6, 2018, Prepared by Scheffer Andrew Ltd.; and Report Number 00406489-R002; Wetland Assessment and Impact Report (WAIR) for the Badlands Motorsports Resort near Rosebud, Alberta, October 9, 2019, Prepared by EnviroConsult Inc.

directly affected and their appeals were dismissed. The Board further advised the Parties that it had declined to grant the stay request, and it would proceed to a hearing of these appeals as soon as possible.

[20] These are the Board's reasons for these decisions.

### **III. ISSUES**

[21] The Board received submissions from the Parties on the following questions regarding the Stay application:

1. Are the Appellants directly affected by Alberta Environment and Parks' decision to issue Approval 00406489-00-00 to Badlands Recreation Development Corp.? The Approval authorizes the infilling of two wetlands, modifying of 3 wetlands, and constructing, operating and carrying out maintenance of a stormwater management system at Section 22-027-21-W4M. This question is asked because the Board can only grant a stay where it is requested by someone who is directly affected. If the Board finds that the Appellants are not directly affected, the Board may dismiss their appeals. Therefore, it is important that each of the Appellants fully answer the question on how the environmental impacts of the Approval directly and personally affect them.
2. What are the serious concerns raised by the Appellants that should be heard by the Board?
3. Would the Appellants suffer irreparable harm if the stay is refused?
4. Would the Appellants suffer greater harm if the stay was refused, pending a decision of the Board, than Badlands Recreation Corp. would suffer if the Board granted the stay?
5. Would the overall public interest warrant a stay?

### **IV. DIRECTLY AFFECTED**

#### **A. Submissions**

1. The Appellants

[22] The Appellants acknowledged that persons submitting Notices of Appeal to the Board must be directly affected by the Director's decision. In their initial submissions, the Appellants stated, the Director "found that 17 Appellants were directly affected by his decision"

and “held that 10 Appellants who had submitted Statements of Concern were not directly affected by his decision to issue the Approval.”<sup>6</sup>

[23] The Appellants argued that the test for determining whether they are directly affected requires them to demonstrate that:

- a. there is a potential for harm;
- b. there is a causal connection between the potential for harm and the approval; and
- c. there is a connection between the potential for harm and an effect on the environment.<sup>7</sup>

[24] The Appellants stated in their submissions that each of them “have submitted correspondence with their Notices of Appeal outlining how they would be directly affected by the Approval.” For brevity’s sake, the brief considered a representative appellant, Ms. Wendy Clark, however, the Appellants stated that the “same analysis applies to each of the other Appellants as their concerns with Approval are the same or analogous to Ms. Clark’s.”<sup>8</sup>

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<sup>6</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraphs 3 to 5.

<sup>7</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 8. Note that the Appellants relied on the test in *Normtek Radiation Services Ltd. v. Alberta (Environmental Appeals Board)*, 2018 ABQB 911, at paragraphs 27-68, which referenced section 91(1)(a)(i) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”). Section 91(1)(a)(i) of EPEA provides:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director’s decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), ....”

The parallel provision to which the Appellants were referring in the *Water Act*, R.S.A. 2000, c. W-3. is contained in section 115(1)(a)(i) which provides:

“A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

(a) if the Director issues or amends an approval, a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108, ....”

<sup>8</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 9.

[25] Ms. Wendy Clark and Mr. Rick Clark (the “Clarks”) stated that they were directly affected by the Approval and had provided several reasons as to how the Approval would affect their land, and the use of their property:

“Our land adjacent would drain into this extremely complex and high risk stormwater plan designed with no local climate information. I am concerned the hydrological function of the whole natural system (the land above, the wetlands, the river) is not clearly understood. I am concerned that the design, construction and maintenance of stormwater off racetracks, motor vehicle paddocks, a skid pad, and a commercial/residential development carries a risk of failure both in quantity and composition. I am concerned that after economic failure the natural function can never be restored.

I am concerned the stormwater design, construction, and maintenance, and wetland disturbance has not been addressed in this application...

Wildlife comes to the river valley for the riparian habitat (provided by the river and the wetlands). I am concerned that during construction the wildlife will be driven away from the site possibly to our adjacent property.”<sup>9</sup>

[26] Ms. Wendy Clark further relied on correspondence dated April 30, 2018, from the Alberta Wilderness Association, which stated in part:

“Members of our group have recreated in the Rosebud River valley and surrounding areas for decades and are concerned about our loss of enjoyment of the valley and wildlife due to the inappropriate development of environmentally significant areas (ESAs) in the Rosebud River valley, including the wetlands covered by this application. We are concerned that approvals may be given that would damage public water bodies and that this development is not appropriate given its scope and magnitude.

...

AWA is concerned about the negative impacts of this proposal on air ESA that includes productive wetlands and adjacent habitats that support federally and provincially listed wild species of concern. The development will overlap with native habitats in wetlands, coulees and riparian areas along the Rosebud River, recognized as important in ESA studies by the Government of Alberta and Kneehill County. These natural areas are revered by Albertans.”<sup>10</sup>

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<sup>9</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 11.

<sup>10</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 12, as quoted from correspondence from the Alberta Wilderness Association, dated April 30, 2018.

[27] The Appellants submitted that Ms. Wendy Clark's concerns with the Approval were reflective of the Appellants' concerns as a group with the Approval. The Appellants argued that the wetlands covered by the Approval are part of a system of wetlands that stretch along and follow the Rosebud River. The Appellants submitted they recreate, farm, and use the Rosebud River for various purposes and will be directly affected by the filling in of two wetlands, the modification of a further three wetlands and the construction, operation and maintenance of a stormwater management system.<sup>11</sup>

[28] As a neighbour to the Approval Holder, Ms. Wendy Clark expressed "deep concern" as the stormwater system proposed by the Approval Holder contemplates releasing stormwater directly into the Rosebud River and acknowledges that the system will install the minimum sizes recommended to contain stormwater discharge.<sup>12</sup>

[29] The Appellants summarized their arguments on standing and directly affected by stating:

- "i. The "network of wetlands that run along the Rosebud River support a wide array of wildlife enjoyed by the Appellants. Disconnecting that wildlife by permanently removing or disturbing five wetlands affects the Appellants by either increasing wildlife on their property or permanently harming the wildlife that use the network of wetlands.
- ii. Wetlands are interconnected. Property owners along the Rosebud River with wetlands on their property will be impacted by the decision to permanently remove or disturb five wetlands;
- iii. The proposed stormwater plan will send effluent from a racetrack into the Rosebud River. This will not only alter the ability to recreate along the Rosebud River, it will prevent adjacent landowning farmers from practicing sustainable farming."<sup>13</sup>

[30] The Appellants argued that the potential harm connected to the Approval was the network of wetlands along the Rosebud River being permanently affected by the Approval and the stormwater plan is subject to the Approval. The Appellants further argued there is a connection between the potential harm and the environment, "in that the harm contemplated is wholly environmental."<sup>14</sup>

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<sup>11</sup> Appellants' Initial Submissions, February 21, 2020, at paragraphs 13 and 14.

<sup>12</sup> Appellants' Initial Submissions, February 21, 2020, at paragraph 15.

<sup>13</sup> Appellants' Initial Submissions, February 21, 2020, at paragraph 16.

<sup>14</sup> Appellants' Initial Submissions, February 21, 2020, at paragraph 16.

[31] The Appellants argued that the harm was heightened in this particular case as wetlands in Southern Alberta are rare, and removing them from a semi-arid region would result in greater impacts if they were located in different geographic locations.

2. Appellants Comments re: “Directly Affected” from their Notices of Appeal<sup>15</sup>

A. Mr. Andrew and Ms. Laurie Reiffenstein and Ms. Joan Reiffenstein<sup>16</sup>

[32] In their Statement of Concern, which accompanied their Notice of Appeal, these Appellants acknowledged that their “property is not immediately adjacent to the racetrack.” They stated a concern with the noise the proposed development would generate throughout the Rosebud River Valley, stating “loud noises generated from the proposed development will be extremely detrimental to the future enjoyment of our property.” They further expressed concerns because of recent flooding of the Rosedale River in Beynon, Wayne, and Rosedale<sup>17</sup> that a significant amount of paved surfaces in the proposed development would result in greater run-off from the site [leading to increased flood] damage downstream.<sup>18</sup>

B. Ms. Angela Chevrier

[33] In her Statement of Concern, Ms. Angela Chevrier stated that she “lived next door to this proposed racetrack.” She further stated “...we had purchased this property to raise our family in this remote, quiet and peaceful river valley.” Her concerns centred on the environmental significance of the river valley and the impact the racetrack would have to the river valley and the health of the residents of Wheatland County.<sup>19</sup>

C. Ms. Ann Gray-Elton and Mr. John Elton

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<sup>15</sup> The Board considered the arguments contained in the Appellants’ Initial Submissions to be applicable to the Appellants at large, but also considered the circumstances of each appellant individually. They are noted here as they are relevant to the issue of standing and directly affected before the Board, and because the Appellants raised the contents of the Statements of Concern filed by the Appellants in paragraph 9 Appellants’ Initial Submissions, February 21, 2020.

