# ALBERTA ENVIRONMENTAL APPEALS BOARD

# Decision

**Date of Decision – November 16, 2021**

**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 Delbert and Helen Edey, Gerrit and Jantje Top, James and Lillian Howie, Rod and Nicole Macklin, and Peter and Sheila Macklin with respect to the decision of the Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 00419723-00-00 to the Town of High River.

Cite as: Interim Decision: *Edey et al.* v. *Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks*, re: *Town of High River* (16 November 2021), Appeal Nos. 19-089-091 and 093-094-ID2 (A.E.A.B.), 2021 ABEAB 33.

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| **BEFORE:** | Mr. Alex MacWilliam, Board Chair (Retired). |
| **SUBMISSIONS BY:** | |
| **Appellants:** | Mr. Delbert and Ms. Helen Edey, Mr. Gerrit and Ms. Jantje Top, Mr. James and Ms. Lillian Howie, Mr. Rod and Ms. Nicole Macklin, and Mr. Peter and Ms. Sheila Macklin, represented by Mr. Gavin Fitch, McLennan Ross LLP. |
| **Approval Holder:** | Town of High River, represented by Mr. John Gruber, MLT Aikins LLP. |
| **Director:** | Mr. Andun Jevne, Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General. |

# EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an approval under the *Water Act*, R.S.A. 2000, c. W-3, to the Town of High River (the Town), allowing the Town to construct and place a berm, approximately 2.6 kilometres long, and a swale within the flood plain of the Highwood River resulting in a permanent alteration of the flow, the direction of flow, and water levels of the Highwood River (the Approval).

The following individuals, who had previously submitted statements of concern to AEP, appealed the Approval and asked for a stay: Mr. Delbert and Ms. Helen Edey, Mr. Gerrit and Ms. Jantje Top, Mr. James and Ms. Lillian Howie, and Mr. Rod and Ms. Nicole Macklin (collectively, the Appellants). Mr. Peter and Ms. Sheila Macklin (the Macklins) also appealed the Approval.

Two preliminary matters were before the Board: (1) whether the Macklins' appeal was properly before the Board; and (2) whether the Board should grant a stay of the Approval.

Section 115(1)(a)(i) of the *Water Act* makes submitting a statement of concern to AEP a prerequisite to filing a notice of appeal with the Board. In reviewing the submissions of the Macklins, the Town, and AEP, the Board found the Macklins failed to submit a statement of concern due to a typographical error in the email address, and AEP did not receive their statement of concern.

Submission of a statement of concern to AEP requires more than an attempt to submit the statement of concern. AEP must receive the statement of concern. There was no evidence of extenuating circumstances to cause the Board to exercise its discretion to accept a notice of appeal where a statement of concern was not submitted as required by section 115(1)(a)(i). The Board determined the Macklins' appeal was not properly before it and dismissed their appeal pursuant to section 95(5)(a)(iii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

The Board determined the Appellants were directly affected by the Approval, as floodwaters redirected by the berm and swale authorized by the Approval could impact the Appellants' lands. The Board asked the Appellants, the Town, and AEP (collectively, the "Parties") to answer questions regarding the stay test.

The Board found the appeals raised serious issues to be heard, satisfying the first part of the stay test. In considering the second part of the test, the Board found the Appellants had failed to demonstrate irreparable harm. Any harm to the Appellants resulting from the construction of the berm and swale could be compensated for monetarily. In considering the balance of convenience and the public interest, the Board noted the berm and swale were being constructed by a public authority for a public purpose. The berm and swale were designed to protect infrastructure in the Town from flood events, and construction delays could put infrastructure within the Town at risk and increase construction costs.

As the Appellants failed to demonstrate irreparable harm and the balance of convenience and public interest favoured denying the stay, the Board did not grant the stay.

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## I. INTRODUCTION

[1] This is the Environmental Appeals Board's reasons for its decisions in its April 1, 2020 letter regarding preliminary matters 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 the Town of High River (the "Approval Holder" or the "Town") by the Director, South Saskatchewan Region, Regulatory Assurance Division, Environment and Parks (the "Director"). The Approval authorizes the construction of a swale and a berm of approximately 2.6 kilometres in length. The berm and swale are the last components of a series of dikes constructed throughout the Town as part of the Approval Holder's flood risk mitigation program.

[2] The Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Delbert and Ms. Helen Edey (Appeal No. 19-089) (the "Edeys"), Mr. Gerrit and Ms. Jantje Top (Appeal No. 19-090) (the "Tops"), Mr. James and Ms. Lillian Howie (Appeal No. 19-093) (the "Howies"), and Mr. Rod and Ms. Nicole Macklin (Appeal No. 19-094) ("R&N Macklin") (collectively, the "Appellants"). The Board also received a Notice of Appeal from Mr. Peter and Ms. Sheila Macklin (Appeal No. 19-091) (the "Macklins").

[3] Two preliminary matters were raised: (1) was the Macklins' appeal properly before the Board as they had not submitted a statement of concern to the Director as required by section 115(1)(a)(i) of the *Water Act*;[1] and (2) should the Board grant a stay of the Approval until the appeals were heard.

[4] The Board received and reviewed submissions from the Macklins, Approval Holder, and Director, regarding the filing of the Macklins' statement of concern.

[5] The Board determined that, as the Director had not received the Macklins' statement of concern which was emailed to an incorrect address, the Macklins had not submitted a statement of concern to the Director. As the filing or submitting of a statement of concern

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[1] Section 115(1)(a)(i) of the *Water Act* states:

> "(1) 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...."

contemplates actual receipt of the statement of concern by the Director, and it is a prerequisite to the right to file an appeal under section 115(1)(a)(i) of the *Water Act*, the Board determined the Macklins' appeal was not properly before it. Therefore, pursuant to section 95(5)(a)(iii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.-12 ("EPEA"),[2] the Board dismissed their appeal.

[6] The Board received and reviewed submissions from the Appellants and Approval Holder on the stay application.[3] The Director did not take a position concerning the stay application.

[7] In deciding the stay application, the Board first determined the Appellants were directly affected by the Approval. The Appellants own lands downstream of the proposed berm and swale. The berm and swale will permanently alter the direction, flow, and water levels of redirected waters from the Highwood River during a flood event, resulting in impacts to the Appellants' lands.

