

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 5, 2013

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

-and-

IN THE MATTER OF appeals filed by the Gull Lake Water Quality Management Society, Chris Simard, and Rich Thul with respect to *Water Act* Approval Nos. 00292313-00-00 and 00279021-00-00 and *Water Act* Licence Nos. 00293413-00-00 and 00293311-00-00 issued to Delta Land Co. Inc. by the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Preliminary Motions: *Gull Lake Water Quality Management Society et al. v. Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Delta Land Co. Inc.* (05 December 2013), Appeal Nos. 12-019-030-ID1 (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Panel Chair and Board Member.

SUBMISSIONS BY:

Appellants: Gull Lake Water Quality Management Society, Mr. Chris Simard, and Mr. Rich Thul.

Approval Holder: Delta Land Co. Inc., represented by Mr. Lance Dzaman.

Director: Mr. Todd Aasen, Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Erika Gerlock, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an approval to Delta Land Co. Inc. (Delta Land) under the *Water Act* for the construction and maintenance of a marina (consisting of an inland marina and a channel connecting the inland marina with Gull Lake), a beach, and fisheries enhancement works and a second approval for the construction and maintenance of a storm water management system and the modification of two wetlands. AESRD also issued two licences under the *Water Act* to Delta Land to operate a works and divert water for the purpose of a recreational vehicle resort and irrigation of a golf course. The approvals and licences apply to a site located at Gull Lake in Lacombe County.

Gull Lake Water Quality Management Society, Chris Simard, and Rich Thul appealed the issuance of the approvals and licences and applied for stays of the approvals and licences.

The Board found Gull Lake Water Quality Management Society, Chris Simard, and Rich Thul directly affected by the issuance of the approval for the construction of the marina and the two licences. However, they were found not to be directly affected by the issuance of the approval for the storm water management system.

The Board granted the stay of the marina approval because there was the potential for irreparable harm to the environment, specifically to Gull Lake and adjoining beach area. The channel connecting the inland marina and the lake and the beach area is proposed to be constructed in an area designated as environmentally sensitive. The Board did not believe work in the bed, bank, and shore of the lake could be undone in any meaningful way. Although the stay precluded Delta Land from completing construction of the channel and beach within the timeframe allowed under the federal Fisheries and Oceans approval, Delta Land would not suffer any irreparable harm. However, construction of the marina and beach could result in irreparable harm to Gull Lake and the beach area. The public interest warranted the stay be granted.

As the stay was granted on the basis of the potential impacts to Gull Lake, the Board explained Delta Land could proceed with the construction of the inland marina, but it was prohibited from conducting any work or activities on the bed, bank, and shore and in the waters of Gull Lake including, but not limited to: (1) the building of the boat launch in the lake; (2) the excavation of

the channel; (3) the stripping of the shoreline to create a beach; and (4) no materials of any kind could be placed on the bed, bank, and shore of the lake.

If Delta Land continued with the construction of the inland marina and the appeals resulted in the approval or licences being reversed or varied, Delta Land would be obligated to return the site to pre-disturbance condition or alter construction plans to ensure it complied with any amendments.

The Board did not stay the two *Water Act* licences because the Appellants did not meet the test applied by the Board to stay applications.

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I. INTRODUCTION

[1] The Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director") issued an approval to Delta Land Co. Inc. (the "Approval Holder" or "Delta Land") under the *Water Act*, R.S.A. 2000, c. W-3, for the construction and maintenance of a marina (consisting of an inland marina and a channel connecting the inland marina and Gull Lake), a beach, and a fisheries enhancement works and a second approval for the construction and maintenance of a storm water management system and the modification of two temporary wetlands. The Director also issued two water licences under the *Water Act* to Delta Land to operate a works and divert water for the purpose of a recreational vehicle resort and irrigation of a golf course. The approvals and licences apply to a site located at Gull Lake in Lacombe County. The Gull Lake Water Quality Management Society (the "Society"), Mr. Chris Simard, and Mr. Rich Thul (collectively, the "Appellants") appealed the issuance of the licences and approvals. The Society also requested a Stay of the approvals and licences. These are the Environmental Appeals Board's reasons for finding the appellants directly affected and for granting the Stay application in respect of one approval.

[2] In this decision, the Environmental Appeals Board (the "Board") had to determine if any of the Appellants were directly affected, because only a party to an appeal can request a Stay.

[3] After reviewing the submissions, the Board found the Appellants were directly affected by the issuance of the approval for the construction of the marina and the water licences, but they were not directly affected by the approval to construct the storm water management system.

[4] The Board granted the Stay of the marina approval on the basis there would be irreparable harm to Gull Lake and the beach area if the Stay was not in place, and the balance of convenience, including the public interest, supported the granting of the Stay. The Board did not grant stays of the water licences because the Appellants did not meet the test applied by the Board to stay applications.

II. BACKGROUND

[5] On August 3, 2012, the Director, under the *Water Act*, issued Approval No. 00292313-00-00 (the “Marina Approval”) to the Approval Holder allowing for the construction and maintenance of a marina (consisting of an inland marina and a channel connecting the inland marina and Gull Lake), a beach, and a fisheries enhancement works at Gull Lake in Lacombe County. Further, the Director issued Approval No. 00279021-00-00 for the construction and maintenance of a storm water management system and the modification of two temporary wetlands (the “Storm Water Approval”). The Director also issued Licence Nos. 00293413-00-00 and 00293311-00-00 (the “Licences”) under the *Water Act* to the Approval Holder allowing the operation of a works and the diversion of up to 38,725.0 and 23,554.0 cubic metres of water annually from well ID 341921 (“Well C”) and well ID 941922 (“Well B”), and well ID 341923 (“Well A”), respectively, at NE 01-41-01-W5M for recreational purposes (a recreational vehicle resort) and for irrigation of a golf course.