<sup>16</sup> Note that the Statement of Concern submitted for Ms. Joan Reiffenstein was the same as that submitted for Mr. Andrew and Ms. Laurie Reiffenstein.

<sup>17</sup> Note that the Statement of Concern was dated April 26, 2018, and the flooding referenced therein, was stated to have occurred April 24-25.

<sup>18</sup> Statement of Concern, Mr. Andrew and Ms. Laurie Reiffenstein, April 26, 2018, as attached to their Notice of Appeal, dated January 20, 2020. Also see the Notice of Appeal of Ms. Joan Reiffenstein.

<sup>19</sup> Statement of Concern, Ms. Angela Chevrier, April 27, 2018, as attached to their Notice of Appeal, dated January 20, 2020.

[34] Ms. Ann Gray-Elton and Mr. John Elton (the “Eltons”) stated that they own a residence in Beynon and spend about a 1/3 of the year at the residence. They stated “we are intimately familiar with the proposed site and the surrounding coulees we believe that we would be directly affected by this proposed development, including the proposed changes to the wetlands and runoff from the site.” They further stated that the proposed development site includes wetlands and an environmentally significant area, and that in “[their]...opinion it is wrong to consider development in this area.”<sup>20</sup>

[35] The Eltons stated they were concerned with increased run-off and added contamination from the development, including road salt, racetrack spills of oil, grease and other pollutants which would effect the quantity and quality of surface runoff into the Rosebud River, surrounding lands and wetlands. Their concerns included the stormwater plan and that the modifications to the wetlands at the development would not be adequate for future flood events. The Eltons concluded their Statement of Concern by commenting on the environmental significance of the area and the overall reduction of species across the Province, stating “... it is unconscionable to permit a development that will accelerate the loss.”<sup>21</sup>

D. Ms. Debbie Schwartz and Mr. Miles Schwartz

[36] Ms. Debbie Schwartz and Mr. Miles Schwartz stated in their Statement of Concern that they lived 3.59 miles downstream from the proposed development. Their concerns included: noise, harm to wildlife, a lack of protection of the wetlands and river, and damage to the environment from “...oil spills and other hazardous products from the proposed racetrack...”<sup>22</sup>

E. Mr. Derek McMillan

[37] Mr. Derek McMillan stated that he had enjoyed and appreciated the beautiful scenery, the wildlife, and the recreation. He further stated that he canoed, hiked, camped, hunted

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<sup>20</sup> Statement of Concern, Ms. Ann Gray-Elton and Mr. John Elton, April 27, 2018, as attached to their Notices of Appeal, dated January 20, 2020 at page 1. Note that although they filed separate appeals, they filed one Statement of Concern.

<sup>21</sup> Statement of Concern, Ms. Ann Gray-Elton and Mr. John Elton, April 27, 2018, as attached to their Notices of Appeal, dated January 20, 2020 at page 2.

<sup>22</sup> Statement of Concern, Ms. Debbie Schwartz and Mr. Miles Schwartz, April 24, 2018, as attached to their Notices of Appeal, dated January 20, 2020 at page 1.

and tobogganed in the valley.<sup>23</sup> He stated that he was concerned about the irreversible damage to watersheds, wetlands, the Rosebud River, and the overall environmental health of the area.<sup>24</sup>

F. Ms. Linda and Mr. Rick Skibsted and Spruce Coulee Farms Ltd.

[38] Mr. Rick Skibsted stated that he operated Spruce Coulee Farms Ltd. and has farmed and ranched along the Rosebud River his entire adult life. He stated that he has tubed, swam, canoed, and skated on the river his entire life. His use of the Rosebud River valley includes hiking.<sup>25</sup>

[39] His concerns included the destruction of the wetlands and whether or not they had been identified properly, including whether or not the species had been identified properly. He further stated that he was concerned about the stormwater management plan and whether or not it had adequately addressed stormwater management in the North-East part of the development, as they need that road to access their land to the North of the proposed project.<sup>26</sup>

[40] Mr. Rick Skibsted expressed concerns about the noise generated by the proposed project and the impact to their quality of life and to wildlife, whether at risk or not.

G. Ms. Wendy Clark and Half-Diamond HC Limited

[41] Ms. Wendy Clark was the representative appellant for the Appellants in the directly affected issue before the Board as well as the stay application. Her concerns have been summarized in the previous paragraphs above.

H. Mr. Richard Clark and Half-Diamond HC Limited

[42] Mr. Richard Clark stated he was raised in the area, worked and recreated in it. He stated that “I have learned to swim in the river, spent time canoeing on this river, and spent many

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<sup>23</sup> Statement of Concern, Mr. Derek McMillan, April 28, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 1.

<sup>24</sup> Statement of Concern, Mr. Derek McMillan, April 28, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 2.

<sup>25</sup> Statement of Concern, Mr. Rick Skibsted, April 2018, as attached to his and Ms. Linda Skibsted’s Notices of Appeal, dated January 20, 2020 at page 1.

<sup>26</sup> Statement of Concern, Mr. Rick Skibsted, April 2018, as attached to his and Ms. Linda Skibsted’s Notices of Appeal, dated January 20, 2020 at page 2.



hours hiking in the valley as well.” He mentioned the ability to enjoy the wildlife, including hawks, leopard frogs, bank swallows, deer and moose.<sup>27</sup>

[43] He stated that he was concerned that moose travelling across his land will not be able to use the main wildlife corridor to the wetlands or the river, or be able to access the wetlands at all. He further stated that he had concerns about the other wildlife (such as golden eagles and prairie falcons) in the area and their displacement caused by the noise and activity caused by the high powered cars and motorcycles.<sup>28</sup>

[44] Mr. Clark stated that he was concerned about the water quality of the wetlands and the Rosebud River and the lack of climate data for this specific site in regards to stormwater. He also stated that he was concerned about the complex stormwater plan, “...when I know the actual rainfall and spring runoff at this location are much greater.”<sup>29</sup>

I. Ms. Ruth Bellamy and Will Farms Ltd.

[45] Ms. Ruth Bellamy stated that she is the current owner of Will Farms Ltd. and owns the land immediately east of the motor sport facility. Ms. Bellamy stated that the 2 ½ miles of land that

“...we own beside the Rosebud River has more value to us personally than all the very valuable cultivated land we farm. We have discovered this beautiful river valley offers us something that is available nowhere else. Of all the land we own, this valley is our retreat. It is the place where we can go to enjoy wild flowers like tiger lilies and harebells. We can hike and smell the choke cherry blooms in the spring. When we climb up the hills and look down we can see miles of greenery, and we hear nothing. It is quiet. It is totally quiet except for the songs of birds —woodpeckers, bluebirds, kestrels, and chickadees to name a few. Of course where the banks are suitable we can see the nests of swallows. Looking across the valley we can see the nesting bald eagles...”<sup>30</sup>

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<sup>27</sup> Statement of Concern, Mr. Richard Clark, April 27, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 1.

<sup>28</sup> Statement of Concern, Mr. Richard Clark, April 27, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 2.

<sup>29</sup> Statement of Concern, Mr. Richard Clark, April 27, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 2.

<sup>30</sup> Statement of Concern, Ms. Elaine Bellamy, April 30, 2018, as attached to her Notice of Appeal, dated January 20, 2020 at page 1. Note that Ms. Bellamy is referenced as “Ms. Ruth Bellamy” in her Notice of Appeal, but refers to herself as “Elaine Bellamy” in her Statement of Concern.

