
ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 25, 2024

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 an appeal by Windy Field Ltd. with respect to the decision of the Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas, to issue *Water Act* Approval No. DAUT0013709 to 411416 Alberta Ltd.

Cite as: Stay Decision: *Windy Field Ltd. v. Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas*, re: *411416 Alberta Ltd.* (25 January 2024), Appeal No. 23-109-ID1 (A.E.A.B.), 2024 ABEAB 1.

BEFORE:

Ms. Barbara Johnston, Board Chair.

SUBMISSIONS BY:

Appellant: Windy Field Ltd., represented by Mr. Bruce Brander, Brander Law.

Director: Ms. Dorothy Lok, Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas.

Approval Holder: 411614 Alberta Ltd., represented by Mr. Dustin Thompson.

EXECUTIVE SUMMARY

The Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas (the Director) issued an approval (the Approval) under the *Water Act* to 411614 Alberta Ltd. (the Approval Holder) allowing the Approval Holder to construct works for the purpose of stormwater management (the Activity). The stormwater management system is being constructed to service an existing and proposed campsite development on Payne Lake in Cardston County (the Development).

The Environmental Appeals Board (the Board) received a Notice of Appeal from Windy Field Ltd. (the Appellant), accompanied by a request for a stay of the Approval. The Board received submissions on whether the Appellant was directly affected by the Approval and whether a stay should be granted.

The Board found the Appellant was directly affected by the Approval because the Activity will impact Payne Lake and Payne Lake is used to irrigate property owned by the Appellant. Specifically, based on the information currently before the Board, the Activity could result in an increased amount of silt, debris and contaminants entering Payne Lake from the Development.

In considering the stay application, the Board asked the Appellant, the Approval Holder, and the Director to answer the following questions, based on the test for granting stays established by the Supreme Court of Canada in *RJR-MacDonald v. Canada (RJR-MacDonald)*:

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

The Board found the Appellant raised serious issues to be heard by the Board and that the Appellant would suffer irreparable harm if a stay were not granted, satisfying the first and second part of the *RJR-MacDonald* test. The Appellant raised concerns the Activity could increase the risk of silt, debris and contaminants entering Payne Lake and once the Activity was undertaken any harm incurred could not be easily reversed.

The Board also found the balance of convenience and the overall public interest favoured the Appellant, satisfying the third part of the *RJR-MacDonald* test. Payne Lake is an irrigation reservoir managing the headwaters for eight irrigations districts in southern Alberta and the Activity will irreversibly affect stormwater drainage discharging from the Development to Payne Lake. Water is a scarce resource in southern Alberta, and it is in the public interest to ensure the Activity, which relates to a private recreational development, is being carried out without harm to Payne Lake or users of irrigation water sourced from Payne Lake. Based on the foregoing reasons, the Board granted a stay of the Approval. The stay will remain in place until the Minister makes a decision regarding the appeal or the Board orders otherwise.

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1. INTRODUCTION

[1] These are the reasons for the decision of the Environmental Appeals Board (the “Board”) regarding the stay application in respect of the appeal of Approval No. DAUT0013709 (the “Approval”) issued under the *Water Act*, R.S.A. 2000, c. W-3 (the “Act”), to 411614 Alberta Ltd. (the “Approval Holder”). The Approval, issued by the Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas (the “Director”), allows the Approval Holder to construct and operate stormwater management works for a proposed and existing campsite development (the “Development”) on Payne Lake, in Carston County.

[2] On November 16, 2023, the Board received a Notice of Appeal and a request for a stay of the Approval from Windy Field Ltd. (the “Appellant”). The preliminary matter before the Board was whether a stay of the Approval should be granted until the appeal has been heard and determined.

[3] After considering written submission from the Appellant and the Approval Holder, the Board determined:

1. the Appellant was directly affected by the Approval; and
2. the Appellant had met the test the Board applies to stay applications.

[4] The Board granted the stay of the Approval. The Board noted that the stay applies only to the Activity authorized by the Approval, not to any activities authorized or permitted under any other authorizations or permits issued in respect of the Development. The stay will remain in place until the Minister issues her order with respect to this appeal or the Board orders otherwise.

2. BACKGROUND

[5] On November 3, 2023, the Director issued the Approval to the Approval Holder allowing the Approval Holder to carry out the Activity. Payne Lake is the headwater for a connected irrigation system that serves eight irrigation districts in southern Alberta.

[6] According to the Appellant, it received notice of the Director’s decision on December 10, 2023, by email.

[7] On November 16, 2023, the Board received a Notice of Appeal of the Approval from the Appellant, along with the Appellant's request for a stay of the Approval.

[8] On November 21, 2023, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively, the "Parties"), acknowledging receipt of the Notice of Appeal and the Appellant's request for a stay of the Approval. The Board asked the Appellant to provide additional information in support of its stay request.