[8] The Board found the appeals raised serious issues to be heard, the Appellants satisfied the first part of the *RJR-MacDonald* test.[4] However, the Appellants failed to meet the second part of the test as they failed to demonstrate irreparable harm. The Appellants could be compensated for monetarily for any harm caused by the construction of the berm and swale.

[9] In weighing the balance of convenience and the public interest, the Board noted the berm and swale were being built by a public authority for a public purpose, specifically to protect critical infrastructure and residents in the Town. Construction delays could increase safety risks to the public and costs of the project. The Board found the balance of convenience and public interest favoured not granting the stay. Therefore, the Board declined to grant a stay of the Approval.

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2 Section 95(5)(a)(iii) of EPEA states:

"(5) The Board

(a) may dismiss a notice of appeal if...

(iii) for any other reason the Board considers that the notice of appeal is not properly before it...."

3 Note: The Macklins also requested and commented on the stay application. However, as the Board dismissed their appeal, their comments were not considered by the Board in determining the stay application.

4 *RJR-MacDonald* v. *Canada* (*Attorney General*), [1994] 1 SCR 311, 1994 SCC 117.

## II. BACKGROUND

[10] On January 28, 2020, the Director issued the Approval to the Approval Holder. The Approval authorizes the construction and placement of a berm (approximately 2.6 kilometres long) and a swale at Section 35-18-29-W4M and S½-01-19-29-W4M within the flood plain of the Highwood River, resulting in the permanent alteration of the flow, direction of flow, and water levels of the Highwood River (the "SW Dike").

[11] On February 7, 2020, the Board received Notices of Appeal from the Edeys and the Tops appealing the issuance of the Approval and requesting a stay of the Approval.

[12] On February 7, 2020, the Board acknowledged receipt of the Edeys' Notice of Appeal and notified the Approval Holder and Director of the appeal and stay application. The Edeys were asked to answer questions related to their stay request.[5] The Approval Holder was asked to advise the Board if it would agree to a temporary stay until the Board received full legal arguments from the parties and had made its decision on the stay request. The Approval Holder was also asked to advise the Board on the status of the SW Dike construction. The Board requested the Director provide a copy of all documents and all electronic media he reviewed and were available to him when making his decision, including policy documents (the "Record").

[13] On February 8, 2020, the Macklins emailed the Board and said they were concerned they had not received a registered information package regarding the Approval like their neighbours. They further explained they had contacted Alberta Environment and Parks ("AEP") to find out the status of their information package and was informed by AEP their statement of concern had not been received and AEP could do nothing more. The Macklins sent additional information regarding their statement of concern to the Board on February 10, 2020.

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[5] The Edeys were asked to respond to the following stay questions:

"1. Are Mr. and Ms. Edey directly affected by Alberta Environment and Park's decision to issue *Water Act* Approval No. 00419723-00-00 to the Town of High River? 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 Mr. and Ms. Edey are not directly affected, the Board may dismiss their appeal. Therefore, it is important that Mr. and Ms. Edey 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 Mr. and Ms. Edey that should be heard by the Board?

3. Would Mr. and Ms. Edey suffer irreparable harm if the stay is refused?

4. Would Mr. and Ms. Edey suffer greater harm if the stay was refused, pending a decision of the Board, than the Town of High River would suffer if the Board granted the stay?

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

[14] On February 10, 2020, the Howies filed a Notice of Appeal of the Approval and requested a stay of the Approval.

[15] On February 10, 2020, the Board acknowledged receipt of the Tops' Notice of Appeal and notified the Approval Holder and Director of the appeal and stay application. The Board asked the Tops to provide responses to the stay questions as they apply to them.

[16] On February 12, 2020, the Board acknowledged receipt of the Howies' Notice of Appeal and notified the Approval Holder and Director of the appeal and stay application. The Board asked the Howies to answer the stay questions as they apply to them.

[17] On February 12, 2020, the Approval Holder advised the Board it had started preconstruction activities, including prequalifying contractors, utility relocation planning, and subdivision matters. Construction operations would start at the beginning of April 2020, once the frost was off the ground. The Approval Holder opposed any stay of the Approval either on an interim or permanent basis.

[18] On February 13, 2020, the Board acknowledged the Macklins' emails of February 8 and 10, 2020, and their Notice of Appeal dated February 10, 2020, and notified the Approval Holder and Director of the appeal.

[19] On February 14, 2020, the Director wrote to the Board in response to the Macklins' email regarding their statement of concern. The Director stated AEP did not have a record of the Macklins filing a statement of concern, and the first time the Director became aware of the Macklins' statement of concern, which the Macklins said they submitted on July 27, 2019, was on February 5, 2020, when the Macklins emailed and called AEP to discuss the statement of concern. The Director requested the Board decide whether the Macklins' appeal was properly before the Board in accordance with section 95(5)(a)(iii) of EPEA, as filing a statement of concern with the Director is a prerequisite to filing an appeal under section 115(1)(a)(i) of the *Water Act.*

[20] On February 18, 2020, R&N Macklin filed a Notice of Appeal of the Approval and requested a stay of the Approval.

[21] On February 20, 2020, the Board acknowledged receipt of R&N Macklins' appeal and notified the Approval Holder and Director of the appeal and stay request.

[22] On February 20, 2020, the Board acknowledged the Director's February 14, 2020, motion to dismiss the Macklins' appeal. The Board set a process for receiving submissions from the Macklins, Approval Holder, and Director concerning the Director's motion.

[23] On February 20, 2020, the Appellants provided their submission to the Board in support of a stay.

[24] On February 22, 2020, the Board acknowledged the Appellants submissions in support of a stay and set a process for receiving submissions from the Appellants, Approval Holder, and Director (collectively, the "Parties") regarding the stay application.

[25] Between February 20 and March 27, 2020, the Board received submissions from the Parties and the Macklins in two concurrent processes. The Board received submissions between February 12 and March 10, 2020, from the Macklins, Approval Holder, and Director on whether the Macklins' appeal was properly before the Board. The Board received submissions from the Parties[6] on whether the Appellants were directly affected by the Director's decision to issue the Approval and whether a stay should be granted.