[6] Between September 10 and 14, 2011, the Environmental Appeals Board (the “Board”) received Notices of Appeal from the Gull Lake Water Quality Management Society, Chris Simard, and Rich Thul appealing the Approvals and Licences.

[7] On September 18, 2012, the Board wrote to the Appellants, Approval Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and Director of the appeals. In this letter the Board noted the appeals of the Approvals were filed past the seven day time limit set out in the legislation, but the letter sent from the Director notifying the Statement of Concern filers that the Approvals had been issued stated there was a 30 day appeal period. The Board stated it would accept the Notices of Appeal as being filed in time unless one of the Participants objected. On September 21, 2012, the Approval Holder submitted its objection. The Director notified the Board on September 25, 2012, that he would not question the Notices of Appeal filed within the 30 day period.

[8] On September 27, 2012, the Board notified the Participants that it accepted the Notices of Appeal as being filed in time given the Director’s letter stated there was a 30 day appeal period.

[9] On October 23, 2012, the Board notified the Participants that, after consultation with the Participants, a mediation meeting would be held on December 4, 2012. On November 14, 2012, the Director requested an adjournment of the mediation meeting because the record was not yet available. The Board granted the request.

[10] On December 13, 2012, the Board received a request for a Stay from Mr. Thul and the Society. The Appellants were asked to provide a response to the Stay questions.¹

[11] On December 14, 2012, the Board notified the Participants that the mediation meeting was re-scheduled to April 16, 2013.

[12] On December 17, 18, and 19, 2012, the Board received responses to the Stay questions from the Appellants.

[13] On December 20, 2012, the Board notified the Participants that there was sufficient information to consider granting a Stay. The Board granted a temporary stay pending completion of the Stay process. The Approval Holder could proceed with the construction of the inland marina, but it was prohibited from conducting any work or activities on the bed, bank, and shore and in the waters of Gull Lake, including but not limited to: (1) the building of the boat launch on the lake; (2) the excavation of the channel; (3) the stripping of the shoreline to create a beach; and (4) no materials of any kind are to be placed on the bed, bank, and shore of the lake. The Board requested the Approval Holder and Director respond to the Stay questions.

[14] On January 9 and 10, 2012, the Board received comments from the Director and Approval Holder, respectively. The Appellants did not provide a rebuttal submission.

¹ Mr. Thul and the Society were asked to respond to the following questions:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the Stay is refused?
3. Would the Appellants suffer greater harm if the Stay was refused pending a decision of the Board, than Delta Land would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are the Appellants directly affected by the Approvals and Licences? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected.

[15] Upon reviewing the submissions, the Board asked the Appellants to provide additional information on how they are directly affected by the issuance of the Licences and Approvals. The additional information was provided on January 23 and 24, 2013. The Director and Approval Holder provided their responses to the Appellants' additional information on January 25 and 28, 2013, respectively.

[16] The Board notified the Participants on January 31, 2013, that the Appellants are directly affected by the issuance of the Licences and the Marina Approval. The Appellants were found not to be directly affected by the issuance of the Storm Water Approval. The Board also granted the Stay with respect to the Marina Approval only. As stated, these are the Board's reasons for its decisions.

III. DIRECTLY AFFECTED

A. SUBMISSIONS

1. Appellants

[17] The Society stated its directors represent all quadrants of the lake and their families own properties in four different lakeshore communities. It stated it has over 80 members and 75 percent of its members own property on Gull Lake.

[18] The Society explained it was formed in 1998 and has worked to protect the lake environment. It stated it has volunteered to sample the lake water for Alberta Environment and Sustainable Resource Development ("AESRD"), sampled various streams that feed into the lake, and has funded and carried out major projects to maintain the lake environment. The Society stated it is an active member of the Red Deer River Watershed Association.

[19] The Society noted that when a new development, beach clean up, or permits are applied for, AESRD asks the applicants if the Society has been contacted.

[20] The Society stated its members own land around the lake and have a direct interest in the preservation of that environment. The Society stated its members use well water from the aquifers the Approval Holder intends to use.

[21] The Society expressed concerns that no sewage treatment plan was provided.

[22] Mr. Simard stated his family's lot is located approximately 3.5 miles from the development site. Mr. Simard submitted proximity to the proposed development is not the most important factor in determining directly affected. He argued that, given the magnitude of the project, its proximity to the lake, and the potential impact on the lake and surrounding aquifers, anyone with property adjoining the lake or makes use of the lake is directly affected.

2. Approval Holder

[23] The Approval Holder noted the closest of the Appellants, Mr. Simard, lives over seven kilometers away.

3. Director

[24] The Director took no position on the directly affected status of the Appellants.

B. Legal Test

[25] The Board has discussed the issue of "directly affected" in numerous decisions. The Board received guidance on this issue from the Court of Queen's Bench in *Court*.²

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

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

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

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

² See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

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 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.”³

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....”⁴

[27] In determining whether a person has standing to bring forward an appeal, the Board relies on the principles articulated in the *Court* decision.⁵ The onus is on the Appellants to demonstrate to the Board that there is a reasonable possibility they will be directly affected by the decision of the Director. The effect must be plausible and relevant to the Board’s jurisdiction in order for the Board to consider it sufficient to grant standing.

[28] At this point in the appeal process, the Board does not have all of the evidence and arguments before it. The determination of directly affected is a preliminary matter. As a result, the test for standing cannot be based on whether there is certainty the appellant is directly affected. Without all of the evidence, that cannot be conclusively determined. An appeal before the Board is a quasi-judicial process. The appeals process must adhere to the principles of natural justice and must be fair to all of the participants. The Board considers it appropriate that,

³ *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.).

⁴ *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.).