[46] Ms. Bellary stated she was concerned with the impact the motor sport facility will have on the riparian area that flows through her land. She stated that

“...whatever happens upstream in a river affects everything downstream.... Vegetation is designed to allow for natural drainage from an area. If the racetrack is allowed to be built you will be taking away the vegetation, and substituting paved areas. Consider the snow melt situation of this spring. We had a very fast melt. There would be no area left to absorb the runoff, and this would leave water rushing off the paved areas taking undesired sediment, and contaminants, into the river.”<sup>31</sup>

[47] She further stated concerns with disruption to animal corridors, displacement of animals placing pressure on the vegetation further down the river, and a concern that this could lead to displaced animals destroying portions of the river downstream from the proposed race track where she has tried to maintain a healthy ecosystem.<sup>32</sup>

[48] Ms. Bellamy also stated that she was concerned with the impacts the noise of the construction would have and the timing of the construction, and that between “... the migratory birds, the rutting season, and even the simple denning of snakes, there is no ‘safe’ time for construction to occur.”<sup>33</sup>

J. Ms. Samantha Andersen and Mr. Vincent Andersen and H&A Farms Ltd.

[49] Mr. Vincent and Ms. Samantha Andersen stated in their Statement of Concern that they were directly affected by the proposed racetrack as they could see the developer’s land from their living room window to the North. Mr. Vincent Andersen stated that he takes his children hiking, biking, tubing down the river, for picnics, camp fires etc. in the river valley.

[50] He stated a concern with the location of the lower racetrack in the middle of a wildlife corridor. He stated a concern with the water quality of the Rosebud River as well as the wetlands

“...also in jeopardy as the developers used Calgary's average monthly rainfall as their guide to designing their stormwater plans. But living next to the valley all

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<sup>31</sup> Statement of Concern, Ms. Elaine Bellamy, April 30, 2018, as attached to her Notice of Appeal, dated January 20, 2020 at page 2.

<sup>32</sup> Statement of Concern, Ms. Elaine Bellamy, April 30, 2018, as attached to her Notice of Appeal, dated January 20, 2020 at page 2.

<sup>33</sup> Statement of Concern, Ms. Elaine Bellamy, April 30, 2018, as attached to her Notice of Appeal, dated January 20, 2020 at page 2.

my life I know that we can get more than Calgary's average monthly rainfall totals in about 20 minutes or less as frequent heavy thunderstorm events occur often in the summertime...”<sup>34</sup>

K. Ms. Shauna Kenworthy

[51] Ms. Shauna Kenworthy stated that she is “...directly affected by the proposed development because she spends many months of the year at the Skibsted’s farm; visiting, dog-sitting for them, gardening and photographing the birds and wildlife in the area and directly adjacent to this site.”<sup>35</sup> She stated that she has enjoyed fossil hunting in the valley. She stated concerns related to pollution, noise pollution and impacts to the wetlands and wildlife. Ms. Kenworthy concluded by stating that hikers, campers, photographers, hunters and others out for a driver should be able to enjoy the valley.<sup>36</sup>

L. Mr. Barry Pallesen and Ms. Pauline Pallesen and Dalbey Farms Ltd.

[52] Mr. Barry Pallesen and Ms. Pauline Pallesen stated in their Statement of Concern that they had numerous concerns with the proposal. They stated that their land is directly downstream of the proposed project and they had concerns about the quality and quantity of water that their cattle use. They further stated concerns related to the river valley and habitat, native plants and wildlife. They also stated a concern about the flood risk created by the concrete from the project.<sup>37</sup>

M. Mr. George Comstock

[53] Mr. George Comstock stated in his Statement of Concern that he and his family own 645 acres of land about five miles southeast of the proposed racetrack site. He stated that he is concerned with the pollution that will be produced:

“1. Noise pollution—wildlife should be allowed to live, roam and reproduce in the valley without the sounds of a racetrack or other commercial activity.

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<sup>34</sup> Statement of Concern, Mr. Vincent Andersen, April 30 2018, as attached both to his and Ms. Samantha Andersen’s Notices of Appeal, dated January 20, 2020 at page 1.

<sup>35</sup> Statement of Concern, Ms. Shauna Kenworthy, April 29, 2018, as attached to her Notice of Appeal, dated January 20, 2020 at page 1.

<sup>36</sup> Statement of Concern, Ms. Shauna Kenworthy, April 29, 2018, as attached to her Notice of Appeal, dated January 20, 2020 at page 2.

<sup>37</sup> Statement of Concern, Mr. Barry Pallesen and Ms. Pauline Pallesen, January 19, 2018, as attached to their Notices of Appeal, dated January 20, 2020 at page 1.

2. Physical pollution the residue from a racetrack: oil, grease, tar, burnt tire shreds and other automotive debris will be washed by rain and wind into the Rosebud River and will pollute the entire South Saskatchewan River System...”<sup>38</sup>

N. Ms. Jacqueline Skytt and 1688732 Alberta Ltd.

[54] In her Statement of Concern, Ms. Jacqueline Skytt said she and her family “... own High Heat Farms Ltd., 1688732 Alberta Ltd., and JSL Farms Ltd. which [they] collectively farms and owns 6400 acres northeast of the proposed development ... which are 2.3 miles down stream from the proposed development.” She stated they have numerous concerns with the proposed development including:

1. destruction of the wetlands;
2. decrease in water quality – in their opinion the river does not have the capacity to sustain a development the size of the proposed project without severe consequences to the people and animals downstream as the proposed project includes housing and retail activities, which will require water to be extracted from the Rosebud River, used for commercial and residential activities, before being treated and returned;
3. stormwater management concerns – the racetrack development will have pavement and concrete surfaces that will collect oil, gasoline and rubber deposits that will be carried into the valley and river below. The racetrack development will also change the natural flow of water into the valley and has the potential to increase erosion in the coulee and along the riverbank; and
4. environmental pollution – increase in human activity from the racetrack development will result in more trash and litter, in the grasslands and the river.<sup>39</sup>

O. Mr. Jim Eskeland and Ms. Julie Eskeland

[55] In their Statement of Concern, Mr. Jim Eskeland and Ms. Julie Eskeland stated that they farm and are raising their children in the Rosebud River valley. They stated that they enjoy

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<sup>38</sup> Statement of Concern, Mr. George Comstock, April 29, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 2.

<sup>39</sup> Statement of Concern, Ms. Jacqueline Skytt, April 27, 2018, as attached to her Notice of Appeal, dated January 20, 2020 at pages 1 and 2.

hiking, walking, camping and the peace and quiet of the valley. They expressed concerns that the proposed racetrack would destroy the natural habitat.<sup>40</sup>

P. Mr. Jonathan Groves

[56] In his Statement of Concern, Mr. Jonathan Groves stated that he was concerned about the impact of the proposed development on species at risk in the area, specifically, raptors. He stated that he is a professional photographer and a conservationist, and that he makes his living by showcasing the wildlife that lives in the Rosebud River valley.<sup>41</sup>

[57] He was particularly concerned with species at risk, stating:

“The biophysical Impact Assessment prepared by EnviroConsult Ltd. fails to adequately address both the occurrence and potential impacts of this proposed development on nesting raptors in the Rosebud River valley. Prairie falcons occupy a territory on lands contained by this proposed development. This prairie falcon territory uses two-nest sites, one on the cliffs within the southwest corner of the project area and the other 400 m to the east on cliffs immediately adjacent and above the Rosebud River. EnviroConsult Ltd. disregarded the use of local knowledge when conducting surveys for breeding birds in the area and failed to even properly identify resident nesting raptors. This prairie falcon territory will certainly be abandoned with the construction and operation of this proposed development....”<sup>42</sup>

Q. Mr. Patrick Murphy and Ms. Shauna Murphy

[58] Mr. Patrick Murphy and Ms. Shauna Murphy stated in their Statement of Concern that they lived in the Hamlet of Rosebud in the Rosebud River Valley. They stated that they had lived here for 22 years and believe this racetrack proposal will negatively affect their lives. They stated they spent many hours walking, tubing and exploring the valley and river. They further stated that they still regularly walk along the river with their dog and enjoy the natural beauty of the valley and that they “...are also avid bird watchers and love the wildlife we observe throughout the valley. We feel a racetrack would be detrimental to the animals habitat....”<sup>43</sup>

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<sup>40</sup> Statement of Concern, Mr. Jim Eskeland and Ms. Julie Eskeland, April 30, 2018, as attached to their Notices of Appeal, dated January 20, 2020 at page 1.

<sup>41</sup> Statement of Concern, Mr. Jonathan Groves, May 1, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 1.

<sup>42</sup> Statement of Concern, Mr. Jonathan Groves, May 1, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 1.