[26] On April 1, 2020, the Board informed the Parties and the Macklins the Board had reviewed the written submissions and dismissed the Macklins' appeal for not filing a statement of concern with the Director, which was a prerequisite to filing their Notice of Appeal with the Board. The Board further advised the Parties the Appellants were found to be directly affected by the SW Dike, but the Board declined to grant a stay. The Board advised it would proceed to a hearing of the appeals as soon as possible.

[27] The following are the Board's reasons for the decisions set out in its April 1, 2020 letter.

## III. ISSUES

[28] Three issues were before the Board arising from the preliminary motions:

1. Did the Macklins submit a statement of concern, and is their appeal properly before the Board?
2. Are the Appellants directly affected by Director's decision to issue the Approval?

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[6] The Board asked its stay questions of the Edeys, Tops, and Howies. As all Appellants retained the same legal counsel, the submission included concerns of al the Appellants, collectively and individually.

3. Should the Board grant a stay of the Approval?

## IV. MACKLINS' STATEMENT OF CONCERN AND APPEAL

### A. Submissions

1. Macklins

[29] The Macklins noted section 108(1) of the *Water Act* requires an applicant for an approval provide public notice of the application. The Macklins stated that, if public notice of an application is provided under section 108(1)(a), then section 109(1) of the *Water Act* allows a directly affected person to submit a written statement of concern setting out the person's concerns with the application to the Director.[7] The Macklins noted section 115(1)(a)(i) of the *Water Act* provides that, if the Director issues an approval, a person who previously submitted a statement of concern to the Director in accordance with section 109(1) may file a notice of appeal with the Board.

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[7] Section 108 of the *Water Act* provides in part:

"108(1) An applicant

(a) for an approval,

(b) for a licence,

(c) for a renewal of a licence if the Director has decided to conduct a public review of the licence renewal,

(d) for an amendment of

(i) an approval,

(ii) a preliminary certificate, or

(iii) a licence, or

(e) for a transfer of an allocation of water under a licence,

shall provide notice of the application in accordance with the regulations."

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

(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."

[30] The Macklins stated sections 108 and 115 of the *Water Act* refer to the directly affected person submitting a statement of concern, not whether the Director received the statement of concern.

[31] The Macklins argued the test is whether the person filing the Notice of Appeal previously submitted a written statement of concern, not whether the Director received the statement of concern. The Macklins acknowledged receipt of a statement of concern is evidence one was submitted but, in this case, there was evidence the Macklins submitted a statement of concern.

[32] The Macklins explained they prepared a letter on July 27, 2019, setting out their concerns about the SW Dike. They stated they submitted the statement of concern on July 29, 2020, by emailing it to the address on the notice published in the High River Times: aep.waapplication@gov.ab.ca. The Macklins said they did not receive any indication from their internet service provider that there were any technical issues or problems with its transmission.

[33] The Macklins argued Ms. Macklin's affidavit was *prima facie* evidence that a statement of concern was submitted to the Director, and it was not relevant that it was not received. The Macklins stated the test set out in section 115(1)(a)(i) of the *Water Act* had been met as the statement of concern was submitted to the Director.

[34] The Macklins submitted the Approval Holder and Director would not be prejudiced if the Board accepted the Macklins' Notice of Appeal as being valid. The Macklins noted four other landowners who are neighbours of the Macklins filed valid appeals and were affected in the same manner as the Macklins. The Macklins said if their appeal was rejected, the appeals of the Appellants would still proceed.

2. Approval Holder

[35] The Approval Holder noted neither it nor the Director received a statement of concern from the Macklins.

[36] The Approval Holder argued the position being advocated by the Macklins would create "an untenable situation for the working of the Board. If accepted, the Board would be engaged in time consuming adjudications over 'how close' a purported appellant needs to be in

situations where such appellant failed to deliver a submission in accordance with the *Water Act*."[8]

[37] The Approval Holder stated a random or incorrect submission does not meet the legislative requirement to file a statement of concern to the Director, and contrary to the submissions of the Macklins, "... the requirement is not met unless the statement of concern is submitted *to the Director*, in the manner set out in the Notice."[9]

[38] The Approval Holder stated a person who believes they are directly affected by an approval has the onus of submitting a statement of concern that conforms to the requirements set out in the public notice, which includes sending it to the correct address. The Approval Holder argued if the person fails to send it to the correct address, then the person did not submit a statement of concern to the Director within the meaning of section 109(1) of the *Water Act*. The Approval Holder submitted a "near miss" does not meet the requirements of sections 109(1) and 115(1)(a)(i) of the *Water Act*.[10]

[39] The Approval Holder relied on *ATA* v. *Battle River School Authorities Assn.* ("*ATA*"),[11] and noted the similarities between *ATA* and the present appeal. The Approval Holder explained that, in *ATA*, the Alberta Court of Appeal found the requirement to submit something to someone, was synonymous with the word "direct" and "address." In *ATA*, the Alberta Court of Appeal found the application was submitted to the chairman of the board, and not the secretary as required in the statute. The Court of Appeal held the board could not hear the application because the grievance had not been "submitted to" the secretary.[12]

[40] The Approval Holder argued there were no unusual circumstances surrounding the Macklins' failure to submit their statement of concern. The Approval Holder stated the concept of prejudice would only apply where there were rare or unusual circumstances being relied on as the reason for not submitting a statement of concern to the Director. The Approval Holder submitted that, when an appellant explains the reason for not submitting is a statement of

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8 Approval Holder's submission, March 17, 2020, at page 1.

9 Approval Holder's submission, March 17, 2020, at page 1 (emphasis in original).

10 Approval Holder's submission, March 17, 2020, at page 2. Note: The Approval Holder referred to section 115(1)(a)(ii) of the *Water Act* in its submission, but the Board believes the intention was to reference section 115(1)(a)(i).

11 *ATA* v. *Battle River School Authorities Assn.*, [1988] AWLD 1075 (ABCA).

12 Approval Holder's submission, March 17, 2020, at page 2.

concern was due to unusual circumstances, then the Board must consider any prejudice which the Director and respondents may suffer.[13] The Approval Holder stated the Macklins did not rely on any rare or unusual circumstances such as the ones identified in *O'Neill*[14] and, therefore, the concept of prejudice does not apply in the Macklin's standing application.