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

in assessing preliminary matters, the standard should be less onerous than that imposed by a court. Therefore, the Board considers it appropriate that appellants show on a *prima facie* basis there is a reasonable possibility they are directly affected by the Director's decision.

[29] As stated, the effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find an appellant directly affected. Both the reasonableness and the possibility of the affect must be shown.

[30] When the Board assesses the directly affected status of an appellant, the Board looks at how the person uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.⁶

[31] The effect on the appellant does not have to be unique in kind or magnitude.⁷ However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.⁸ Under EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class. The Legislature, in using the more restrictive language, also did

⁶ 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.).

⁷ 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.).

⁸ See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

not intend for the Board to provide a general right of review for the Director's decision; it intended it be something narrower.

[32] The Board uses this basic framework for assessing whether a person is directly affected and applies this framework to groups and organizations. The Board does not make a distinction between the right of a natural person to appeal or the right of a group or organization to appeal. However, different information is required when a group files a Notice of Appeal and the group, as a distinct entity, seeks directly affected status before the Board.

[33] There are two pivotal cases in which the issue of a group filing an appeal was addressed – *Hazeldean*⁹ and *Bailey*.¹⁰ In the *Hazeldean* case, the Community League filed an appeal in relation to a plywood manufacturing plant located immediately next to their community. The approval holder objected to the appeals on the basis that none of the parties that had filed an appeal were directly affected.

[34] In *Hazeldean*, the Board stated:

“The Board notes that the residents of the Community live immediately across the street and in the vicinity of the Zeidler plant. The Community distributed a survey to all of the residents of the Hazeldean area and asked them to respond to certain questions concerning the Zeidler plant and its emissions. The results of the survey were submitted to the Board with the Community's representations. Seventy-five of 105 people who completed this survey indicated that they were very concerned about air quality in the neighbourhood. Over 50% of the residents who responded found the odour to be an unpleasant annoyance at least one-half of the time. The Community stated that its close proximity to the Zeidler plant gave rise to these odour complaints because of the prevailing westerly or south westerly winds which cause the emissions to blanket the community. It also stated that there was a great concern regarding the possibility of other compounds within the emissions that may raise health concerns. Their survey found that 55 of 105 completed responses indicated that the residents were concerned with health effects of the Zeidler emissions. Their concern is that the Approval will directly result in increased emissions to the atmosphere, where they will remain at a sufficiently low elevation that the plume distribution will undoubtedly affect the neighbours of the facility who have no choice but to breathe the air outside.

⁹ *Hazeldean Community League v. Director of Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995) Appeal No. 95-002 (A.E.A.B.).

¹⁰ *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (13 March 2001), Appeal Nos. 00-074, 075, 077, 078, 01-001-005 and 011-ID (A.E.A.B.) (“*Bailey*”).

Unlike the quality of water, which leaves the ultimate choice (to drink or not) to the user, there is no real option to breathing the ambient air. If the people of the Hazeldean district are not directly affected, no one will ever be.

Herein lies the crux of the directly affected dilemma: how does an appellant discharge the onus of proving that he or she is directly affected when the nature of air emissions is such that all residents within the emission area may be directly affected to the same degree? One might be led to the conclusion that no person would have standing to appeal because of his inability to differentiate the affect upon him as opposed to his neighbour. This is unreasonable and it is not in keeping with the intent of the Act to involve the public in the making of environmental decisions which may affect them.”

[35] The group in *Hazeldean* identified their members and provided the results of the survey that was taken to support their position. The major factor in the Board’s decision to accept the *Hazeldean* group was that individual members of the group would probably have been determined to be directly affected since they lived in close proximity to the project.

[36] Although the Board assesses each appellant on their individual circumstance, it has been the exception rather than the general rule to have a group deemed to be directly affected. One exception has been the Lake Wabamun Enhancement and Protection Association (“LWEPA”). In *Bailey*, the Board decided that LWEPA was a group that was directly affected. LWEPA provided a membership list to the Board, and the Board determined that LWEPA “...was created for the express purpose of engaging in the regulatory approval process, now appealed to the Board. LWEPA is the means by which ... many of the local residents have in fact chosen to carry out their obligations to participate in the TransAlta Approval process.”¹¹ In addition, two of its members filed separate, valid appeals, and the Board found there was sufficient evidence to determine that LWEPA, whose members surround and use the lake, had status to participate in these appeals. All of its members could have filed appeals in their own right and would have, in all likelihood due to their proximity to the lake, been determined to be directly affected.

[37] The cornerstone of all of the cases before the Board is the factual impact of the proposed project on individuals. It is important to understand that it is acceptable for an

¹¹ Re: *TransAlta Utilities Corp.* (2001), 38 C.E.L.R. (N.S.) 68 (A.E.A.B.) at paragraph 56, (*sub nom. Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation*) Appeals No. 00-074, 075, 077, 078, 01-001-005 and 011-ID.

organization to file an appeal, but in order to demonstrate the personal impact required by section 91 of EPEA, individual members of the organization should also file an appeal – either jointly with the organization or separately. There will be cases where an organization can proceed with an appeal on its own. However, in these cases, the Board will need to be clearly convinced the individual members of the organization (effectively the “*in personam*” of the organization) are individually and personally impacted by the project.¹²

C. Analysis

[38] Before the Board can consider the Stay, it must determine whether any of the Appellants are directly affected by the issuance of the Licences or Approvals.

[39] As stated above, a group may file an appeal, but in order to be found directly affected, the group must meet certain criteria.

[40] The Society did not provide many details on its membership other than to say its members represent the communities around the lake and most of its members own property along the lake. Under the *Hazeldean* test, the Board has generally accepted that the majority of the individual members need to be directly affected in their own right in order for the group to be found directly affected. Without details of the Society’s membership, the Board cannot determine whether the majority of the membership is directly affected by the Director’s decisions.