[9] On November 23, 2023, the Approval Holder emailed the Board requesting that the appeal be dealt with as soon as possible and the stay be denied. The Approval Holder stated work had begun at the Development site, alleged that the purpose of the appeal was to delay the Development, and stated that the appeal was focused on environmental matters unrelated to the Approval.

[10] On November 23, 2023, the Board acknowledged the Approval Holder's email and asked the Director or the Approval Holder to provide the Board copies of reports and plans identified in the Approval (the "Additional Materials").

[11] On November 27, 2023, the Board received the information requested from the Appellant to support its stay. The Director provided the Additional Materials to the Board and advised she would be representing herself in the appeal.

[12] On November 28, 2023, the Board found the Appellant had made a *prima facie* case the Appellant was directly affected and granted a temporary stay. The purpose of the temporary stay was to allow the Board to receive written submissions from the Parties with respect to the stay in a timely manner.

[13] On December 3, 2023, the Director stated she took no position on whether the Appellant was directly affected or whether the Board should grant the Appellant's stay request.

[14] The Board received the Approval Holder's response submission on December 5, 2023, and the Appellant's rebuttal submission on December 8, 2023.

[15] On December 8, 2023, the Board wrote to the Parties informing them the Board had reviewed the submissions from the Appellant and the Approval Holder regarding the stay and directly affected status of the Appellant. The Board advised that it found the Appellant was directly affected and held that the stay would remain in place until the appeal is addressed.

[16] These are the Board's reasons for those decisions.

3. ISSUES

[17] The Board received comments from the Appellant and the Approval Holder on the following questions regarding the stay application:

1. Is the Appellant directly affected by the Approval issued to the Approval Holder?
2. What are the serious concerns raised by the Appellant that should be heard by the Board?
3. Would the Appellant suffer irreparable harm if the stay is refused?
4. Would the Appellant suffer greater harm if the stay was refused than the Approval Holder, would suffer if the Board granted a stay, pending a decision of the Board?
5. Would the overall public interest warrant a stay?

4. LEGISLATION AND CASELAW

4.1. Standing of the Appellant – Directly Affected Status

[18] For the Board to consider if a stay should be granted, the Board must first determine if the Appellant has standing to appeal the decision of the Director to issue the Approval. Section 115(1)(a)(i) of the Act provides a person who has submitted a statement of concern in accordance with the Act and is directly affected by the Director's decision may submit a notice of appeal:

“115(1) A notice of appeal under the 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 the Director's decision*, if notice of the application or proposed changes was previously provided under section 108...”

(Emphasis added by the Board.)

[19] In *McMillan et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Development Corp.* (“*McMillan*”),¹ the Board set out the framework it uses to determine if a person is directly affected by a decision. In Standing Decision: *Jeans-Moline et al. v. Director, North Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Canadian Carmelite Charitable Society Inc.* (“*Jeans-Moline*”), the Board refined the framework developed in *McMillan*, setting out a three-part test that must be met if an appellant is to be considered directly affected:

1. Is there a personal or private interest, consistent with the underlying policies of the applicable statutes, being asserted by a person?
2. Is there is an adverse effect to the identified interest?
3. Is the adverse effect to the identified interest direct?²

4.2. The Board’s Authority to Grant a Stay

[20] The Board’s authority to grant a stay is found in section 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“*EPEA*”), which provides in part:

- “97(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.”

[21] The Board’s test for a stay is adapted from the Supreme Court of Canada decision in *RJR-MacDonald (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR-MacDonald*”) and has been applied by the Board in previous decisions.³ The steps in the test, as stated in *RJR-MacDonald*, are:

¹ *McMillan et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Development Corp.* (31 May 2022), Appeal Nos. 19-066 to 071, 074, 081, and 083-085-ID4 (A.E.A.B.), 2022 ABEAB 22.

² Standing Decision: *Jeans-Moline et al. v. Director, North Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Canadian Carmelite Charitable Society Inc.* (1 June 2023), Appeal Nos. 21-025-026 and 22-001-034, 036-037-1D1 (A.E.A.B.), 2023 ABEAB 9, at paragraph 74.

³ See Stay Decision: *Gereluk v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Stone’s Jewellery Ltd.* (23 November 2021), Appeal No. 20-002-ID1 (A.E.A.B.), 2021 ABEAB 34; *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.); and *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.).