[41] The Approval Holder stated that, if the Board considers prejudice a valid consideration in this appeal, it would suffer prejudice.

[42] The Approval Holder noted many of the concerns raised by the Macklins were also raised by the Appellants, who met the requirements of section 109(1) of the *Water Act*.[15]

[43] The Approval Holder submitted the Macklins failed to comply with section 115(1)(a)(i) of the *Water Act* as they did not submit a statement of concern, and there were no unusual circumstances. The Approval Holder argued the Macklins were not entitled to standing to appeal the Approval.

3. Director

[44] The Director noted he did not receive, nor has any record of, a statement of concern from the Macklins in response to the public notice of the application within the time limits prescribed in the notice. The Director stated he only became aware of the Macklins' July 27, 2019 statement of concern on February 5, 2020, when the Macklins emailed it to AEP and followed up with a telephone call to AEP the next day.

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13 Approval Holder's submission, March 17, 2020, at page 2.

14 *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D ("*O'Neill*").

15 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

(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."

[45] The Director noted the Macklins emailed their statement of concern to aep.waapplication@gov.ab.ca even though the public notice required the statement of concern to be emailed to aep.waapplications@gov.ab.ca.

[46] The Director stated the onus is on the person to submit the statement of concern to the correct address or email address as stated on the public notice. The Director argued if the Macklins' interpretation of the *Water Act* was accepted, a person would only have to show they had submitted a statement of concern anywhere and they would have met the legislative requirement.

[47] The Director argued the Macklins' belief the Director would not be prejudiced if the notice of appeal was accepted without a statement of concern missed the reason for the legislative requirement. The Director explained he uses the statement of concern process to identify and address concerns early in a file. The Director referred to the Board's previous decision in *Viponds*,[16] in which the Board recognized the importance of filing a statement of concern early in the application process.

[48] The Director relied on another prior Board decision, *O'Neill*[17], and argued the Macklins did not submit evidence or arguments to show this was an unusual or exceptionally rare case to warrant the Board allowing their appeal to proceed. The Director submitted "[t]his is not a case where the notice of the application was factually unclear, or the appellants were physically unable to meet the deadline for filing the statement of concern."[18]

[49] The Director acknowledged the Macklins likely intended to file a statement of concern, but they did not take all reasonable steps to ensure it was sent to the proper email address.

[50] The Director argued he would be prejudiced if the Macklins' appeal was allowed to proceed. The Director stated there would be additional parties to respond to at both a mediation and at a hearing, and depending on the outcome of the appeal, there could also potentially be an additional party claiming costs.

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16 *Viponds et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *EcoAg Initiatives Inc.* (11 March 2011), Appeal Nos. 09-006-009, 016 & 019-R (A.E.A.B.) ("*Viponds*").

17 *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D.

18 Director's submission, March 13, 2020, at page 2.

4. Macklins' Rebuttal

[51] In response to the Approval Holder's submission, the Macklins noted they addressed their statement of concern to the Director but made a small error in the email address.

[52] The Macklins stated their statement of concern was not received because of the mistake in the email address. The Macklins said this distinguished their situation from that found in *ATA*, in which the grievance had been addressed to the wrong person.[19] The Macklins stated their error was minor in comparison.

[53] The Macklins argued accepting their appeal would not create an untenable situation as alleged by the Approval Holder, where the Board would be engaging in time consuming adjudications over whether a statement of concern was submitted but not received by the Director. The Macklins stated the facts in this appeal were "clear and largely uncontested: (1) a [statement of concern] was prepared by the Macklins; (2) it was addressed to the Director; (3) it was emailed to the Director, but the Macklins made one small error in the email address."[20]

[54] The Macklins distinguished the present circumstances from *O'Neill,* as relied upon by the Approval Holder and Director. The Macklins noted that, in *O'Neill*, the Board asked the appellant repeatedly to provide some evidence he had submitted a statement of concern, but he failed to do so. The Macklins, however, provided a sworn affidavit attesting to the fact they submitted a statement of concern to the Director. The Macklins argued they provided *prima facie* evidence they submitted a statement of concern to the Director, and the Approval Holder did not challenge the evidence.

[55] In response to the Approval Holder relying on *O'Neill* to support the proposition that prejudice is only relevant when there are rare or unusual circumstances, the Macklins noted *O'Neill* set out two circumstances where it may be possible for the Board to process a statement of concern where it was filed late or not at all. The Macklins noted the Board pointed out circumstances in which prejudice may be relevant are highly fact-specific.

[56] The Macklins stated they had not sent their statement of concern "anywhere," but they addressed it to the Director and sent it to the email address in the notice of application, but they unfortunately missed one "s" in the address. The Macklins said the Board must determine

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19 Macklin's submission, March 27, 2020, at page 2.

20 Macklin's submission, March 27, 2020, at page 2.

the validity of the Macklins' statement of concern based on the evidence before it, not on hypothetical or speculative scenarios.

[57] The Macklins stated the Director was aware of their concerns given the Macklins' neighbours had filed statements of concern.

[58] The Macklins argued adding one more appellant represented by the same legal counsel as the Appellants would not prejudice the Director, and it would have minimal impact on a potential mediation meeting, hearing, or costs claim.

[59] The Macklins agreed submitting a statement of concern is a statutory prerequisite to the right to file a Notice of Appeal. The Macklins stated the question in situations where the Director did not receive a statement of concern, is whether there was evidence a statement of concern was submitted by the appellant.

[60] The Macklins argued there is evidence they submitted a statement of concern. The Macklins stated the inquiry should not end if the Director did not receive the statement of concern. The Macklins noted the legislation clearly states the test is whether the statement of concern was submitted, not whether it was received. The Macklins stated receipt of the statement of concern is evidence it was submitted, but there can be evidence where it was submitted but not received, as in this case.

## B. Analysis

[61] Two pieces of legislation govern the issue currently before the Board, section 95(5)(a)(iii) of EPEA and section 115(1)(a)(i) of the *Water Act.*

[62] Section 95(5)(a)(iii) of EPEA provides:

> "95(5) The Board
>
> (a) may dismiss a notice of appeal if
>
> (iii) for any other reason the Board considers that the notice of appeal is not properly before it...."