<sup>43</sup> Statement of Concern, Mr. Patrick Murphy and Ms. Shauna Murphy, May 2, 2018, as attached to their Notices of Appeal, dated January 20, 2020 at page 1.

R. Mr. Stanley Riegel

[59] Mr. Stanley Riegel expressed concerns about the detrimental impact of the proposed project on the Rosebud River Valley. He stated that the area is known for torrential downpours which combined with bentonite soil led to significant instability of the landscape. He also stated having concerns about the birds and animals being chased away.<sup>44</sup>

S. Ms. Della Poulsen and Cactus Coulee Farms Ltd.

[60] Ms. Della Poulsen submitted her Statement of Concern on behalf of herself and owners/operators of Cactus Coulee Farms Ltd. She stated that we "... have had numerous hiking trips, picnicking, tenting and many hours watching and adoring the wildlife. Where is the wildlife going to be if this project gets built? The sound of the race cars echoing through this peaceful valley will definitely deter any wildlife from remaining in this area." She further stated concerns about possible contamination entering the creek from the proposed project and questioned who would be monitoring it.<sup>45</sup>

2. Approval Holder

[61] The Approval Holder argued in its Response Submissions dated March 13, 2020, that much of the material and information submitted by the Appellants was not relevant to the stay application and whether the Appellants were directly affected.

[62] The Approval Holder argued that a Notice of Appeal may only be submitted under the *Water Act* by a person who has previously submitted a Statement of Concern in accordance with section 109 of the *Water Act*<sup>46</sup> and who is directly affected by the Director's

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<sup>44</sup> Statement of Concern, Mr. Stanley Riegel, April 29, 2018, as attached to his Notice of Appeal, dated January 20, 2020 at page 1.

<sup>45</sup> Statement of Concern, Ms. Debra Poulsen and Cactus Coulee Farms Ltd., April 27, 2018, as attached to their Notice of Appeal, dated January 20, 2020 at page 1.

<sup>46</sup> Section 109 of the *Water Act* provides:

"(1) If notice is provided

(a) under section 108(1), any person who is directly affected by the application or proposed amendment, and

(b) under section 108(2), the approval holder, preliminary certificate holder or licensee, may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.

(2) A statement of concern must be submitted

(a) in the case of an approval, within 7 days after the last providing of the notice, and

decision. The Approval Holder further argued the Board has the authority under section 115(1)(a)(i) of the *Water Act*<sup>47</sup> to determine whether a person claiming to be directly affected is or is not directly affected, and accordingly dismiss the appeal if the person is not found to be directly affected.<sup>48</sup>

[63] The Approval Holder argued that while the Director had sent correspondence on May 13, 2019, recognizing the filing of the Appellants' Statements of Concern and advising them that they would be notified of the Director's decision on the Approval, the Director did not find any of the Appellants directly affected.<sup>49</sup>

[64] The Approval Holder argued that the Appellants that had not answered the questions asked by the Board in its correspondence of January 23, 2020, had not proven that they were directly affected for the purpose of filing an appeal, and therefore, their appeal should be dismissed. The Approval Holder said "...each appellant needed to demonstrate how they are directly affected by the Director's Approval decision."<sup>50</sup>

[65] The Approval Holder argued that while Ms. Wendy Clark and Mr. Richard Clark are adjacent landowners to the parcel of land to which the Approval relates, their residence is not on this land. The Approval Holder further argued that there may be some drainage from the Clarks' property to the Approval Holder's property,

"... but that there was no reason to believe that construction of the Approved Stormwater Management Plan will change this. Ms. Clark has not provided any evidence to support her claims that the Approval would affect their land and use of their space and property. Her claims can be refuted by review of the BMR

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(b) in every other case, within 30 days after the last providing of the notice, or within any longer period specified by the Director in the notice."

<sup>47</sup> Section 115(1)(a)(i) of the *Water Act* provides:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

(a) if the Director issues or amends an approval, a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108...." Note the Approval Holder had argued section 115(r). The Board believes this was an error and the intent was to reference section 115(1)(a)(i).

<sup>48</sup> Approval Holder's Response Submissions, March 13, 2020, at page 8, at paragraph 3.

<sup>49</sup> Approval Holder's Response Submissions, March 13, 2020, at page, 8 at paragraph 4.

<sup>50</sup> Approval Holder's Response Submissions, March 13, 2020, at page 8, at paragraph 9.

Stormwater Management Plan, and the Wetland Impact Report that were provided by the [sic] Alberta Environment [and Parks].”<sup>51</sup>

[66] The Approval Holder argued that concerns regarding economic factors, wildlife management and preservation, public land use and access, municipal zoning or planning issues, are issues that Alberta Environment and Parks (“AEP”) does not have control over in a *Water Act* approval; therefore these concerns and issues have jurisdictional constraints that AEP cannot address under the Approval.

[67] The Approval Holder stated that the concerns and issues expressed by the Alberta Wilderness Association are matters that AEP is not able to place conditions on in a *Water Act* approval, as it would exceed its jurisdiction. The Approval Holder further argued that those issues may or could have been heard and dealt with by Kneehill County at public hearings to pass the Badlands Motorsports Resort Area Structure Plans and Land Use Plans that were held in June and December of 2013. The Approval Holder stated, to the best of its knowledge, The Appellants voiced their concerns and were heard by Kneehill County Council at both public hearings. Both bylaws were passed on December 14, 2014.<sup>52</sup>

[68] The Approval Holder argued that these jurisdictional constraints applied to the concerns of the Appellants. According to the Approval Holder, the “... statements on wetlands are general in nature and have no direct relationship to the Approval. There is no evidence provided that any Appellants will be directly affected by the Approval.”<sup>53</sup>

[69] The Approval Holder argued that none of the Appellants have shown how the Approval will specifically impact them as an individual, or personally in a manner that is different from others who farm and use the Rosebud River for various purposes, stating that:

“No Appellant has stated that they use the water from the river for domestic or agricultural purposes. No Appellant has shown that the approved project will harm a natural resource that the Appellant uses or will harm the Appellant’s use of a natural resource. Therefore, no Appellant can claim to be ‘personally or directly affected by the Approval.’

Ms. Clark’s deep concern and scepticism of the stormwater system allowing effluent directly into the Rosebud River is completed [sic] unfounded. She has not provided any support for her claim. Further, it does not provide any support for

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<sup>51</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 8, at paragraphs 10 and 11.

<sup>52</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 9, at paragraph 12.

<sup>53</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 9, at paragraph 13.



her claim that she is directly affected by the Approval. Neither have the other Appellants provided supporting evidence of how they are directly affected by the Approval.”<sup>54</sup>

[70] The Approval Holder argued that the removal of two wetlands, modification of three wetlands and construction, maintenance and operation of a stormwater management system “... will not in any way cause harm, or have a potential harm to the wetlands that run along the Rosebud River. One wetland is in the middle of the cultivated area on the plateau will be removed and will have little to no effect on the present wetland system.”<sup>55</sup> The Approval Holder stated that a smaller wetland in the lower area is proposed to be modified into a culvert and water would be directed to flow into larger wetlands, and that there would be little to no effect on flows. The Approval Holder also stated that there are presently two outfalls for stormwater to discharge into the Rosebud River, which will not change because of the project’s activity.<sup>56</sup>

[71] The Approval Holder argued that the Approval will not harm surface water or water supply outside of the project area, including the water of the Rosebud River. The Approval Holder further argued that there was no basis for claiming that that alteration of the wetlands in the project area would have any impacts to wetlands in different geographic locations.<sup>57</sup>

[72] The Approval Holder adopted its prior submissions to AEP in support of the Approval and submitted that some of the Appellants’ concerns were outside of the scope of an Approval that allows for the disturbance of wetlands. The Approval Holder further submitted that the Appellants’ concerns were wide-ranging and broadly encompassed their opposition to the proposed development and “... their speculative fears of the impact from a failure of the project.”<sup>58</sup>

[73] The Approval Holder submitted that the Approval is for the disturbance of wetlands and not for the construction of a development project. The Approval Holder further stated that the Appellants needed to connect their statements about the value of the wetlands generally with specific evidence of enhanced risk to them, the residents of Rosebud area, or the

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<sup>54</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 9, at paragraphs 14 and 15.

<sup>55</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 10, at paragraph 16.

<sup>56</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 10, at paragraph. 16.

<sup>57</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 10, at paragraphs 17 and 18.