[41] However, the Society did explain to the Board that it was formed in order to deal with issues around Gull Lake, including development plans, development permit applications, and approval and licence applications. In the LWEPA decision, the Board found LWEPA was directly affected because it was formed to deal with the regulatory processes, and its members, had they filed appeals in their own right, would likely have been found directly affected. In the Board’s view, the Society in this case falls into this category. Members of the Society would have a right to appeal the Director’s decisions in their own right. The Society was formed to

¹² “*In personam*: Against the person. Action seeking judgment against the person involving his personal rights and based on the jurisdiction of his person, as distinguished from his property.” (*Black’s Law Dictionary*, 6th ed.)

collectively participate in the processes. Each member would have similar interests, these interests are brought forward by the Society, and individual members of the Society, Mr. Simard and Mr. Thul, filed their own individual appeals. As the Society has met the test established in *Bailey*, the Board will then consider if the Society is directly affected by the issuance of the Approvals and Licences in the same manner as Mr. Simard and Mr. Thul.

[42] The individual Appellants own properties on Gull Lake, a lake that is commonly used for recreational purposes by Albertans and tourists. The Approval Holder intends to build a resort, which was described as the largest development on the lake. The resort includes lots for recreational vehicles, a golf course, beach access, and a marina. The marina consists of an inland marina that is connected to Gull Lake via a 30 metre wide channel.

[43] The Storm Water Approval applies to the management of the runoff from the development. The storm water management system will become operational when construction of the resort is complete. The runoff water will drain into the storm water retention ponds where it will be stored until the water quality meets AESRD standards, and will then be used for irrigation purposes. According to the information in the Director's record, very little runoff water will flow directly to the lake. The Appellants did not provide any information on how they will be affected or how water quality or quantity in Gull Lake or groundwater aquifers will be impacted by the operation of the storm water management system. Since the Appellants have not met the onus of demonstrating they are directly affected by the storm water management system, the Board dismisses the appeals related to the Storm Water Approval.

[44] The Licences allow the diversion of water from three groundwater wells. The Appellants stated there is a possibility the wells are hydrogeologically connected to Gull Lake. The Appellants argued that, if the wells are connected to the lake and the wells are pumped to their capacity, there could be an impact on the lake levels which could impact all lake users. In addition, the Appellants stated that some of the residents along the lake have water wells that are finished in the same aquifer as the licenced wells. If the wells are completed within the same aquifer, there is a reasonable possibility that, if Wells A, B, and C are pumped to capacity, there could be an impact to other water well users.

[45] Even if the wells are not hydraulically connected directly, if lake levels are impacted and other wells along the lake are hydraulically connected to the lake, the impact could be farther reaching.

[46] The Appellants raised issues regarding the quality of the water from the licenced wells, and argued that, if the water is allowed to enter the lake, the quality of the lake water could be impacted. The Approval Holder said the water from the wells will be treated so there will be no adverse effect on the water quality in Gull Lake.

[47] At this stage in the appeal process, the Board does not have all of the evidence to show which perspective is correct. However, as there is a reasonable possibility there could be an impact on the water quality and quantity in Gull Lake or surrounding groundwater aquifers, the Board accepts the Appellants as being directly affected by the issuance of the Licences.

[48] The Marina Approval allows for the construction of the marina, beach, and fisheries enhancement works. In order to construct the marina, the Approval Holder will also be constructing a channel which connects the inland marina to the lake. The channel will be 30 metres wide and will extend into the lake in order to maintain the required slope and depth into the water. As part of the marina project, the Approval Holder will be clearing a beach area. The marina and beach will be constructed in an area that has been identified as environmentally sensitive. This indicates to the Board there is a strong possibility Gull Lake could be impacted, thereby impacting those who live at and use the lake.

[49] The evidence shows the individual Appellants, and many members of the Society, own property adjacent to Gull Lake. If the lake is impacted by the issuance of the Marina Approval, then the Appellants' use and enjoyment of the lake could be affected. Therefore, the Board accepts the Appellants as directly affected with respect to the issuance of the Marina Approval.

[50] The Board wants to make it clear that it has yet to determine if the project as approved will have an adverse effect on the environment and the Appellants. There is a significant difference between being found directly affected for the purpose of filing a Notice of Appeal and for a project to have an adverse effect on a party and the environment. The Board

will make its determination on whether the project will cause an unacceptable environmental impact after it has heard all of the evidence at the hearing of the merits.

D. Summary

[51] Having determined the Appellants are not directly affected by the issuance of the Storm Water Approval, the Board dismisses the appeals from the Director's decision on that approval. The Board finds the Appellants are directly affected by the issuance of the Licences and the Marina Approval. Accordingly, since the Appellants have standing, the Board will address the Stay applications of the Licences and Marina Approval.

IV. STAY APPLICATION

A. Submissions

1. Appellants

[52] The Society explained it has concerns regarding the aquifer, the lack of plans for sewage treatment, sediment control, lot coverage, loss of habitat, and design flaws of the project. The Appellants noted the area in which the project will be developed has been listed as the most critically sensitive area of Gull Lake.

[53] The Society expressed concern that the Approval Holder would complete construction of the marina before the hearing and then claim it cannot be undone. The Society submitted that refusing to issue a Stay could negate the appeal process. The Society stated the proposed project is the largest development on the lake and will have the most impact on the lake and watershed. The Society said its members own land around the lake and believe the development is a threat to the environment and property values.

[54] The Society argued the potential damage to the lake may cause a greater loss to the environment than requiring the Approval Holder to wait until the appeals are heard.

[55] The Society submitted the public interest would be served by: (1) ensuring the protection of the scarce habitat and recreational resource; and (2) respect for the appeal process.