Section 115(1)(a)(i) of the *Water Act* provides:

> "115(1) 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...."

[63] The Macklins, Approval Holder, and Director agreed that, in order to file a Notice of Appeal with the Board under section 115(1)(a)(i) of the *Water Act*, an appellant is first required to have submitted a statement of concern to the Director. The question before the Board is whether the Macklins submitted a statement of concern to the Director within the meaning of section 115(1)(a)(i) of the *Water Act*.

[64] The Director and Approval Holder argued section 115(1)(a)(i) of the *Water Act* requires receipt of the statement of concern by the Director, whereas the Macklins argued an attempt to submit a written statement of concern to the Director is sufficient, if there is evidence of such an attempt.

[65] Statements of concern assist in the review of an application and help the Director consider the effects the implementation of an application would have on the environment and other persons. Section 115(1)(a)(i) of the *Water Act* limits appeals of the Director's decisions to those brought by the approval holder and directly affected persons who previously submitted statements of concerns with the Director.

[66] The Board finds the intention of the legislature, as expressed in section 115(1)(a)(i) of the *Water Act*, requires a person wishing to exercise an appeal right under the *Water Act* must have "previously submitted a statement of concern," and the statement of concern must be received by the Director, not just sent.

[67] There are unintended consequences in accepting an interpretation of section 115(1)(a)(i) where its requirements are satisfied by an attempt to submit. Without the statement of concern reaching the Director, the concerns of the statement of concern filer could not be considered by the Director nor addressed by the Director or Approval Holder prior to a decision being made on the application. In addition, as what occurred in this appeal, directly affected persons would not be identified and would not be notified of the issuance of the Approval.

[68] The Board has commented in previous decisions that there may be exceptions to the requirement to file a statement of concern, and the Board "may be able to process an appeal where a statement of concern was filed late. Or perhaps an appeal could be processed even when a statement of concern has not been filed due to an extremely unusual case."[21] On application and in appropriate circumstances, the Board could exercise its discretion to exempt an appellant from filing a statement of concern.

[69] In the present case, the Macklins provided evidence of a clerical error on their part. They did not provide evidence of unusual circumstances or argue a justifiable reason to exempt them from being required to file a statement of concern. The Approval Holder and Director argued the onus is on the person to ensure the statement of concern conforms to the directions contained within the public notice of the application, including sending it to the address listed. While unfortunate, a clerical error is not evidence of unusual circumstances or a justifiable reason for the Board to exercise its discretion to exempt the Macklins from filing a statement of concern.

[70] The Board finds the Macklins did not submit a statement of concern to the Director as required by section 115(1)(a)(i) of the *Water Act*. Therefore, pursuant to section 95(5)(a)(iii) of EPEA, the Board finds the Macklins' appeal is not properly before it, and their appeal is dismissed.

## V. DIRECTLY AFFECTED

### A. Submissions

1. Appellants

[71] The Appellants explained they all own land adjacent to the Little Bow River, downstream of the Town of High River and the proposed SW Dike. The Appellants noted the SW Dike will be constructed in the floodplain of the Highwood River and will result in a permanent alteration of the direction of flow and water levels in the Highwood River, which will

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21 *O'Neill* v. *Regional Director, Parkland Region, Alberta Environmental Protection* re: *Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D, at paragraph 14. See also: *Deneschuk Homes Ltd.* v. *Director, Approvals, Parkland Region, Regional Services, Alberta Environment*, re: *Town of Sylvan Lake* (6 September 2001) Appeal No. 01-060-D.

directly and significantly affect the Appellants, "as the water is being diverted to flow across their lands."[22]

[72] The Appellants stated they were asked to enter into restrictive covenant agreements in the nature of a flood easement. The Appellants said they were asked to agree to having their lands be flooded on an intermittent basis to protect lands within the Town of High River from flooding. The Appellants submitted the effect of the Approval is to transfer flood impacts from properties inside the Town of High River to the Appellants' properties. The Appellants argued this clearly demonstrates a direct and significant adverse effect on the Appellants.

2. Approval Holder

[73] The Approval Holder took no position with respect to whether the Appellants were directly affected by the Approval.

3. Director

[74] The Director took no position with respect to whether the Appellants were directly affected by the Approval.

## B. Analysis

[75] As part of its consideration of a 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 has standing and is directly affected by the decision of the Director. In this case, the Appellants must show they are directly affected by the decision to issue the Approval.

[76] The Board has examined the issue of standing and whether an appellant is "directly affected" in numerous prior decisions. The Board has received guidance on this issue from the Court of Queen's Bench in *Court*.[23]

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

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22 Appellants' submission, February 20, 2020, at page 1.

23 Note: This decision was decided before *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeals Board*, 2020 ABCA 456. *Normtek* provided further guidance on the Board's directly affected test.

"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."[24]

[78] 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...."[25]

[79] The Board relies on the principles articulated in the *Court* decision when determining whether or not a person has standing to bring forward an appeal. The onus is on the appellant to demonstrate to the Board 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 jurisdiction of the Board in order for the Board to consider it sufficient to grant standing. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.[26]

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[24] *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.).

[25] *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

[26] 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.).

[80] 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 certainty the appellant is directly affected.

[81] The Board has noted in prior decisions that an appeal before 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 those 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.[27]

[82] While the effect on an appellant does not need to be unique in kind or magnitude,[28] it needs to be more direct than the effect on the public at large.

[83] In *Kostuch*, 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."[29]

[84] 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 being found directly affected by the decision. In the current case, the Approval authorizes the construction and placement of the SW Dike within the floodplain of the Highwood River, resulting in the permanent alteration of the flow, the direction of flow, and water levels of the Highwood River. The Approval also changes the location of water for drainage purposes. The effect of the Approval is the redirection of floodwaters during a flood event.

[85] The evidence before the Board is the SW Dike will divert floodwaters across portions of the Appellants' lands. The Appellants own land downstream of the SW Dike authorized by the Approval. The Appellants were asked by the Approval Holder to sign restrictive covenant agreements which were essentially flood easements, the purpose of which

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[27] 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 para 61.