<sup>58</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 10, numbers 1 and 2. Note that Approval Holder changed the numbering of the paragraphs.

environment. It was insufficient to state that wetlands are generally good for the environment so, they cannot be disturbed.<sup>59</sup>

[74] The Approval Holder submitted that the “project had been carefully planned, designed, and scrutinized by qualified experts throughout the planning stages and the pre-Approval investigations and design stage.” The Approval Holder further submitted that there was no reason to derail the project at great expense to the Approval Holder, associated loss of potential Alberta tax revenue, and a recreational, economic, and tourism project.<sup>60</sup>

[75] The Approval Holder stated that the

“project was designed to ensure the water could continue to flow through the wetlands and that any water from the roadways would not be allowed to flow into the watercourse, which provides water to the river. The Stormwater Management System is designed to control the stormwater flow to be keep the similar amount of water flow through to the river as presently exists.”<sup>61</sup>

[76] The Approval Holder submitted that the Wetland Assessment and Impact Report (“WAIR”) for the Badlands Motorsports Project was submitted to AEP as part of the Application to disturb the wetlands under the *Water Act*. The Approval Holder stated it met the requirements of the most current Alberta Wetland Policy and Directives, including the following reporting requirements:

- “• The Alberta Wetland Assessment and Impact Report Directive (June 1, 2017). The purpose of this Directive is to outline the pre-disturbance wetland assessment and reporting requirements of the Alberta Wetland Policy.
- The Alberta Wetland Identification and Delineation Directive (June 1, 2015). The purpose of this Directive is to provide identification and delineation standards and improve consistency of wetland boundaries, area, and assessments.
- The Alberta Wetland Rapid Evaluation Tool (ABWRET-A) Manuals. The purpose is to standardize wetland assessment in the Province of Alberta. This tool is used when any anticipated permanent project-related impacts to wetlands will occur.
- The Alberta Wetland Classification System (June 1, 2015). The purpose of the AWCS is to incorporate and merge existing classification systems into

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<sup>59</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 10, numbers 3 and 4.

<sup>60</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 11, numbers 5 and 6.

<sup>61</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 11, number 8.

one system that uses criteria that is consistent with the specific flora and geography of Alberta and provide a standardized approach to classifying wetlands in Alberta.

- The Alberta Wetland Mitigation Directive (June 1, 2015). The purpose of this Directive is to inform decision making to avoid and minimize negative impacts to wetlands and where necessary, replace lost wetland area and value.”<sup>62</sup>

[77] The Approval Holder submitted that the Director had ensured the questions and concerns of the Statement of Concern filers were thoroughly reviewed and addressed.<sup>63</sup> The Approval Holder further submitted that timing constraints would be employed for vegetation clearing and habitat destruction activities to avoid the breeding season for migratory and non-migratory birds, and that best management practices would be followed during construction to ensure erosion and sedimentation control to minimize potential impacts to wildlife, fish and fish habitat.<sup>64</sup>

[78] The Approval Holder submitted there was no evidence that the relative impact of the infill or partial infill of the wetlands outweighs the public benefit offered by the project.<sup>65</sup> The Approval Holder further submitted “... there was no credible evidence to substantiate the wetlands at issue would make any practical difference in a major flood event.”<sup>66</sup>

[79] In response to the Appellants’ argument that the purpose statement of the *Water Act* requires economic considerations to form the basis of any decision to grant an approval, the Approval Holder submitted

“... under the scheme of the *Water Act* a review of economic, financial or business aspects of the proposed development are beyond the authority of the Director. Neither does the Board ha[ve] jurisdiction or authority in this regard. Factor (b) of the purpose statement contained in section 2<sup>67</sup> of the *Water Act* does

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<sup>62</sup> Approval Holder’s Response Submissions, March 13, 2020, at pages 11 and 12, number 9.

<sup>63</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 13, number 15.

<sup>64</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 13, number 16.

<sup>65</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 14, number 19.

<sup>66</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 14, number 20.

<sup>67</sup> Section 2(b) of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing ...  
(b) the need for Alberta’s economic growth and prosperity....”

not in and of itself provide the Director or the Board the authority to consider economic considerations of a proposed development.”<sup>68</sup>

[80] The Approval Holder concluded its arguments by stating that none of the Appellants had established that he or she was directly affected by the Approval of the project as required by section 115(1)(a)(i)<sup>69</sup> of the *Water Act*.<sup>70</sup>

[81] In the case of Ms. Wendy Clark, the Approval Holder argued that she had not demonstrated that the Approval would harm a natural resource that she uses or harm her use of a natural resource. The Approval Holder argued that the Approval would not directly affect her because she will be in the same position from the activity of the approved project as she was prior to the Approval being granted.<sup>71</sup>

[82] The Approval Holder concluded by stating that none of the Appellants are directly affected by the Approval and that appeals and stay should be dismissed.<sup>72</sup>

### 3. Director

[83] The Director took no position with respect to the issue of whether Appellants’ are directly affected.

### 4. Appellants’ Response Submissions

[84] In their Response Submissions, the Appellants argued that the Director had found some of the Appellants that had filed Notices of Appeal were directly affected by the Approval, “by virtue of being considered an official Statement of Concern” filer, and notified those Appellants through correspondence sent November 13, 2013.<sup>73</sup>

[85] In response to the Approval Holder’s argument that only Ms. Wendy Clark had led evidence of her harm, the Appellants argued that the concerns of Ms. Wendy Clark applied to all of the Appellants and that they had demonstrated how they were directly affected by the

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<sup>68</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 14, number 22.

<sup>69</sup> Note the Approval Holder had argued section 115(1)(r), the Board believes the intent was to argue section 115(1)(a)(i).

<sup>70</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 15, number 1.

<sup>71</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 15, number 2.

<sup>72</sup> Approval Holder’s Response Submissions, March 13, 2020, at page 16, number 8.

<sup>73</sup> Appellants’ Response Submissions, March 27, 2020, at page 4, paragraph 6. See also Tab 2 of the Appellants’ Rebuttal Brief for the ‘Directly Affected Letters.’

Director's Approval decision.<sup>74</sup> More specifically, the Appellants stated they had indicated their adoption of their Notices of Appeal and their Statements of Concern attached to them and where applicable, included a certificate of title or corporate search.<sup>75</sup>

[86] Ms. Clark stated that stormwater from her property drains into the Approval Holder's, and the opposite hold as well. The Appellants argued that:

"Ms. Clark's statement of concern was clear in that effluent from the construction and eventual use of an automobile racetrack will drain into her property and affect the network of wetlands, a portion of which is subject to the Approval. By the Approval Holder's own admission, Ms. Clark is directly affected by the Approval.

Ms. Clark's concerns are reflected in the Approval Holder's own Stormwater Management Plan. Figure 4 (Appendix 'A') of the Stormwater Management Plan is a predevelopment graphic showing effluent drainage from the site. The Approval Holder's land currently drains effluent in three directions: into the Rosebud River, to the West and North West into Mr. and Ms. Clark's property and directly North into Mr. and Ms. Skibsted's property. There is insufficient clarity on whether that will change."<sup>76</sup>

[87] Ms. Clark stated further that she had tried to register a Conservation Easement on her property and the wetlands that she sought to permanently protect will be negatively impacted by the infilling of the Approval Holder's wetlands. It was argued the impact to her wetlands was "the personal or private interest in an approval" an individual was required to establish in order to be considered directly affected, per *Normtek Radiation Services Ltd v. Alberta (Environmental Appeals Board)*.<sup>77</sup> She argued that she had established a personal and private interest by being concerned that her land will be directly affected by the construction and use of a racetrack and she is concerned that the network of wetlands, part of which run through her property will be affected by the Approval.<sup>78</sup>

[88] The Appellants adopted the concerns referenced in their Statements of Concern.

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<sup>74</sup> Appellants' Response Submissions, March 27, 2020, at paragraphs 10 and 11.

<sup>75</sup> Appellants' Response Submissions, March 27, 2020, at paragraphs 12 and 13.

<sup>76</sup> Appellants' Rebuttal Brief, March 27, 2020, at page 5, paragraphs 16 and 17.

<sup>77</sup> Appellants' Rebuttal Brief, March 27, 2020, page 6, at paragraphs 18 and 19. See also *Normtek Radiation Services Ltd v. Alberta (Environmental Appeals Board)*, 2018 ABQB 911 at paragraph 36.