[56] Mr. Simard said several reports detailing the productive capacity of Well A have varied, and the discrepancy must be resolved to ensure Well A is produced at a sustainable rate. He stated there is evidence to suggest there is connectivity between Well A and the lake which could result in other water than what is licenced being diverted. Mr. Simard expressed concern that the first phase of the development will exceed the productive capacity of Well A, leaving an unsustainable situation since the water produced from Wells B and C is unfit for human consumption or long term irrigation. Mr. Simard stated the first phase of the development, including 575 serviced RV lots, would require 460 m³ of water per day at peak capacity, but Well A has a maximum productive capacity of only 180 to 190 m³ per day.

[57] Mr. Simard stated that if a Stay is granted, the Appellants' concerns can be addressed. He argued that if the development is allowed to proceed, there could be irreversible damage to the water resources in and around Gull Lake. He said that if the water supply is found to be insufficient for the proposed development, without the Stay, the development could proceed to a stage that is unsustainable.

[58] Mr. Simard said overuse of Well A could result in the diversion of lake water and cause an adverse and possible irreversible impact on the water quality of Gull Lake. He stated the development could harm water resources at Gull Lake that will not be able to be repaired later.

[59] Mr. Simard submitted the residents of the Summer Village of Gull Lake will suffer greater harm if a Stay is not granted than the Approval Holder would suffer if the Stay was granted. He said the possible connectivity between Well A and the lake, and the possibility that Well A will be used at an unsustainable rate, could result in diversion of lake water, which would have a negative and irreversible impact on water quality in the lake.

[60] Mr. Simard stated the sodium and sulphate levels of the water in Wells B and C make it unsuitable for human consumption and irrigation, and if the water is used for irrigation and gets back to the lake, water quality in Gull Lake could be impacted.

[61] Mr. Simard submitted that if the development proceeds, the quality of the lake will be negatively and possibly irreparably impacted. He said the vegetation, wildlife, residents'

enjoyment, and property values are at risk. Mr. Simard argued the only prejudice to the Approval Holder if the Stay was granted is that its development and marketing efforts would be temporarily put on hold while the substantive issue regarding water supply is determined. He stated this is not material harm and should not stand in the way of the granting of the Stay.

2. Approval Holder

[62] The Approval Holder argued there is no evidence to support a direct connection between the wells at the development and Gull Lake.

[63] The Approval Holder explained it calculated the quantity of water it will require by using actual data provided by the Glennifer Lake Resort, which is a resort like this development in that it accommodates RV units, a clubhouse, and swimming pools.

[64] The Approval Holder stated it is installing a water treatment plant that will treat groundwater to meet or exceed all requirements set by AESRD. The Approval Holder acknowledged the water from Wells B and C have excessive levels of sodium and high sulfate, and all three wells have slightly excessive pH. The Approval Holder explained these parameters exceed the Guidelines for Canadian Drinking Water Quality but are mostly aesthetic in nature, and any deficiencies in quality must be addressed in the design of the treatment plant.

[65] The Approval Holder stated aquifer testing confirmed the RV resort development and the three wells will not: (1) unreasonably interfere with existing users of the groundwater source; (2) negatively impact the aquifer or other aquifers and surface water bodies; and (3) harm the environment, if managed appropriately. The Approval Holder acknowledged there would be some interference with most nearby wells, but the interference would be much less than the available head. The Approval Holder said all wells within a two kilometre radius were taken into consideration to determine if there would be any impacts based on the full build out of the resort.

[66] The Approval Holder explained the inland marina will be developed in three stages: Phase 1 will consist of a public boat launch and 156 slips; Phase 2, consisting of another 156 slips, will not be started until Phase 6 of the RV Resort is completed and sold out. Phase 3 of the marina cannot start until new boat studies and environmental studies are completed and approved as stipulated by Lacombe County.

[67] The Approval Holder explained it changed the design of the project from the original concept after it received input from Lacombe County, AESRD, Department of Fisheries and Oceans, the public, Transport Canada Navigable Waters Protection Division, engineers, and biologists. The Approval Holder stated the marina design went from two marinas with numerous channels to the lake to one smaller, three-phased marina with one channel into the lake.

[68] The Approval Holder explained that, even though it was exempt from meeting the criteria of the 2010 Gull Lake Intermunicipal Development Plan, the density of its development meets the 2010 criteria. The Approval Holder said the condominium by-laws specify that no lot owner can disrupt or change the intended stormwater flow. The Approval Holder stated all calculations were performed by an accredited and certified engineer registered and working in Alberta.

[69] The Approval Holder said: (1) all construction areas will be controlled by berms, silt fencing, or bales to eliminate the flow of sediment into the lake; (2) stormwater will be controlled by using ditches and swales; (3) sediment catchment basins will be monitored and maintained to allow for proper operation; and (4) the marina design takes into consideration average lake elevation, trigger elevation, and target elevation.

[70] The Approval Holder stated there is a 30 metre environmental reserve along the entire shoreline of the development, and the berm and silt fencing have created an additional 10 metre buffer from the lake. The Approval Holder said no equipment will enter the reserve except for the 30 metre wide channel that will connect the inland marina to the lake.

[71] The Approval Holder stated all water that must be pumped during the construction of the marina will be pumped upland and made to flow through a series of bales and silt fencing prior to returning to the lake.

[72] The Approval Holder stated that portions of the area have been impacted by agriculture and unrestricted use of all-terrain vehicles, and the environmentally sensitive areas are now protected by the environmental reserve.

[73] The Approval Holder stated it will develop six acres of wetlands and ponds on the golf course to help offset any loss of wetlands and will provide other wetland compensation as defined in the wetlands policy. The Approval Holder said only 240 metres of lakefront will be disturbed initially, and it will be reclaimed to the appropriate standard. In addition, the Approval Holder will implement a fish habitat compensation plan as part of the Department of Fisheries and Oceans approval.