“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.”⁴

[22] The standard of proof in a stay application is the balance of probabilities, and the onus is on the appellant to establish that the stay test is met.⁵

[23] In addition, the environmental mandate of the Board requires the Board to consider whether the overall public interest would warrant the granting of a stay. As stated by the Board in *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, Southern Region, Operations Division, Alberta Environment*, re: *Gas Plus Inc. and Handel Transport (Northern) Ltd.*, (“*Gas Plus*”):

“The Environmental mandate of this Board requires the public interest be considered in appeals before the Board. Therefore, the Board has assessed the public interest as a separate step in the test. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay affect the public interest.... The effect on the public may sway the balance for one party over the other.”⁶

[24] If all the steps of the stay test are not met, in most cases, a stay will not be granted. However, in all cases, the fundamental question before the Board remains whether, in the circumstances, the granting of a stay is just and equitable.⁷ As stated by the Alberta Court in *Cleanit Greenit* when considering the tripartite test in *RJR-MacDonald*, “[t]he factors guide the Court’s exercise of discretion but the fundamental question remains whether granting of a stay is just and equitable in all circumstances.”⁸

⁴ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at paragraph 43.

⁵ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 30.

⁶ *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, Southern Region, Operations Division, Alberta Environment*, re: *Gas Plus Inc. and Handel Transport (Northern) Ltd.*, 10-034 & 11-002-ID1, 2011 ABEAB 21, at paragraph 65.

⁷ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 47.

⁸ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 33. See also *Priddis Greens Services Co-op Ltd. v. Director, South Saskatchewan Region, Operations Division Alberta Environment and Parks* (4 April 2019), Appeal No. 18-024-DL1 (A.E.A.B.), 2019 AEAB 7, at paragraph 26, where the Board stated:

5. SUBMISSIONS AND ANALYSIS

5.1. Directly Affected

5.1.1. Submissions

5.1.1.1. Appellant

[25] The Appellant submitted it is directly and adversely affected by the Approval because it owns property on the shoreline of Payne Lake, downstream of the Development, which requires clean, uncontaminated water sourced from Payne Lake for irrigation. The Appellant asserted it is directly affected by anything that impacts the water supply from Payne Lake.

[26] The Appellant submitted that Payne Lake is a small, shallow lake of 550 acres created as a reservoir for storing irrigation water and is the uppermost reservoir in a connected irrigation system extending from Payne Lake to Medicine Hat, providing water to eight of Alberta's thirteen irrigation districts. The Appellant stated it operates three irrigation pivots using source water from Payne Lake through irrigation canals.

[27] The Appellant stated it filed a statement of concern with the Director by email on March 8, 2023, a copy of which was provided to the Board with the Appellant's Notice of Appeal.

[28] The Appellant expressed concern that the construction of the Development would result in the replacement of existing vegetation on the Development's steeply graded site with gravel campsites, buildings, and roads, increasing the flow of stormwater to Payne Lake. The Appellant submitted the increased flow of stormwater, through the stormwater management system authorized by the Approval, would contaminate the lake with silt, hydrocarbons, and grey/black water from the Development, and could adversely affect water quality, reservoir capacity, and cause damage to irrigation infrastructure.

[29] The Appellant also expressed concern that the culverts located under Range Road 281, which is the access road for both the Appellant's property on Payne Lake and the

"The Board finds consideration of "the justice and equity of the situation" means that in some cases, such as when a stay of administrative penalty is requested, it is appropriate for the Board to depart from the RJR MacDonald test and consider what is just, equitable and reasonable for all parties involved. To be clear, the Board is not abandoning the RJR MacDonald test for all stay applications."

Development, are unable to handle the increased volume of water discharged into the Payne Lake and could be washed out so that the Appellant could not access its property.

[30] The Appellant alleged their statement of concern was ignored and the Appellant was not notified by Environment and Protected Areas (“EPA”) that the Approval was issued. The Appellant stated they located the Approval on the Authorization Viewer five days after it was issued, but the Approval could not be found on EPA’s Digital Regulatory Assurance system (“DRAS”).

5.1.1.2. Approval Holder

[31] The Approval Holder submitted the Appellant was not directly affected by the Approval, and the concerns raised by the Appellant were addressed by the Approval, as follows:

1. the rate of flow of stormwater from the stormwater management system would decrease post-development and would not adversely impact the culverts under Range Road 281;
2. the Approval contained provisions for siltation and erosion control that would be adhered to and followed during the term of the Approval;
3. the Approval Holder’s management and maintenance workers, and users of the Development monitor runoff to ensure no impact to the environment;
4. construction of the Development was occurring during the winter so there is little chance of a 1 in 100-year storm occurring;
5. the increase in water flow does not mean that flooding would not occur, but if it did occur, it would not be made worse and would likely be improved by the stormwater management system; and
6. the Approval was reviewed and approved by EPA and its experts, complied with the Act, and is consistent with other approvals in the province.

[32] The Approval Holder submitted the Approval related only to the Activity and did not change the development permit issued by Cardston County (the “Development Permit”), which dealt with matters other than those relating to stormwater management. The Approval Holder noted the decision to issue the Development Permit was upheld by the Land and Property Rights Tribunal the (“LPRT”) and permission to appeal LPRT’s decision was denied by the Alberta Court of Appeal.