[28] 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.).

[29] *Kostuch* v. *Alberta (Director, Air & Water Approvals Division, Environmental Protection*, (23 August 1995), Appeal No. 94-017-D (A.E.A.B.) at para 34.

the Appellants believed was to allow floodwaters to inundate portions of their lands and, thereby, accept a transfer of the flood risk from properties in the Town of High River to the Appellants' lands. The Appellants argued the Approval's effect similarly authorizes the transfer of flood risks from properties inside the Town of High River to the Appellants' lands. This transference of risk from a flood event is a direct and significant impact to the Appellants.

[86] Based on the evidence before the Board, and noting the Approval Holder and Director did not take a position on whether the Appellants were directly affected, the Board finds the Appellants have met the onus of showing they were directly affected by the Director's decision to issue the Approval.

### C. Decision

[87] The Board finds the Appellants have demonstrated they are directly affected by the Director's decision to issue the Approval. The SW Dike as authorized by the Approval will result in a permanent alteration of the flow, direction of flow, and water levels in the Highwood River, which may impact the Appellants' lands during a flood event.

## VI. STAY REQUEST

### A. Submissions

1. Appellants

[88] The Appellants stated their most serious concern is the Approval authorizes the flooding of their lands to protect other lands from being flooded. The Appellants stated there would be an adverse impact to their property values given the flood easements would restrict the Appellants from developing portions of their lands that would be subject to flooding as a result of the SW Dike.

[89] The Appellants stated the floodwaters could potentially have an adverse impact on their domestic aquifers, from which they obtain their drinking water. The Appellants also raised concerns about the impact flooding would have on soil quality and future crop yields.

[90] The Edeys were concerned about their residence potentially being flooded and their irrigation system being damaged. The Edeys said the flood mapping provided to them by the Approval Holder indicated flooding could occur within a few feet of their residence.

[91] The Appellants noted "irreparable" harm is determined by the nature of the harm, not its magnitude or extent. The Appellants submitted they would suffer irreparable harm if a stay was not granted and the Approval Holder was permitted to proceed with the construction of the SW Dike. The Appellants said if a flood were to occur before the appeal was determined, the Appellants' lands could be flooded and the damage would be done.

[92] The Appellants argued they would suffer greater harm if the stay was not granted than the Approval Holder would suffer if the stay was granted. The Appellants noted the Approval Holder was in the very early stages of the project, and there would only be a minor delay to the schedule. The Appellants stated they did not object to the Approval Holder undertaking pre-construction activities, such as pre-qualifying contractors, utility relocation planning, and subdivision matters, but they argued actual construction of the SW Dike should be stayed.

[93] The Appellants stated, if the SW Dike was built and a flood occurred, the Appellants would suffer substantial harm as their properties could significantly decrease in market value.

[94] The Appellants acknowledged protecting the Town from future flood events is in the public interest. The Appellants argued as landowners downstream of the Town, they were equally deserving of protection from flood events.

[95] The Appellants explained they were either not affected by the 2013 flood event or suffered only minor flooding, but if the SW Dike was built, the magnitude of future floods would be much greater. The Appellants stated the natural flood protection they currently have, given their location and area topography, would be destroyed. The Appellants argued the project would not only not protect them from flooding, but it would increase their exposure to flooding. The Appellants submitted that transferring flood risk from one set of landowners to another is not in the public interest.

2. Approval Holder

[96] The Approval Holder opposed a stay of the Approval on either an interim or permanent basis.

[97] The Approval Holder referred to the Board's previous decision in *Aurora Heights*,[30] and stated the Appellants did not meet the test for a stay as set out by the Board.

[98] The Approval Holder noted the Appellants and Approval Holder were unable to reach an agreement on compensation and value. The Approval Holder said the Director was aware of the Appellants' concerns regarding land value and compensation when he considered the application for the Approval. The Approval Holder noted there was nothing in the Notices of Appeal which suggested the review by the Director of the application materials or the statements of concern was deficient in any manner. The Approval Holder argued the first part of the stay test was not met.

[99] The Approval Holder argued the Appellants would not suffer irreparable harm since their concerns relate to value and compensation, and it could not be said the Appellants could not be compensated for any impacts.

[100] The Approval Holder argued the balance of convenience favours denying the stay. The Approval Holder said the work contemplated by the Approval has a public service objective, namely protecting citizens from the risks of seasonal flooding. The Approval Holder said losing the construction season would delay the flood protection. The Approval Holder stated the public was bearing the costs of the work, and delays in the construction season would increase construction costs. The Approval Holder argued it was unlikely the Appellants would suffer any negative impacts prior to the appeals being determined.

[101] The Approval Holder noted the Appellants suggested the SW Dike would result in negative impacts to their lands, but the Approval Holder stated the allegations were inaccurate or misleading and did not show irreparable harm.

[102] The Approval Holder reviewed the impacts the SW Dike would have on the Appellants' properties:

1. Concerning the Howies' property, the Approval Holder did not agree when the Howies' stated their property was not flooded in 2013. The modelling indicated that, during the 2013 flood event, 69.7 acres of their property were inundated. Post completion of the SW Dike, it was predicted there would be a 36% reduction in inundation (from 43% to 7%). A small area of

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[30] Approval Holder's submission, February 12, 2020, citing *Aurora Heights Management Ltd. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (23 November 2018), Appeal Nos. 16-049-051-ID1 (A.E.A.B.), 2018 AEAB 21.

undeveloped land would be temporarily inundated different from the 2013 flood. Market value of the land is likely to increase as less land would be inundated. Financial or economic harm is not irreparable.

2. Concerning the R&N Macklins' property, it was acknowledged modelling projected a temporary increase in inundation in portions of their parcel that were undeveloped. However, monetary compensation could remedy the harm caused by the temporary inundations. The Approval Holder was aware changes to the Provincial Flood Mapping were contemplated, but it was not known what the changes would be and whether the property would be put in a floodway.

3. Concerning the Edeys' property, the modelling projected the east parcel, which is developed land, would experience a decrease of 28% in the area temporarily inundated, and the west parcel, which was undeveloped, would see an increase of 29% in area subject to inundation. Monetary compensation could remedy the harm caused by those temporary inundations.