[74] The Approval Holder explained that, under the *Migratory Birds Convention Act*, S.C. 1994, c. 22, nests containing eggs and young birds cannot be disturbed. The Approval Holder stated the construction plans reflect this restriction. The Approval Holder noted the environmental reserve protects the most critical waterfowl and water bird habitat.

[75] The Approval Holder explained the storm water system was designed to safely flow a 1-in-100 year return volume with adequate ditches, swales, and culverts, and with storm water retention ponds located within the golf course. The Approval Holder stated the majority of the storm water from the proposed development will be routed through the golf course, and only a small portion will be directed to the lake through the day use parking lot. The Approval Holder explained once water has flowed through the retention ponds, it will be routed through the RV development via grassed swales with rip rap check dams, which will assist in the removal of sediment. Water from the RV development will enter a settlement pond, and all sediment below 85 microns will be removed from the flow exiting the settlement pond to the lake. The Approval Holder anticipated the settlement pond would require maintenance and sediment removal approximately every five years.

[76] The Approval Holder explained the flow rate entering the lake will not exceed pre-development rates, and the water entering the lake must meet AESRD specifications. It stated any storm water flowing over the golf course and RV development will not dissolve or accumulate any toxins which would be hazardous to the lake aquatic life.

[77] The Approval Holder explained the actual construction of the channel and beach work was to begin in mid February, but it pre-ordered concrete panels, steel, and contractors, at a value greater than \$400,000.00, to complete the work while the ground and lake were adequately frozen. The Approval Holder stated the channel construction will only take a couple of days, and the stripping of the shoreline to create the beach would be completed at the same time. The Approval Holder explained that if work did not start on the marina by the beginning of January, it would be unable to complete the work while the ground was frozen, and it would be forced to postpone all the work until the following January.

3. Director

[78] The Director took no position on the Stay application.

B. Legal Basis for a Stay

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

- “(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
- (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted.”¹³

¹³ Section 97 of EPEA also provides:

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

[80] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*¹⁴ and *Stelter*,¹⁵ is adapted from the Supreme Court of Canada case of *RJR MacDonald*.¹⁶ 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.”¹⁷

[81] 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 will be before the Board at the time the decision is made regarding a Stay application, “...a prolonged examination of the merits is generally neither necessary nor desirable.”¹⁸

[82] 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.¹⁹ Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other. In *Ominayak v. Norcen Energy Resources*,²⁰ the Alberta Court of Appeal defined irreparable harm by stating:

¹⁴ *Pryzbylski v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd.* (6 June 1997), Appeal No. 96-070 (A.E.A.B.).

¹⁵ *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.).

¹⁶ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR MacDonald*”). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid v. Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

¹⁷ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

¹⁸ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 50.

¹⁹ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

²⁰ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

“By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.”²¹

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.²² The damage that may be suffered by third parties may also be taken into consideration.²³

[83] The third step in the test is the balance of convenience: “...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”²⁴ The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the applicant would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The courts have considered factors such as the cumulative effect of granting a Stay,²⁵ third parties who may suffer damage,²⁶ or if the reputation and goodwill of a party will be affected.²⁷

[84] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the “...concerns of society generally and the particular interests of identifiable groups.”²⁸ The effect on the public may sway the balance for one party over the other.

C. Analysis

[85] The Appellants requested a Stay of the Approvals and the Licences. The Licences allow for the withdrawal of water from three groundwater wells. The water is to be treated and

²¹ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

²² *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

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

²⁴ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

²⁵ *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

²⁶ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

²⁷ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

²⁸ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

used by the residents of the RV Resort and the treated waste water will be used for irrigation of the golf course.

[86] At the present time, there are no residents at the resort and the golf course is not constructed. The Board understands some of the lots in the first phase of the RV Resort have been sold and should be ready for occupancy this summer. The hearing of these appeals is scheduled for May 14 and 15, 2013, so it is unlikely there will be many, if any, residents at the resort that will require drawing water from the wells from now until the appeals are heard. Therefore, little to no water will be pumped from the wells during the time it will take for the Board to hear the appeals and for the Minister to make her decision. Accordingly, the Stay request as it applies to the Licences is denied.

[87] For the reasons provided earlier in this Decision, the Board has dismissed the appeals of the Storm Water Approval. Therefore, the Stay application relating to the Storm Water Approval is moot. The Board will proceed to assess whether the Stay should be granted for the Marina Approval.

[88] At this stage of the appeal process the Board does not have all of the technical and legal arguments before it. The Board must base its analysis on the information provided by the Participants and what is available in the Director's record. It is clear from the Appellants' Notices of Appeal and submissions that they have concerns regarding the impacts the development could have on the water quality of Gull Lake and on the environmentally sensitive areas of the lake should the proposed project proceed as currently planned. The Board considers this a serious issue that needs to be heard. The first part of the Stay test has therefore been met.

[89] The second step in the Stay test is to determine whether the Appellants would suffer irreparable harm if the Stay is not granted. In determining if the Appellants will suffer irreparable harm, the Board looks at whether the Appellants could be compensated monetarily for any damages that may occur. The Appellants, not the Approval Holder, have the onus of showing there is a likelihood of an irreparable impact on them or the environment from the Approval Holder's permitted actions under the Marina Approval. The Appellants argued that, if the Approval Holder proceeds with its project before the matter is heard by the Board, there will be fewer alternatives available to the Board in making its recommendations.

[90] The Appellants argued they would suffer irreparable harm if the Stay was not granted, as the work would be completed, and if their appeal was successful, the project would have to be removed and the damage to the area adjacent to Gull Lake and the lake itself would be done.