[33] The Approval Holder submitted the appeal process should not be used by the Appellant to delay the completion of the Development.

[34] The Approval Holder stated the Appellant's statement of concern was not ignored, and the Approval Holder and EPA talked in depth about the concerns raised in the statement of concern and how they could be mitigated.

5.1.1.3. Appellant's Rebuttal

[35] The Appellant submitted the purpose of the appeal process under the Act was to provide an independent and expert review of the Director's decision. The Appellant argued the appeal process cannot be avoided by relying on the Approval Holder's assertions that the Approval complied with the Act, the Approval Holder had made changes to the Approval as required by EPA, the decision to issue the Approval was made by the Director so drainage issues were resolved, and no one was impacted.

[36] The Appellant submitted it was not sufficient for the Approval Holder to also assert the Appellant was not directly affected because the Appellant's concerns are resolved by other permits and approvals in place with respect to the Development. If that were the case, then any proponent could avoid the appeal process by referring to approvals and permits not currently before the Board.

[37] The Appellant submitted one of the purposes of the appeal process was to allow the Appellant an opportunity to be heard. While acknowledging the Approval Holder likely had conversations with EPA regarding the Appellant's statement of concern, the Appellant submitted it does not have the same access as the Approval Holder to communicate with EPA and cannot be expected to produce engineering reports for EPA.

[38] The Appellant submitted the Board should conclude the Appellant was directly affected by the Approval.

5.1.2. Analysis

[39] For the Board to consider whether a stay should be granted, the Board must first determine if the Appellant has standing to appeal the Director's decision to issue the Approval. Section 115(1)(a)(i) of the Act requires that a person filing a notice of appeal must have submitted a statement of concern to EPA and be directly affected by the Director's decision:

“Section 115(1)(a)(i) 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...”

[40] The Board accepts the Appellant’s evidence that a statement of concern was received by the Director by email on March 8, 2023. Neither the Approval Holder nor the Director provided evidence to the contrary.

[41] In determining if the Appellant is directly affected, the Board considered the three-part test set out in *Jeans-Moline*:

1. Is there was a personal or private interest, consistent with the underlying policies of the applicable statutes, being asserted by a person?
2. Is there is an adverse effect to the identified interest?
3. Is the adverse effect to the identified interest direct?⁹

[42] When considering if an appellant might be directly affected:

“[t]he Board avoids defining in advance or limiting the circumstances in which an appellant might be found directly affected. The Board interprets “directly affected” as limiting the class of persons who can appeal a director’s decision. However, the Board retains broad discretion to determine who is directly affected.”¹⁰

[43] The Board in *Jeans-Moline* also set out the principles that guide the Board’s application of the directly affected test as follows:

- “1. ***Factual circumstances vary.*** The Board determines the directly affected status of an appellant on a case-by-case basis, considering the varying facts and circumstances of each appeal.

⁹ Standing Decision: *Jeans-Moline et al. v. Director, North Region, Regulatory Assurance Division, Alberta Environment and Parks*, re: *Canadian Carmelite Charitable Society Inc.* (1 June 2023), Appeal Nos. 21-025-026 and 22-001-034, 036-037-IDI (A.E.A.B.), 2023 ABEAB 9, at paragraph 74.

¹⁰ Standing Decision: *Jeans-Moline et al. v. Director, North Region, Regulatory Assurance Division, Alberta Environment and Parks*, re: *Canadian Carmelite Charitable Society Inc.* (1 June 2023), Appeal Nos. 21-025-026 and 22-001-034, 036-037-IDI (A.E.A.B.), 2023 ABEAB 9, at paragraph 72.

2. **Interest.** The appellant must have a direct personal or private interest greater than the abstract or generalized interest of the community in an area or all Albertans. The interest affected must be consistent with the underlying policies of the applicable statute. Subject to the applicable statute, the Board examines the alleged adverse effects of the Director’s decision, or the activity authorized by the Director’s decision, on (a) the environment, (b) human health, (c) safety, or (d) property interests. The Board may also examine any alleged (e) social, (f) economic, and (g) cultural impacts of the Director’s decision or the activity authorized by the Director’s decision, if those impacts directly affect the appellant’s identified interests.
3. **Natural Resources.** The Board examines harm to a natural resource which [is used by the appellant], or harm to an appellant’s use of a natural resource, as this may be sufficient but is not a prerequisite to find an appellant directly affected where other adverse effects are alleged.
4. **Adverse Effect.** The Board interprets ‘affected’ as meaning the Director’s decision or the activity authorized by the Director’s decision will harm or impair the appellant’s identified interests. ‘Directly affected’ connotes an adverse effect. Adverse effect as defined under EPEA and the *Water Act* means ‘impairment of or damage to.’ The effect does not have to be unique in kind or magnitude but must be more than an effect on the public at large.
5. **Direct.** The Board interprets ‘directly’ as meaning the Director’s decision must have a clear and uninterrupted chain of cause and effect, or there must be an unbroken causal link between the Director’s decision and the harm on the appellant’s identified interest. In other words, the alleged harm to the identified interest must be caused by the Director’s decision or authorized activity. Further, the adverse effect must be actual or imminent, not speculative, and not at an undetermined time in the future. Some types of future harm, but not all, may be too remote or speculative to be considered direct.
6. **Evidence required.** The Board considers the nature and merits of the appellant’s Notice of Appeal when considering if they are directly affected by the Director’s decision or the activity authorized by the Director’s decision. The appellant must provide *prima facie* evidence to support their position that they are directly affected. This evidence need only establish a reasonable possibility they will be directly affected.
7. **Summary dismissal.** The Board may summarily dismiss a notice of appeal where it determines that the appellant is not directly affected, but such summary dismissal can only be made after there has been some consideration of the merits of the appellant’s appeal.”¹¹