<sup>78</sup> Appellants' Rebuttal Brief, March 27, 2020, page 6, at paragraph 20.

[89] The Appellants noted that the Approval Holder had asserted that, in order to be directly affected, the Appellants had to prove effects upon them greater than the average Albertan. The Appellants argued each of them had met this test.<sup>79</sup>

[90] The Appellants stated that:

“Ms. Clark’s concerns are reflected in the Approval Holder’s own Stormwater Management Plan. Figure 4 (Appendix ‘A’) of the Stormwater Management Plan is a predevelopment graphic showing effluent drainage from the site. The Approval Holder’s land currently drains effluent in three directions: into the Rosebud River, to the West and North West into Mr. and Ms. Clark’s property and directly North into Mr. and Ms. Skibsted’s property. There is insufficient clarity on whether that will change.”<sup>80</sup>

It was argued that the wetlands that she had sought to permanently protect on her property through a Conservation Easement would be negatively impacted by the infilling of the Approval Holder’s wetlands.

[91] The Appellants argued that they were directly affected by the proposed Approval because the wetlands are a part of a network of wetlands that follow the Rosebud River. Wetlands affected by the Approval drain into the Rosebud River, as does the Approval Holder’s proposed stormwater management plan and provide key unfragmented habitat for wildlife.<sup>81</sup>

[92] It was argued that this was analogous to the situation in *Corbeil et. al. v. Director, South Saskatchewan Region*,<sup>82</sup> where the appellants had asserted they were directly affected by the proposed Approval because they resided in close proximity to the creek and relied on the creek for intrinsic value and enjoyment.<sup>83</sup>

[93] The Appellants argued that the Approval would directly affect each Appellant by:

“a. draining effluent into the Rosebud River, which the Appellants use for recreation and agricultural purposes;

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<sup>79</sup> Appellants’ Rebuttal Brief, March 27, 2020, page 6, at paragraph 22.

<sup>80</sup> Appellants’ Response Submissions, March 27, 2020, at paragraph 17.

<sup>81</sup> Appellants’ Response Submissions, March 27, 2020, at paragraph 26.

<sup>82</sup> *Corbeil et al. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn* (18 December 2014), Appeal Nos. 14-003-006-IC (A.E.A.B.) (*Corbeil*).

<sup>83</sup> Appellants’ Response Submissions, March 27, 2020, at paragraph 25.

- b. removing wildlife habitat, forcing wildlife to relocate to adjacent properties and affecting the Appellants who rely on that wildlife for vocational and intrinsic purposes; and
- c. fragmenting an unbroken network of wetlands along the Rosebud River.”<sup>84</sup>

[94] The Appellants further argued that they had each established a personal or private interest in the Approval. “Each Appellant, in their own words, has explained how they are directly affected by the Approval.”<sup>85</sup>

[95] The Appellants argued that in considering whether the Appellants were directly affected, the Board “... ought not consider whether those effects are substantiated.”<sup>86</sup> According to the Appellants:

“The scope of risk to Ms. Clark’s property from effluent run-off is an issue for the Board to consider at its hearing and weighing evidence. At this stage, in determining whether the Appellants are directly affected, it is sufficient for the Board to consider the following, that the Appellants:

- a. rely upon the affected wetlands for their recreational activities;
- b. use the Rosebud River for their agricultural operations; and
- c. rely upon the wetlands and adjacent Rosebud River for their employment income, including wildlife viewing, photography operations and agricultural operations.”<sup>87</sup>

## **B. Analysis**

[96] As a part of its consideration of the stay application and before the Board can accept an appeal as being valid, the person filing the notice of appeal must show that he or she is directly affected by the decision of the Director; in this case, by the issuance of the Approval.

[97] The Board has examined the issue of standing and whether an appellant is “directly affected” in prior decisions. The Board has received guidance on this issue from the Court of Queen’s Bench in *Court*.

[98] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing in the context of appeals to the Board:

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<sup>84</sup> Appellants’ Response Submissions, March 27, 2020, at paragraph 27.

<sup>85</sup> Appellants’ Response Submissions, March 27, 2020, at paragraph 28.

<sup>86</sup> Appellants’ Response Submissions, March 27, 2020, at paragraph 29.

<sup>87</sup> Appellants’ Response Submissions, March 27, 2020, at paragraph 30.

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

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

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

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

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

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

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



While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”<sup>88</sup>

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”<sup>89</sup>

[99] The Board relies on the principles articulated in the *Court* decision when determining whether or not a person has standing to bring an appeal. The onus is on the appellant to demonstrate to the Board that there is a reasonable possibility that they will be directly affected by the decision of the Director. The effect must be plausible and relevant to the jurisdiction of the Board in order for the Board to consider it sufficient to grant standing. The Board will examine how the appellant uses the environment where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the appellant’s use of the area. The closer these elements are connected (their proximity), the

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<sup>88</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“Bildson”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“Mizera”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

<sup>89</sup> *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

more likely the person is directly affected.<sup>90</sup> The onus is on the appellant to present a *prima facie* case that he or she is directly affected.<sup>91</sup>

[100] As this is a preliminary matter, the Board does not require nor will it have all of the evidence or arguments before it that may be submitted during a hearing on the merits. The test therefore, cannot be based on a whether there is a certainty that the appellant is directly affected.

[101] The Board has noted in prior decisions that an appeal to the Board is a quasi-judicial process. While the appeal process must adhere to the principles of natural justice and be fair to all of the participants, it is appropriate that, in assessing preliminary matters, the standard be less onerous than that found in a court. Therefore, the Board considers it appropriate that an appellant show, on a *prima facie* basis, there is a reasonable possibility they are directly affected by the Director's decision.<sup>92</sup>

[102] While the effect on an appellant does not need to be unique in kind or magnitude,<sup>93</sup> it needs to be more direct than the effect on the public at large.

[103] In *Kostuch v. Alberta (Director Air and Water Approvals Division Environmental Protection)*, this Board determined that “[d]irectly means the person claiming to be “affected” must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.”<sup>94</sup>

[104] There must be a direct connection between the Director's decision and the effect on the appellant. The closer the nexus, the greater the likelihood of the appellant being found directly affected by the decision. In looking to the interest, the Board in *Normtek Radiation Services Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Secure Energy Services Inc.*, stated that an “... appellant must show how its personal

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<sup>90</sup> *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Rocky View County* (30 November 2011), Appeal No. 10-032-D (A.E.A.B.) at paragraph 60.

<sup>91</sup> See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

<sup>92</sup> See *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Rocky View County* (30 November 2011), Appeal No. 10-032-D (A.E.A.B.) at paragraph 61.

<sup>93</sup> See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection* re: *Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

<sup>94</sup> *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)*, (23 August 1995), Appeal No. 94-017-D (A.E.A.B.) at paragraph 34.

interest will be affected by the decision of the Director, and it is of assistance to the Board if the type of interest the appellant claims to be affected is supported by the legislation, such as being included in the purpose section of EPEA.”<sup>95</sup>

[105] The initial onus is on the Appellants, to establish, on a *prima facie* basis, that they are directly affected by the Approval. If this is done, the onus shifts to the Approval Holder to establish why the Appellants are not directly affected by the Director’s decision.

[106] The Appellants have appealed the decision of the Director to issue an Approval for the infilling and permanent alteration of five wetlands. The starting point of the Board’s analysis to determine how the Appellants are affected by this decision.

[107] In reviewing the Statements of Concerns of the Appellants, the Board divides the Appellants into two groups. Those that have largely argued impacts to the intrinsic value and their enjoyment of the Rosebud River valley, and those that while arguing the same concerns, have alleged additional impacts based on their proximity to the proposed Activity, keeping in mind this Activity is the infilling of two wetlands, the modification of three wetlands, and construction, operation, and maintenance of the stormwater management system. (It is important to remember the Activity is not the race track.)

[108] In the first grouping includes the Reiffensteins, Angela Chevrier, Jonathan Grovers, the Eskelunds, and the Schwartzs. Their concerns related to the impacts from noise, increased run-off causing damage downstream, impacts to the river valley and to wildlife (included species at risk) and the use of the natural habitat for things like hiking and camping.

[109] Intrinsic value is not supported by the legislation as an interest that is protected or one on which an appeal can be based. The Appellants have relied on the *Corbeil* decision to suggest that intrinsic value is supported as a basis for finding the Appellants directly affected. The Board notes that *Corbeil* can be distinguished from the present case for this group of Appellants. In *Corbeil*, the Board “...found the Appellants are directly affected given they own property directly adjacent to Pigeon Creek where the proposed work is being undertaken.”<sup>96</sup> In

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<sup>95</sup> *Normtek Radiation Services Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Secure Energy Services Inc.* (2 March 2018), Appeal No. 16-024-D (A.E.A.B.). at paragraph 128.