4. Concerning the Tops' property, modelling projected a decrease in the temporary inundation on their land by 26%. The portion of the lands that would be subject to inundation was undeveloped. The land is outside the existing Provincial Flood Mapping, and future floodway boundaries were not known. Lost development potential were vague and unsupported. Monetary compensation could remedy the harm caused by temporary inundations.

[103] The Approval Holder argued the Appellants' assertions that water would be diverted across their lands were either unsupported by any evidence or analysis, or failed to recognize the overall reduction of land potentially subject to temporary inundation.

[104] The Approval Holder submitted the balance of convenience favours the denying of the stay, because the purpose of the SW Dike is to protect critical infrastructure such as roads and a hospital and reduce the potential for public harm. The Approval Holder stated there was risk of multifaceted harm to an entire community as opposed to strictly financial loss to specific individuals.

[105] The Approval Holder relied on the following statement of the Alberta Court of Appeal in *360Ads Inc.*,[31] in support of its position:

> "It must be borne in mind that where there is a governmental authority charged with promoting the public interest and actions are taken by that governmental

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31 *360Ads Inc.* v *Okotoks (Town)*, 2018 ABCA 319, at paragraph 13.

> authority in discharging that responsibility, a court must assume harm to the public if the actions are restrained."[32]

[106] The Approval Holder referred to the Board's previous decision, *Re Sommerstad*,[33] where the Board adopted the reasoning in *RJR-MacDonald* and concluded a stay would not be granted:

> "In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant....The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impunged legislation, regulation, or activity was undertaken pursuant to that responsibility."[34]

[107] The Approval Holder stated it has a mandate to protect the public interest, and the Approval was obtained for the protection of the public interest. The Approval Holder argued it should not be prevented from executing its public mandate, and any delay in constructing the SW Dike would put the public at risk.

[108] The Approval Holder stated the Appellants were seeking to protect monetary interests. The Approval Holder submitted the concerns raised by the Appellants might not be insignificant to them, but those concerns should not prevail over the Approval Holder's public interest mandate to protect citizens and infrastructure.

[109] The Approval Holder stated any delay in the construction of the SW Dike could result in the construction season being materially delayed or lost, and such a delay would create the risk of another spring and summer passing without the flood mitigation in place and potentially increasing the costs of construction. The Approval Holder argued a stay would put the Approval Holder's citizens and infrastructure at unnecessary risk.

[110] The Approval Holder submitted the Appellants did not meet the test for a stay. The Approval Holder stated any possible harm the Appellants might incur would be monetary in nature and could not be considered irreparable. The Approval Holder stated the balance of

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32 Approval Holder's submission, March 2, 2020, at page 5, citing *360Ads Inc.* v. *Okotoks (Town)*, 2018 ABCA 319, at paragraph 13.

33 *Re Sommerstad*, 2007 CarswellAlta 435.

34 Approval Holder's submission, March 2, 2020, at page 5, citing *Re Sommerstad*, 2007 CarswellAlta 435, at paragraph 58.

convenience did not favour hindering the Approval Holder from conducting its mandate to protect the public interest by protecting its citizens and infrastructure.

3. Director

[111] The Director did not take a position with respect to the Appellants' stay application.

4. Appellants' Rebuttal

[112] The Appellants' stated the Approval Holder's flood modelling was inaccurate. The Appellants questioned why the Approval Holder used modelled information instead of actual information about the 2013 flood.

[113] The Edeys explained the extent of the 2013 flood event was greater than the modelling depicted. They stated the west parcel suffered less flooding in 2013 than what was depicted in the modelling, so the percentage change in the amount of that parcel that would be flooded after the SW Dike was constructed would be greater than the modelling predicted. The Edeys stated the east parcel suffered more flooding in 2013 than what the model depicted. They noted the modelling showed their buildings were not damaged by the 2013 floods, but their shop was flooded. The Edeys stated they had little faith in the modelling.

[114] The Howies explained they were told by the Approval Holder that 21% of their land was flooded in 2013 and 8% would be prone to flooding after the SW Dike was constructed, but when reviewing the modelling, it determined 43% of the Howies' land was flooded and only 7% would be susceptible to flooding after construction of the dike. The Howies noted that, even though the modelling showed less flooding on their property after the SW Dike was in place, where the property would be flooded was important. The Howies said the north and east portions of their property was flooded in 2013, but the modelling shows the southwest corner of their property would be flooded after the SW Dike was constructed. The Howies explained the southwest corner has the greatest potential for development given its location and views.

[115] The R&N Macklins noted the modelling shows their property would suffer greater flooding due to the SW Dike than occurred in the 2013 flood. The R&N Macklins explained their use of the term "floodway" meant their land would be subject to flooding as a result of the SW Dike.

[116] The Appellants submitted their concerns regarding diminished property values and loss of development potential were not speculative. The Appellants noted the Approval Holder asked them to agree to a flood easement that would permanently sterilize portions of their property from future development. The Appellants stated their lands had development potential given the close proximity to the south boundary of the Town of High River.

[117] The Appellants referenced the Approval Holder's comments regarding the Appellants refusing the offer made in respect to the flood easement and no counter-offer was made. The Appellants explained they were presented with a Restrictive Covenant Agreement and were asked to sign. The Appellants, who were not represented by counsel at the time, did not believe they were able to counter-offer what was presented to them.

[118] The Appellants argued the balance of convenience favours granting the stay. They rejected the Approval Holder's characterization that the purpose of the project was to reduce the risk of public harm whereas the Appellants would only suffer "private financial harm." The Appellants noted the majority of the lands within the Town of High River that would be protected by the SW Dike are owned by private landowners and are currently undeveloped.[35] The Appellants stated the interest they sought to protect were the same as the Approval Holder was protecting, the ability to use developable land to its highest and best use.

[119] The Appellants argued the Approval Holder did not offer concrete evidence it would suffer real harm if the stay was granted. The Appellants noted the Approval Holder did not provide its construction schedule or anything that would support the dike could not be in place in time to provide flood mitigation this spring/summer. The Appellants noted the Approval Holder was only pre-qualifying contractors and undertaking utility relocation planning, suggesting it was unlikely the dike would be ready for flood mitigation this spring/summer.[36]

[120] The Appellants submitted the balance of convenience supported granting the stay by postponing the start of construction of the SW Dike while allowing the Approval Holder to take necessary steps to advance the project.