¹¹ Standing Decision: *Jeans-Moline et al. v. Director, North Region, Regulatory Assurance Division, Alberta Environment and Parks*, re: *Canadian Carmelite Charitable Society Inc.* (1 June 2023), Appeal Nos. 21-025-026 and 22-001-034, 036-037-1D1 (A.E.A.B.), 2023 ABEAB 9, at paragraph 75.

[Emphasis in the original.]

5.1.2.1.1. **Personal or Private Interest of the Appellant**

[44] The first step of the test requires that the Appellant provide evidence it has a direct personal or private interest greater than the abstract or generalized interest of the community in the area or all Albertans.

[45] The Approval was granted to the Approval Holder for purposes of constructing and operating a stormwater management system for the Development. Payne Lake was originally constructed as a reservoir that is part of a system that supplies eight of thirteen irrigation districts in Alberta. Payne Lake is also a recreational lake available to the local community and all Albertans.

[46] The Board finds the Appellant met the first requirement of the test as the Appellant has a property interest on Payne Lake and relies on water sourced from Payne Lake for irrigation. This interest of the Appellant is a direct personal or private interest that is greater than the generalized interest of the public to use Payne Lake as a recreational facility.

5.1.2.1.2. **Direct Adverse Effect to the Identified Interest**

[47] For the second and third components of the test, the Appellant must provide evidence to show a reasonable possibility that their personal or private interest would be negatively affected and that the asserted negative effect or harm was caused by the decision of the Director, or the Activity authorized by the Approval. This means the Board must consider if the Activity would impair or harm the Appellant's use of Payne Lake or the Appellant's use of water sourced from Payne Lake. The asserted harm must not be speculative or too remote.

[48] The Appellant argued it would be adversely affected by the Activity because siltation and contamination from increased discharge of water into Payne Lake both during construction and continued operation of the stormwater management system could negatively impact water quality and reservoir capacity, harming the Appellant's irrigation activities and causing damage to the irrigation infrastructure.

[49] The Approval Holder argued the Appellant would not be adversely affected by the Activity because:

1. the post-development flow rate of water entering Payne Lake from the stormwater management system would be lower than the pre-development flow rate;
2. the drainage plan, and the methods and methodologies used in the expert report,¹² had been approved by EPA and the Approval Holder had provided information and made changes as required by EPA;
3. the Approval was like other approvals within the province;
4. the Approval complied with the *Water Act*;
5. the Approval required the establishment of a siltation and erosion control plan that would be adhered to during the Activity;
6. the management team, maintenance staff, and users of the campsite would report any erosion; and
7. construction at the site would occur in the winter season so there was little chance of a 1 in 100-year storm.

[50] The Board finds the identified interests of the Appellant could be negatively affected by the decision of the Director to issue the Approval. The Approval Holder failed to provide evidence that it had developed a siltation and erosion control plan prior to commencement of the Activity. The Board notes that the site of the Development is steeply graded, increasing the potential for silt and debris to be carried with stormwater discharging into Payne Lake. The Board finds the Approval Holder's evidence, that construction would occur in the winter and that management, maintenance staff and users of the campground would report erosion, is not persuasive evidence of an erosion and siltation control plan as required by the Approval.

[51] The Board also finds there is potential for hydrocarbon and grey/black water contamination to be carried with stormwater discharging from the Development to Payne Lake, and that the Approval Holder did not provide evidence that it had established a plan for controlling and monitoring the quality of water discharged into Payne Lake.

¹² The Board notes Approval includes attachments DAPP001855-R001, "Hydrological and Site Drainage Analysis: Payne Lake Subdivision" and DAPP0010885-R002, "Hydrological and Site Drainage Analysis Addendum: Payne Lake Subdivision".