<sup>96</sup> *Corbeil et al. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn* (18 December 2014), Appeal Nos. 14-003-006-IC (A.E.A.B.) at paragraph 4.

the present case, the vast majority of the Appellants do not live directly adjacent to the property, with at least three Appellants living part of the time in another city.<sup>97</sup>

[110] The second group of Appellants have made similar arguments regarding intrinsic value, noise and the environment at large, but these Appellants own land or uses land in close proximity to the proposed Activity. This fact creates additional concerns that set them apart from the other Appellants. The Board notes that this group of Appellants is more analogous to the appellants in *Corbeil*.

[111] The Board notes that the following individuals own or work property immediately adjacent to the land owned by the Approval Holder, which is subject to the Approval being challenged:

- Mr. Rick and Ms. Linda Skibsted, Mr. Derek McMillan and Spruce Coulee Farms Ltd: 23-27-21-W4M
- Ms. Wendy and Mr. Richard Clark and Half-Diamond HC Limited: S 21-27-21-W4M and SE 28-27-21-W4

[112] These Appellants have raised additional concerns regarding the Approval Holder's proposed stormwater management system.

[113] These Appellants ownership and use of land adjacent to the proposed Activity creates a nexus between the impacts of the Approval and the Appellants. A review of Figure Four, Predevelopment Drainage Basin, Badlands Motorsports Resorts,<sup>98</sup> shows that surface water drains from the land owned by Mr. Rick and Ms. Linda Skibsted, Mr. Derek McMillan, and Ms. Wendy and Mr. Richard Clark into the proposes stormwater management system. There is a potential for this drainage to be affected by the Activity in ways that could impact the lands owned and used by the Directly Affected Appellants.

[114] Specifically, as the land is currently the drainage from the Directly Affected Appellants' land enters leaves this land and enters a natural drainage system on the Approval Holder's land and makes its way to the rivers. Once the Approval Holder constructs the stormwater management system, the drainage from the Directly Affected Appellants' land will

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<sup>97</sup> Ms. Shauna Kenworthy visits at the Mr. and Ms. Skibsted's property. Ms. Ann Gray-Elton and Mr. John Elton spend 1/3 of the year in the valley.

<sup>98</sup> See Figure 4, Predevelopment Drainage Basin, Badlands Motorsports Resort, Stormwater Management Plan, attached as Appendix "A" to this Decision.

now enter this manmade drainage system. The manmade drainage system, will be design be different than the natural drainage system. If the stormwater management system does not operate as intended it could result in stormwater backing up on the Directly Affected Appellants' land, negatively affected the land. In short, the change made to the natural drainage system by the Approval Holder could directly affected the lands owned by the Directly Affected Appellants.

[115] As the Appellants have met the onus of showing on a *prima facie* basis that they are directly affected by the Director's decision to issue the Approval, the burden shifts to the Approval Holder to show that the Appellants are not directly affected.

[116] The Approval Holder disputed the Appellants' assertions that they were directly affected, arguing that none of the Appellants had shown how the Approval would specifically impact them personally, in a manner that is different from others that farm and use the Rosebud River.

[117] With respect to Ms. Wendy Clark, the Approval Holder argued that her concerns regarding the water from the stormwater management system were unfounded. The Approval Holder did not specifically address the other Appellants that owned property adjacent to the Approval Holder's lands.

[118] In reviewing the Approval Holder's submissions, the Board notes that the Approval Holder argued that the construction, operation, and maintenance of the stormwater management system would not cause harm to the wetlands that run along the Rosebud River. The Approval Holder stated that a smaller wetland in the lower area is proposed to be modified into a culvert and water would be directed to flow into larger wetlands, and that there would be little to no effect on flows.

[119] The Board notes that there is insufficient evidence before the Board to make a final determination on the nature of the impact of the proposed stormwater management system. However, in reviewing Figure 4 – Stormwater Management Plan, it appears that surface water drains from the west and northwest from the Clarks' land, and from the north from the Skibsteds' land onto the Approval Holder's land. (The Board notes Mr. McMillan farms the land with the Skibsteds.) On a preliminary analysis, the stormwater management system appears to have the

potential to interfere with these natural drainage patterns. The Approval Holder has not rebutted this conclusion.

[120] The Director did not take a position on whether or not the Appellants were directly affected.

### **C. Decision**

[121] The Board finds that the following Appellants: Mr. Richard Clark, Ms. Wendy Clark, Half-Diamond HC Limited, Mr. Rick Skibsted, Ms. Linda Skibsted, Spruce Coulee Farms Ltd., and Derek McMillan, have demonstrated, on a *prima facie* basis, that they are directly affected by the Director's decision to issue the Approval. The proposed stormwater management system may interfere with the flow of surface water from their lands, which may have an impact on the lands of these Appellants.

[122] The remaining Appellants have based their position on the question of whether they are directly affected on the potential impacts to the intrinsic value and enjoyment of the Rosebud River valley. Respectfully, these concerns relate to the impact the race track will have on their use and enjoyment of the river valley, and not the impact of the work authorized under the Approval. The Board finds that these Appellants have failed to show that they are personally directly affected by the decision to issue the Approval that is being appealed.

## **V. STAY**

### **A. Initial Submissions**

#### **1. The Appellants<sup>99</sup>**

[123] In regards to the stay application, the Appellants argued that the threshold to demonstrate whether there is a serious issue is low and that in order to demonstrate a serious issue, "...the issues complained of must only be above the standard of frivolous or vexatious."<sup>100</sup>

[124] The Appellants relied upon the submissions contained in their filed Statements of Concern and stated that there were additional concerns they wished to address in their

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<sup>99</sup> Note that for the purposes of the Stay application, only those Appellants that were found to have standing and that are directly affected, were considered (Mr. Richard Clark, Ms. Wendy Clark, Half-Diamond HC Limited, Mr. Rick Skibsted, Ms. Linda Skibsted, Spruce Coulee Farms Ltd., and Derek McMillan).

<sup>100</sup> Appellants' Initial Submissions, February 21, 2020, at paragraphs 22 and 23.

submissions. The first issue pertained to the application of the 2013 Alberta Wetland Policy. The Appellants argued that the 2013 Alberta Wetland Policy creates two standards: 1) to avoid the deterioration of wetlands, and 2) the Approval fails to meet the requirements of the 2013 Wetlands Policy.<sup>101</sup>

[125] The Approval Holder noted that the Director was provided with a November 13, 2018, report by EnviroConsult Inc., which concluded that all five wetlands affected by the Approval were determined by AEP to be Class D wetlands and described by the Stewart and Kantrud wetland classification system to be Class III Seasonal Ponds.<sup>102</sup> However, EnvironConsult Inc. later provided a supplemental report dated October 9, 2019, which had stated that AEP has reviewed the ABWRET-A Data Forms and determined that three wetlands are Class D, while two wetlands were determined to be Class B.<sup>103</sup> The Appellants argued that this change in classification does not appear to have been considered by the Director in granting his Approval and under the 2013 Alberta Wetland Policy, requires additional protective measures and further study into whether the wetlands are correctly classified.<sup>104</sup>

[126] The Appellants further argued that the wetlands subject to the Approval are unique in the Rosebud River valley and supply a considerable amount of food to insectivores.

[127] The Appellants argued, that section 2(b)<sup>105</sup> of the Water Act, guides the Director and the Board in granting Approvals, and that economic considerations “ought to form the basis for any decision to grant an approval.” The Appellants questioned the economic viability of the proposed project and argued that when determining whether or not to permanently affect five wetlands, the Board should consider whether there is an economic basis to justify the environmental impacts raised by the Appellants.

[128] The Appellants further argued that the Director failed to consider the requirements of the South Saskatchewan Regional Plan when granting the Approval.

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<sup>101</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 26.

<sup>102</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 29.

<sup>103</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 30.

<sup>104</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 31.

<sup>105</sup> Section 2 of the *Water Act*, provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing ... (b) the need for Alberta's economic growth and prosperity....”