[91] Based on the information currently before the Board, it appears that there will be an impact on the riparian vegetation, including the various grasses and sedges, the fisheries, and the birds in the area, given the size and nature of Gull Lake. The marina is being built in an area that has been designated as environmentally critically sensitive. In the latest study completed on Gull Lake, the area has also been noted as a significant pelican loafing area.

[92] Therefore, the Board will proceed to consider whether the alleged damage to the environment would be irreparable if the Board recommends, and the Minister orders, the Approval be cancelled or varied.

[93] The Stay would be in place until the time of the hearing, and the Board would then decide whether the Stay should remain in force or be lifted until the Minister makes her decision. The Minister's decision could lead to one of the following results: (1) the Marina Approval is not varied and the Approval Holder can continue with its operation as allowed under the current Marina Approval; (2) the Marina Approval can be varied, and the project is allowed to continue in accordance with the terms of the varied Approval; or (3) the Marina Approval is reversed (cancelled) and the Approval Holder must stop work under the Marina Approval immediately.

[94] The work allowed under the Marina Approval is done adjacent to and in Gull Lake. In this particular circumstance, the Board must look at whether there will be irreparable harm to the environment if the Stay was not granted. The proposed channel is to be constructed to join the inland marina to Gull Lake. It involves the dredging and sloping of the channel area and the clearing of the beach area. If the Board recommends, and the Minister accepts, the Marina Approval should be varied or modifications be made to the project, the Approval Holder would be required to essentially reverse the work that had been completed. If the dredging and vegetation removal is determined to have a negative environmental impact, the re-dredging to

meet pre-disturbance conditions would exacerbate the impact. The Board is also uncertain whether the aquatic ecosystem could be re-established.

[95] The Approval Holder explained the vegetation along the beach area would be cleaned out as part of the marina construction. The vegetation in these areas generally aids in minimizing erosion. If the vegetation is removed, there is an increased likelihood that sedimentation into Gull Lake would increase. If the Marina Approval is reversed or varied, the Approval Holder would be responsible for returning the beach area to pre-disturbance conditions.

[96] When dealing with issues that may affect the bed, bank, and shores of a water body, it is often difficult, if not impossible to reverse the activity without causing further effects to the environment. As a key part of the mandate of this Board is to protect the environment, it would not be reasonable to allow an activity in circumstances in which a Board recommendation on the merits could lead to further damage to the environment.

[97] The Board has looked at similar situations in previous decisions where enforcement orders were issued to landowners for placing sand and gravel on property adjacent to a lake.²⁹ Although in these cases the Board agreed with the director that an approval was required to do the work, it also found more harm would result from the removal of the material after the activity was completed.

[98] In the *Martin* case,³⁰ the Board discussed the effect of requiring the removal of an illegal deposition of sand. After evaluating the effect of the activity, plus the potential effect the project could have on the environment, and comparing it to the effect of halting the activity and removing the material, the Board stated:

“In light of the fact that Mr. Martin placed a small amount of sand on the site, an amount that would be difficult to accurately determine, the nutrient loading damage would already be done, and that removal of this amount of sand could

²⁹ See: *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001) Appeal Nos. 00-071-072-R (A.E.A.B.).

³⁰ *Martin v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal No. 00-065-R (A.E.A.B.).

create as much or more environmental damage through siltation than leaving it in place, it is environmentally unreasonable to require Mr. Martin to remove it.”³¹

[99] In a similar case, *Gilmore*,³² the Board discussed the reasonableness of an enforcement order that required removal of sand. In *Gilmore*, the Board stated:

“An enforcement order to stop an activity which was already done is appropriate, as is an enforcement order to undertake remedial action that is logical, reasonable, and environmentally sound. However, an enforcement order that includes a direction to undertake remedial action when it is not logical or reasonable to do so is not appropriate.”³³

[100] In these previous cases, the issue was not whether the addition of the gravel was causing a detrimental effect, but it was the non-compliance with the legislated requirements that was at issue. In the appeals currently before the Board, the issue that has to be determined is whether the construction of the proposed channel joining the marina to Gull Lake and the clearing of the beach area will have a detrimental effect on the environment or if there are more environmentally acceptable options. If the Board determines there is an adverse effect, the project would have to be modified or removed; leaving it in place as is would not be an option in those circumstances. Until the Board hears all of the evidence, it cannot make a determination on the effects of the proposed project.

[101] However, in making a decision, whether it is regarding a Stay or any other matter in its jurisdiction, the Board assesses which option would have the minimum effect on the environment. In this particular situation, the Approval Holder wants to dredge an area of the lake to accommodate the channel and clear an area for the beach. One of the issues the Board must determine when it holds the substantial hearing is whether the construction of the channel and beach will have a detrimental effect on the environment. If a Stay is not granted and the Board finds the marina and the beach should not have been constructed, there would be further impacts on the environment should the Approval Holder be required to remove the channel or restore the beach.

³¹ *Martin v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal No. 00-065-R (A.E.A.B.) at paragraph 34.

³² *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal Nos. 00-071-072-R (A.E.A.B.).

³³ *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta*

[102] Based on the information available to the Board at this time, the Appellants have met the onus of demonstrating the environment could be irreparably harmed if work proceeds along the bed, bank, and shore and in Gull Lake.

[103] The third step in the Stay test is to assess who will suffer the greater harm, the Appellants if the Stay is not granted or the Approval Holder if the Stay is granted. In determining who will suffer the greater harm, the Board considers the timeframe in which the appeal would be resolved. Essentially, would the Appellants suffer greater harm during the time their appeal is considered and the Minister's decision released? The hearing will determine if there will be actual harm to the environment and if recommendations should be made to reverse or vary the Marina Approval.