[52] Based on the foregoing, the Board finds the Appellant is directly affected by the decision of the Director to issue the Approval and the Activity authorized by the Approval.

5.2. Stay Application

5.2.1. Submissions

5.2.1.1. Appellant

[53] The Appellant submitted a stay should be granted as it had raised serious concerns that should be heard by the Board, that it would suffer irreparable harm, and that the balance of convenience, and the overall public interest favoured the Appellant.

[54] The Appellant argued in the Notice of Appeal and stay application that the Appellant had raised serious concerns to be heard by the Board because the Director:

1. relied on inappropriate or inadequate engineering report, inappropriate modelling and data, incomplete designs and drawings, and incomplete recommendations;
2. failed to require a wetland assessment and impact report for wetlands or a comprehensive study of the ecosystem and wildlife impacted by the Activity;
3. failed to assess the potential for siltation, hydrocarbon, or grey/black water contamination on water quality and reservoir capacity, and failed to provide for appropriate siltation and erosion control measures;
4. failed to address adequacy of the capacity of the culverts under Range Road 281; and
5. failed to address the risks associated with the increase in motorized watercraft.

[55] The Appellant submitted the notice of the decision to issue the Approval was not given to stakeholders, did not appear on EPA's DRAS system, and was only found by the Appellant on EPA's approval viewer system several days after its issuance.

[56] The Appellant submitted it would suffer irreparable harm if the stay were not granted as the undertaking of the Activity would result in the permanent and irreversible changes to the drainage pattern from the Development to Payne Lake, which could permanently alter water quality and reservoir capacity of Payne Lake. The Appellant argued it would be too late to resolve

the damage if siltation or contamination occurred affecting water quality or reservoir capacity or causing the culverts under Range Road 281 to be flooded.

[57] The Appellant explained that construction of the Development would require vegetation on the site to be removed, dramatically changing the overland drainage pattern, and increasing the flow of stormwater to Payne Lake. The Appellant provided the Board anecdotal evidence of significant storm events that had in the past caused increased siltation in Payne Lake and other water systems in Alberta. The Appellant noted that most storm events occur in June when irrigation is most needed, so damage to the quality of water or irrigation infrastructure at that time would significantly impact the irrigation of downstream properties.

[58] The Appellant submitted, on the balance of convenience test, that it would suffer greater harm from permanent, irreversible alteration of Payne Lake and its surrounding environment if a stay were not granted than the Approval Holder would suffer if the stay were granted pending a decision of the Board.

[59] The Appellant argued that if a stay were granted, the Approval Holder would only face a temporary delay in undertaking the Activity. However, if a stay were not granted, the Appellant argued the Activity would place the Appellant at risk of damage to its property and irrigation operations due to inadequate controls over siltation and erosion and the potential of contamination of stormwater discharging into Payne Lake.

[60] The Appellant submitted it is in the public interest that issues raised in the appeal be determined before permanent, irreversible changes are made that could potentially affect natural wetlands, Payne Lake, and the irrigation canals and infrastructure. The Appellant further argued the public interest warranted a stay because the Approval Holder had previously failed to comply with other *Water Act* approvals, including the failure install Armtec valves at the culverts under Range Road 281 as specified in a 2018 approval issued by EPA.

[61] The Appellant asserted the overall public interest warranted the granting of a stay because Payne Lake is the source of water for irrigation of agricultural properties in eight irrigation districts downstream of Payne Lake and is a scarce resource that should be protected. The

Appellant argued the Board should recognize the environmental importance of the area around Payne Lake and grant the stay, as the impacts of the Approval need to be properly assessed.

[62] The Appellant submitted all three elements of the *RJR-MacDonald* test were met and the Board should stay the Approval.

5.2.1.2. Approval Holder

[63] The Approval Holder submitted there were no serious concerns to be heard by the Board because the Approval complied with legislation and policy, had been reviewed by experts and EPA, and was consistent with other approvals within the province.

[64] The Approval Holder argued that many of the Appellant's submissions were not appropriately before the Board because they did not relate to the Approval or the Activity, or they were addressed by the Additional Materials.

[65] The Approval Holder submitted the Appellant did not suffer harm because of the decision of the Director to issue the Approval or the Activity as:

1. the rate of flow of stormwater from the Development would decrease post-development as required by the *Water Act* which also improved water flow through the culverts under Range Road 281;
2. the wetlands on the Development site would not be affected because stormwater would be diverted around the wetlands;
3. the Development Permit required the Approval Holder to monitor for invasive species;
4. the Approval Holder monitors runoff, and would adhere to the siltation and erosion plan required under the Approval and legislation;
5. the Director did not rely on incomplete information because the data used represented more intense storm conditions than local data from Payne Lake, and the modelling was accepted by EPA;
6. construction activities had been undertaken in the winter season so that concerns around a 1 in 100-year flood were remote;
7. the impact of the Activity downstream from Payne Lake was remote due to the lack of proximity; and
8. the Appellant's statement of concern was addressed by the Approval and any items not addressed by the Approval were outside the scope of the appeal.