[129] The Appellants argued that when there is doubt as to the soundness of an environmental proposal, that proposal should be rejected. The Appellants commented that the Precautionary Principle has been approved by the Supreme Court of Canada and argued that it forms the interpretative basis underlying the *Water Act*. The Appellants argued that the soundness of the Approval is in doubt; there is little economic basis to justify the Approval and the environmental reports and studies upon which the Approval is based are unsound.<sup>106</sup>

[130] The Appellants argued that the harm suffered would be permanent as once the wetlands are filled or replaced, as contemplated by the Approval, there is no recourse to restore them.

[131] The Appellants argued that the balance of convenience favours maintaining the status quo:

“[a]cting on the Approval by filling in the wetlands or altering the five wetlands in the Rosebud River valley would cause substantial harm to the persons directly affected. In addition to the catastrophic harm caused to the river valley, directly affected persons will suffer long term harm associated with a deeply flawed stormwater management plan.”<sup>107</sup>

The Appellants stated that the Approval Holder has been working on this project for ten years. The Appellants argued that ensuring that the proper Approval is in place prior to irreparably harming the Rosebud River valley weighs the balance of convenience in favour of the Appellants.

[132] The Appellants argued that they were unaware of a statutory or common law basis to consider public interest as a part of a remedy for a stay of proceedings. The tripartite test established in *RJR McDonald*,<sup>108</sup> it was argued, is binding on the Board.

[133] In the alternative, it was argued that the public interest was similar to the consideration of the balance of convenience. The Appellants argued that there was no evidence to suggest that a stay of the Approval would affect anyone other than the Approval Holder. Here

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<sup>106</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraphs 39 and 40.

<sup>107</sup> Appellants’ Initial Submissions, February 21, 2020, at paragraph 48.

<sup>108</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R.311.



it was argued, "...the public interest favours granting a stay of proceedings because of the irreparable harm that the public would suffer if the stay is not granted."<sup>109</sup>

## 2. The Approval Holder

[134] In its Response Submissions, the Approval Holder argued that the Approval will not affect the adjacent lands and the farming operations on the adjacent lands which will remain the same as prior to the Approval being granted. The Approval Holder argued that the Clarks would not suffer a loss in income or property value because of the Approval. The Approval Holder further argued that the Clarks would not suffer any harm if the stay was refused.<sup>110</sup>

[135] The Approval Holder argued the Appellants would not suffer irreparable harm if the stay were refused, whereas the Approval Holder would suffer irreparable harm if the Board were to grant the stay.<sup>111</sup>

[136] The Approval Holder argued that the overall public interest does not warrant a stay. The Approval Holder argued there was no reason "... to derail the project with enormous cost to the Approval Holder of over \$4 million dollars to date.... Any stay would affect the Approval Holder's ability to finance the proposed development and move forward with the project."<sup>112</sup>

[137] The Approval Holder further commented that the Appellants would not suffer irreparable harm if the stay were not granted, as the Approval Holder still needed to obtain development permits from Kneehill County for the proposed development.<sup>113</sup>

## 3. Director

[138] The Director took no position with respect to the Appellants' Stay application.

## **B. Analysis**

[139] The Board has the authority to grant a stay under section 97 of EPEA, which provides in part:

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<sup>109</sup> Appellants' Initial Submissions, February 21, 2020, at paragraph 56.

<sup>110</sup> Approval Holder's Response Submissions, March 13, 2020, at page 15, number 3.

<sup>111</sup> Approval Holder's Response Submissions, March 13, 2020, at page 15, number 5.

<sup>112</sup> Approval Holder's Response Submissions, March 13, 2020, at pages 15 and 16, number 6.

<sup>113</sup> Approval Holder's Response Submissions, March 13, 2020, at page 16, number 7.

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

[140] The Board’s test for a stay, as stated in previous decisions<sup>114</sup> is adapted from the Supreme Court of Canada Case of *RJR MacDonald*.<sup>115</sup> The steps in the test, as stated in *RJR MacDonald*, are:

“First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.”<sup>116</sup>

[141] 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. As not all of the evidence may be before the Board at the time the decision is made regarding the stay application, “...a prolonged examination of the merits is generally neither necessary nor desirable.”<sup>117</sup>

[142] 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.

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<sup>114</sup> See *Prybylski 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.); *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.); and *Northcott v. Director, Northern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (11 January 2005), Appeal Nos. 04-009, 04-011, and 04-012-ID1 (A.E.A.B.).

<sup>115</sup> *MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR MacDonald*”). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid v. Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R.311 at paragraph 41.

<sup>116</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

<sup>117</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 50.

[143] The Alberta Court of Appeal defined irreparable harm in *Ominayak v. Norcen Energy Resources*, 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.”<sup>118</sup>

[144] The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.<sup>119</sup> Damage that may be suffered by third parties can also be considered.<sup>120</sup>

[145] 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.”<sup>121</sup> 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,<sup>122</sup> third parties who may suffer damage,<sup>123</sup> or if the reputation and goodwill of a party will be affected.<sup>124</sup>

[146] The Courts have recognized that any alleged harm to the public is to be assessed at the third stage of the test. The public interest includes the “... concerns of society generally and the particular interests of identifiable groups.”<sup>125</sup>

[147] In assessing the stay application, the Board notes that the first part of the *RJR-Macdonald* test requires the Appellants to raise serious issues to be tried and to show some basis for those concerns.

[148] In the present case, the first step of the test requires the Appellants to show that there is a serious issue to be tried. The Appellants must be able to demonstrate through evidence

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<sup>118</sup> *Ominayak v. Norcen Energy Resources*, 1985 ABCA 12 (CanLII) at paragraph 30

<sup>119</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>120</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>121</sup> *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

<sup>122</sup> *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

<sup>123</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>124</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

<sup>125</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

submitted that there is some basis on which an argument can be presented. As noted previously, at this preliminary stage, the evidence does not need to be complete, as not all of the evidence will be before the Board at the time the decision is made regarding the stay application.

[149] The Directly Affected Appellants have raised concerns raised regarding potential damage to their properties and concerns about stormwater being released from the Approval Holder's land onto their lands. The evidence currently before the Board indicates that there is a potential for the Directly Affected Appellants' lands to be impacted because of the Activity.<sup>126</sup> While there is conflicting arguments about whether the surface water flows off or onto the Appellants' lands, at this stage, it is sufficient that the Appellants have shown a basis for their argument, as required by the first part of the test.

[150] In considering the second part of the test, the nature of the harm has to be irreparable in nature. It is not the magnitude of the harm that is important, so much as the inability to quantify it. The Board notes that the Appellants argued that they would suffer greater harm than the Approval Holder, as the wetlands on the Approval Holder's property once destroyed, cannot be replaced. The Board notes that the harm complained of in this instance is intrinsic in nature.

[151] On a more personal level, the Appellants also argued damage to their lands caused by the wildlife being pushed onto it from the development of the proposed Activity. The Appellants also claimed harm arising from the water being released onto their lands from the Approval Holder's lands. The Appellants also argued that there would be irreparable harm to the wetlands located on their lands, erosion, loss of vegetation and other habitat loss. The Board notes that none of the harms complained of cannot be quantified or compensated for monetarily.

[152] In considering the balance of convenience, the Approval Holder has argued that it will have difficulty obtaining financing if the Board were to grant a stay. The Appellants argued that the "...the public interest favours granting a stay of proceedings because of the irreparable harm that the public would suffer if the stay is not granted."<sup>127</sup>

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<sup>126</sup> See Figure 4, Predevelopment Drainage Basin, Badlands Motorsports Resort, Stormwater Management Plan, attached as Appendix "A" to this Decision.

<sup>127</sup> Appellants' Initial Submissions, February 21, 2020, at paragraph 56.

[153] The Approval Holder advised that it still needed to obtain development permits and did not argue an urgency to commence construction. The balance of convenience and public interest did not favour one party over the other.

[154] Based on the foregoing reasons, the Board has declined to grant a stay of the Approval.

## **VI. CONCLUSION**

[155] The Board finds that the following Appellants are directly affected by the Approval: Mr. Richard Clark, Ms. Wendy Clark, Half-Diamond HC Limited, Mr. Rick Skibsted, Ms. Linda Skibsted, Spruce Coulee Farms Ltd., and Derek McMillan.

[156] The Board finds that the remaining Appellants are not directly affected and their appeals are dismissed.

[157] The Board declines to grant a stay.

Dated on April 28, 2020 at Edmonton, Alberta.

“original signed by”  
Alex MacWilliam  
Board Chair

Appendix A