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35 Appellants' submission, March 9, 2020, at page 2.

36 On March 11, 2010, the Approval Holder notified the Board that pre-construction activities that were undertaken were in relation to construction scheduled to start in 4 to 6 weeks. If actual construction did not occur in the 2020 spring/summer construction season, the pre-construction activities would need to be repeated in 2021.

## B. Analysis

[121] The Board has the authority to grant a stay under section 97 of EPEA, which 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 application of a party to a proceeding, before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[122] The Board's test for a stay, as stated in previous decisions,[37] is adapted from the Supreme Court of Canada case of *RJR-MacDonald.*[38] 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."[39]

[123] 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."[40]

[124] 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

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37 See *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.); *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.).

38 *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 m *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.

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

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

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.

[125] 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."[41]

[126] 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.[42]

[127] 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."[43] 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,[44] third parties who may suffer damage,[45] or if the reputation and goodwill of a party will be affected.[46]

[128] 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."[47]

[129] In assessing the stay application, 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. The

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

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

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

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

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

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

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

Appellants raised concerns regarding the potential for redirected floodwaters to impact their lands. It was argued these floodwaters could reduce soil quality and damage future crop yields. The Edeys and R&N Macklin stated the redirected waters would threaten buildings and equipment on their lands. Concerns for the aquifer, which the Appellants rely on for drinking water, were also raised. The Appellants questioned the accuracy of the Approval Holder's flood modelling. The Appellants also raised the loss of development potential and monetary value in their properties due to the redirected floodwaters.

[130] The evidence currently before the Board demonstrates there is a potential for the Appellants' lands to be impacted as a result of the SW Dike. Therefore, the Appellants have satisfied the first step of the test since the Appellants raised serious issues resulting from the Director's decision to issue the Approval.

[131] In considering the second part of the test, the nature of the harm has to be irreparable in nature. The Parties agreed the construction of the SW Dike will flood the Appellants' properties, but the Parties disagree as to the extent of flooding that will occur. The Approval Holder predicts there will be less flooding on the Appellants' properties than what occurred in previous flood events. The Appellants believe their lands could be impacted more than what the Approval Holder predicts, or different areas of their property will be impacted. The important aspect of determining if the Appellants would suffer irreparable harm is whether the harm that might occur cannot be compensated for monetarily. The loss of the use of land, whether for crops or future development, can be assessed and be given a monetary value. If damage occurs to buildings, the value can be determined and compensation can be provided. The Appellants did not demonstrate any harm that could occur that could not be compensated for monetarily. Therefore, the Appellants did not meet the second step in the stay test as stated in *RJR-MacDonald* as they will not suffer irreparable harm if the stay is not granted.

[132] In considering the balance of convenience and the public interest, the Board notes the SW Dike is being constructed for a public purpose. The Approval Holder stated a stay would potentially put critical infrastructure, including roads and a hospital, and citizens in the Town at risk. Delays in the construction of the SW Dike could result in the construction season being missed, potentially increasing construction costs. Delays in the work could lengthen the time that critical infrastructure goes without flood mitigation protection.

[133] The Appellants may suffer additional flooding during the time the Board hears the appeals, but any flooding that may occur would be temporary as flood waters recede, and any damage could be compensated for monetarily. The Appellants stated they would be restricted from developing their properties, but there was no indication this was going to occur during the time it would take for the Board to hear the appeals.

[134] In order for the Approval Holder to take steps to protect its citizens and infrastructure, the Board finds the balance of convenience favours the Approval Holder.

[135] The Approval Holder in these appeals is a public entity whose purpose is to protect its citizens. On the question of the public interest, the Supreme Court in *RJR-MacDonald* stated:

> "In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant.... The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."[48]

[136] It is the public interest that is of concern to the Board in determining the balance of convenience in these appeals. The Approval was issued to allow the construction of a berm to protect infrastructure and citizens in the Town. The Board appreciates the Appellants' argument the Approval appears to transfer the flooding issues from the Town to the Appellants. However, given the Approval Holder obtained the Approval to protect the public interest, the Board finds the balance of convenience and the public interest favours denying a stay of the Approval.

## VII. CONCLUSION

[137] The Macklins were required to file a statement of concern with the Director in accordance with section 115(1)(a)(i) of the *Water Act* as a prerequisite to filing their Notice of Appeal. This requirement contemplates receipt of the statement of concern by the Director. The Board found the Macklins did not file a statement of concern with the Director as it was not received by the Director. There was no evidence of extenuating circumstances or justifiable reasons before the Board to justify the Board exercising its discretion to accept their notice of appeal without having met the requirement to file a statement of concern with the Director.

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48 *RJR-MacDonald* v. *Canada* (*Attorney General*), [1994] 1 SCR 311, 1994 SCC 117.

[138] The Director's decision to issue the Approval directly affects the Appellants as the SW Dike will permanently alter the flow, direction of the flow, and the water levels in the Highwood River during flood events, resulting in an impact to the Appellants' lands.

[139] The Appellants raised serious issues to be tried. However, the Appellants failed to demonstrate irreparable harm. Any harm that may result from the floodwaters redirected by the SW Dike could be compensated for monetarily.

[140] In considering the balance of convenience and the public interest, the Board notes the SW Dike is being constructed by a public authority to protect the Town from flood events.

## VIII. DECISION

[141] The appeal of Mr. Peter and Ms. Sheila Macklin is dismissed for failing to submit a statement of concern to the Director as required under section 115(1)(a)(i) of the *Water Act*.

[142] The Appellants are found to be directly affected by the Approval given the SW Dike, as authorized in the Approval, will direct flood waters onto the Appellants' lands.

[143] The Board declines to grant a stay. Although the Appellants raised serious issues to be heard, they would not suffer irreparable as any harm can be compensated for monetarily. Also, the public interest did not support a stay.

Dated on November 16, 2021 at Edmonton, Alberta.

Alex MacWilliam
Board Chair (ret.)