[66] The Approval Holder submitted the public interest did not warrant the issuance of a stay because the goal of the Appellant was to delay or stop the Development from being completed, which was an abuse of the appeal process by the Appellant and unfairly impacts small business. The Approval Holder noted the Appellant was unsuccessful in having its appeal of the Development Permit heard by the Alberta Court of Appeal, and that completion of the Development would help fund the paving of the access road to Payne Lake.

[67] The Approval Holder argued that the Board should not issue the stay as the Appellant did not provide sufficient evidence to satisfy the test in *RJR-MacDonald*, and any potential harm to the Appellant arising because of the Activity was mitigated by the terms of the Approval.

5.2.1.3. Appellant's Rebuttal

[68] The Appellant submitted the Approval Holder had commenced and was expediting the construction to complete as much irreversible work as possible before the appeal could be heard. The Appellant submitted the concern is not that a 1 in 100-year storm would occur in the winter months, but that there was a potential for damage to Payne Lake due to heavy rains in the spring if the stormwater management plan does not work as expected.

[69] The Appellant submitted the Additional Materials did not address the issues raised by the Appellant because it did not address the use of inappropriate data and modelling or the reliance of the Director on incomplete engineering plans and reporting or the failure of the Approval Holder to complete a siltation and erosion plan prior to the commencement of construction.

[70] The Appellant submitted the Board did not lose its jurisdiction to hear an appeal because of the assertion that someone else or some other forum had issued approvals in respect of the Development. The Appellant submitted it was the purpose of the hearing process to allow the parties to challenge expert opinion and to file and examine evidence before the Board. The Appellant argued that the Board must look at what is stated in the expert report provided by the Approval Holder and not rely exclusively on the expertise of the author and approval of the report by EPA.

[71] The Appellant submitted the public interest favours a stay and the Board should consider the impact of the Activity, not whether the Approval Holder is a small business, noting that the Appellant is also a small business.

[72] The Appellant submitted the stay should remain in place until the resolution of the hearing.

5.2.2. Analysis and Findings

[73] The Board has the authority to grant a stay under section 97 of EPEA:

- “(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.”

[74] As noted previously, the Board’s test for a stay is adapted from the Supreme Court of Canada decision in *RJR-MacDonald*:

“First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.”¹³

[75] The onus is on the Appellant to establish the stay test is met on the balance of probabilities.¹⁴

[76] The first step of the test requires the Appellant to show there is a serious issue to be tried. At this step of the test, the Court, and the Board, usually undertakes “an extremely limited review of the case on the merits.”¹⁵

[77] As stated by the Alberta Court of King’s Bench in *Cleanit Greenit*, “[t]his factor is generally a threshold to be satisfied, rather than an attempt to measure the strength of the

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

¹⁴ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 30.

¹⁵ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 47.

applicant's underlying claim.”¹⁶ The Appellant must demonstrate through the evidence submitted there is some basis on which to present an argument. As not all 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.”¹⁷

[78] The Appellant raised concerns the Activity could potentially harm the Appellant's ability to access its property located on Payne Lake and use water sourced from Payne Lake for irrigation. There are conflicting arguments from the Appellant and the Approval Holder that the Approval contained terms and conditions that sufficiently address the potential risk of harm to water quality and reservoir capacity or that the concerns raised by the Appellant were addressed in other permits or approvals issued in respect of the Development. However, at this stage, it is sufficient that the Appellant has shown a basis for its argument as required by the first part of the *RJR-MacDonald* test applied by the Board. In the Board's view, the concerns raised by the Appellant directly relate to the Approval and they are serious in nature.

[79] The second step in the test requires the Board to decide whether the applicant seeking the stay would suffer irreparable harm if the stay was not granted. Irreparable harm is harm that cannot be quantified in monetary terms or harm that cannot be cured, usually because one party cannot collect damages from the other. As stated in *Cleanit Greenit*, citing *RJR-MacDonald*, the Court examines “whether a refusal to grant relief could so adversely affect the applicant's own interests that harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.”¹⁸

[80] It is the nature of the harm that is considered at this step, not its magnitude. The magnitude or extent of the harm is considered in the third step of the test when weighing the balance of convenience.¹⁹ As well, the harm cannot be hypothetical or merely possible. As stated

¹⁶ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 47.

¹⁷ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at paragraph 50.

¹⁸ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 98, citing *RJR MacDonald* at paragraph 30.