[104] If the Stay was granted, the Approval Holder would be delayed in starting the construction of the channel and beach. Although this may be an inconvenience, it is not the type of harm that would support denying the Stay. The Board understands the Approval Holder has a limited window in which to complete the work under its federal Fisheries and Oceans approval. However, the Approval Holder said it would have to wait until January 2014 to complete the work if construction did not start this January. This implies the Approval Holder can re-apply for the federal approval if required. The type of harm the Approval Holder could suffer relates to monetary expenses and time, neither of which is a sufficient basis for denying the Stay.

[105] The Approval Holder may have told potential users the site would be available by a certain date, but there was no guarantee at the time that the project would even be approved by the Director. Therefore, the potential users were relying on projected availability, not absolute availability.

[106] The Board recognizes the time limits placed on the Approval Holder to get the work completed prior to the expiry of the federal Fisheries and Ocean approval. However, it is clear from the information provided by the Approval Holder that any harm associated with the granting of a Stay is an inconvenience and financial in nature. The Approval Holder may apply

Environment (8 June 2001), Appeal Nos. 00-071-072-R (A.E.A.B.) at paragraph 48.

for another approval from the Department of Fisheries and Oceans, and the application can include any changes that may be required as a result of the Minister's decision.

[107] Based on the information provided, the Board cannot conclude the Approval Holder would suffer greater harm if the Stay was granted.

[108] If the Board ultimately recommends to the Minister that the project not proceed, or proceed with modifications, it would be the Approval Holder who will bear the costs of removing or modifying the project. However, it is still the environment that could suffer the greater harm if the project had to be removed.

[109] If the Stay was not granted, the Appellants argued Gull Lake would be potentially irreparably impacted. Harm to the aquatic ecosystem can be irreparable. What the Board does not want to occur in this circumstance is to have a situation that cannot be reversed without causing further environmental damage. The Board does not know the extent of the harm, if any, that may be caused by the construction of the marina and beach. However, if it is determined there is a detrimental effect, particularly to Gull Lake, it would be difficult, if not impossible, to reverse the impact. As this type of damage cannot be realistically quantified, the Board finds it is reasonable to have the Stay remain in effect until the Minister issues her decision.

[110] Given the environmental concerns presented, the Board believes the Appellants, or more specifically the environment, would suffer greater harm if the Stay was not granted than would the Approval Holder suffer if the Stay was granted. The balance of convenience favours the Stay remaining in place until the Minister's decision is released. Therefore, the Appellants have met the third step of the Stay test.

[111] The Board also looks at whether the public interest favours the granting of the Stay. In this case, there is a public interest in both granting a Stay and, likewise, in allowing the continued construction of the marina. The Board appreciates people who have purchased properties in the development likely support the quick completion of the marina and beach area. However, there is a strong public interest in having the Stay remain in place given the Summer Villages of Parkland Beach and Gull Lake and the County of Ponoka support the Society's

efforts in these appeals. This demonstrates a strong public interest in having the Stay remain in place until the Minister has made her decision.

[112] The public interest in these circumstances warrants the granting of a Stay. The environmental degradation that could occur if the Approval Holder is required to remove or alter the channel and restore the beach would affect residents around the lake as well as visitors to the lake.

[113] As the construction of the project has the potential to have an effect on the environment, which is the issue to be determined at the hearing, the public interest supports the Stay remaining in effect.

[114] In granting the Stay, the Board remains cognizant of the time constraints of the Approval Holder in being able to complete the work under the current federal approval, should it be upheld. As stated, the Board will be holding the hearing on May 14 and 15, 2013, and the report and recommendations will be provided to the Minister within 30 days of the close of the hearing.

D. Summary

[115] The Appellants have met all the steps of the Stay test. The Appellants demonstrated there are serious issues that need to be heard. If the Approval Holder is allowed to construct the channel and beach before the hearing is held, irreparable harm may occur and additional harm could result if the Marina Approval is reversed or varied. The Appellants, or more specifically the environment, would suffer the greater harm if the Stay was not granted than would the Approval Holder if the Stay is granted. The public interest favours the granting of the Stay to minimize impacts on a water resource.

[116] Therefore, the Board grants the Stay of the Marina Approval. The Approval Holder may proceed with the construction of the inland marina if it decides to do so, but it is prohibited from conducting any work or activities on the bed, bank, and shore and in the waters of Gull Lake, including but not limited to: (1) the building of the boat launch in the lake; (2) the

excavation of the channel; (3) the stripping of the shoreline to create a beach; and (4) no materials of any kind are to be placed on the bed, bank, and shore of the lake.

V. CONCLUSION

[117] The Board finds the Appellants are directly affected by the issuance of Licence Nos. 00293413-00-00 and 00293311-00-00 and the Marina Approval, Approval No. 00292313-00-00. However, the Appellants are not directly affected by the issuance of the Storm Water Approval, Approval No. 00279021-00-00. As a result, Appeal Nos. 12-022, 026, and 030 relating to the Storm Water Approval are dismissed.

[118] The Board grants the application for the Stay. The Stay remains in place under the same conditions as previously stated in the Board's December 20, 2012 letter. The Approval Holder can proceed with the construction of the inland marina if it decides to do so, but it is prohibited from conducting any work or activities on the bed, bank, and shore and in the waters of Gull Lake, including but not limited to: (1) the building of the boat launch in the lake; (2) the excavation of the channel; (3) the stripping of the shoreline to create a beach; and (4) no materials of any kind are to be placed on the bed, bank, and shore of the lake.

[119] The Approval Holder is reminded that, should the Board recommend to the Minister that the Marina Approval be varied or cancelled, and should the Minister agree with such recommendations, the Approval Holder will be responsible for returning the site to pre-disturbance conditions or making the necessary changes to comply with any amendments.

Dated on December 5, 2013, at Edmonton, Alberta.

"original signed by"
Alex MacWilliam
Board Member