¹⁹ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 99. See also *Alberta (Director of Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks) v. Syncrude Canada Ltd*, 2023 ABKB 447, at paragraph 52.

by the Court in its decision in *Alberta (Director of Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks) v. Syncrude Canada Ltd.*, 2023 ABKB 447 (“*Syncrude*”): “Harm that is speculative, hypothetical, or only arguable at best does not qualify as irreparable harm. Administrative inconvenience, without more, is not irreparable harm.”²⁰

[81] Where the actual harm is financial, however, the evidence of irreparable harm must be clear and compelling because the nature of financial harm can be proven by concrete evidence. The evidence must demonstrate, at a convincing level of particularity, that there is a real probability that unavoidable irreparable harm will result unless a stay is granted.²¹

[82] The Appellant submitted that it would suffer irreparable harm if the Activity, which irreversibly alters the drainage of stormwater to Payne Lake, caused contamination and siltation of Payne Lake resulting in damage to irrigation infrastructure and crop.

[83] The Approval Holder submitted the Appellant had not met its onus of showing on the balance of probabilities that the Activity would cause irreparable harm because:

1. any impact of the Activity downstream of Payne Lake would be remote;
2. construction was occurring in the winter months reducing the chance of a 1 in 100-year storm causing siltation; and
3. the Appellant did not provide evidence that the Approval did not comply with all applicable legislation and policy as required by EPA.

[84] The Board finds the Appellant has demonstrated it would suffer irreparable harm if the stay were refused. Although damage to irrigation infrastructure may be quantifiable in monetary terms, long term damage to crop yield because of contamination of irrigation water sourced from Payne Lake would be difficult, if not impossible, to quantify in monetary terms given other factors that impact crop yields, such as weather events or whether other sources of water could be found to replace the volumes of water contaminated or lost. Once the Activity has been undertaken, the drainage pattern from the Development would be irreversibly changed. The Board

²⁰ *Alberta (Director of Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks) v. Syncrude Canada Ltd.*, 2023 ABKB 447, at paragraph 53.

²¹ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 100.

notes that although the Approval Holder told the Board in November 2023, it had begun work at the Development site, the Approval Holder did not provide evidence that it had developed an erosion and siltation control plan as contemplated by the Approval. Based on the foregoing, the Board finds the second step of the *RJR-MacDonald* test has been met.

[85] The third step in the test is the balance of convenience, which is determined by asking, “...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”²² This requires the weighing of 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,²³ third parties who may suffer damage,²⁴ or if the reputation and goodwill of a party will be affected.²⁵

[86] 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.”²⁶

[87] The Appellant argued that the balance of convenience favoured the Appellant as the Activity would permanently change the drainage pattern from the Development which could adversely affect Payne Lake. However, the Approval Holder would only suffer a delay in starting construction. The Appellant submitted the overall public interest warranted the granting of a stay as Payne Lake was established as a reservoir to manage irrigation waters for eight irrigation districts, that the Payne Lake area is scarce resource that should be protected, and that the impact of Development on the environment need properly be assessed.

[88] The Approval Holder submitted that risks alleged by the Appellant were addressed or mitigated by the Approval, or legislation, or addressed by the Development Permit. The

²² *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

²³ *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

²⁴ *Cleanit Greenit Composting System Inc v. Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 102. See also *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

²⁵ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

²⁶ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at paragraph 66.

Approval Holder argued the public interest does not warrant the issuance of a stay because it was an abuse of the appeal process to attempt to delay the construction of the Development, and that the access road to Payne Lake would be paved because of the Development, which would benefit the public.

[89] The Board finds the balance of convenience favours the Appellant because the Activity would result in the permanent alteration of stormwater drainage from the Development which could not be reversed if the Appellant were successful at appeal. It is the Board's view that the Appellant would suffer greater harm if the stay were not granted than the Approval Holder would suffer if a stay were granted delaying commencement of the Activity pending resolution of the appeal.

[90] The Board finds that the overall public interest warrants a stay as the purpose for which the Payne Lake was established was as a reservoir for the management of irrigation waters and water is a scarce resource in southern Alberta.

[91] The Board notes the Activity services the Development which is a private project by the Approval Holder to be used primarily by customers of the Approval Holder, not the public in general. The granting of a stay of the Activity will not affect the general use of Payne Lake by the public as it does not impact its use as a recreational lake available to all Albertans.

6. DECISION

[92] On the application by the Appellant for a stay of the Approval, the Board finds:

1. The Appellant is directly affected by the Approval; and
2. The Appellant has met the Board's test for a stay. The Board finds the Appellant has raised a serious issue, would suffer irreparable harm if a stay was not granted, the balance of convenience favours the Appellant, and the overall public interest warrants a stay.

[93] The Board grants a stay of *Water Act* Approval No. DAUT0013709. The stay will remain in effect until the appeal is resolved unless otherwise ordered by the Board or the Minister.

Dated on January 25, 2024, at Edmonton, Alberta.

“original signed by”
Barbara Johnston
Board Chair