ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 6, 2024

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

-and-

IN THE MATTER OF an appeal filed by the Bighill Creek Preservation Society with respect to the decision of the Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas, to issue *Water Act* Approval No. DAUT0012841 to the Mountain Ash Limited Partnership.

Cite as: Stay Decision: *Bighill Creek Preservation Society* v. *Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas*, re: *Mountain Ash Limited Partnership* (6 March 2024), Appeal No. 23-046-ID1 (AEAB), 2024 ABEAB 9.

BEFORE: Mr. Chris Powter, Acting Board Chair.[*]

PARTIES:

Appellant:	Bighill Creek Preservation Society, represented by Mr. Shaun Fluker, Public Interest Law Clinic, University of Calgary.
Approval Holder:	Mountain Ash Limited Partnership, represented by Ms. Shauna Finlay and Ms. Emma Banfield, Reynolds Mirth Richards & Farmer LLP.
Director:	Mr. Craig Knaus, Regulatory Assurance Division South, Alberta Environment and Protected Areas, represented by Ms. Shannon Keehn and Ms. Nicole Hartman, Alberta Justice.

[*] Mr. Chris Powter was the Acting Board Chair at the time this decision was made.

EXECUTIVE SUMMARY

Alberta Environment and Protected Areas issued Approval No. DAUT0012841 under the *Water Act* to Mountain Ash Limited Partnership (Approval Holder), for the purposes of aggregate extraction at NW-31-026-03-W5M and SW-31-026-03-W5M, in Rocky View County (the Approval). Multiple individuals and two organizations, the Bighill Creek Preservation Society (Appellant) and Alberta Wilderness Association, appealed the Approval over the course of several days from July 26 to August 11, 2023. The Society requested, among other things, a stay of the Approval pending resolution of the appeals.

The Board requested and received submissions on the directly affected status of the Appellant from the Appellant, the Approval Holder, and the Director (collectively, the Parties) and the Appellant's request for a stay from the Parties.

The Board requested and received submissions on the Appellant's request for a stay from the Parties, specifically on the following:

1. Is the Appellant directly affected by the Director's decision to issue the Approval?
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 the stay, pending a decision of the Board?
5. Would the overall public interest warrant a stay?

Having reviewed the submissions of the Parties, the Board decided that the Appellant was directly affected by the Approval and therefore has standing.

Having reviewed the submissions of the Parties, the Board decided it was just and equitable to deny the application for a stay of the Approval.

TABLE OF CONTENTS

1. INTRODUCTION

[1] This is the Environmental Appeals Board's (the "Board") decision regarding the Bighill Creek Preservation Society's (the "Appellant") application for a stay of the decision of the Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas (the "Director"), to issue *Water Act* Approval No. DAUT0012841 (the "Approval") to Mountain Ash Limited Partnership (the "Approval Holder") for the purposes of gravel extraction at NW-31-026-03-W5M and SW-31-026-03-W5M, in Rocky View County, Alberta (the "Approval").

[2] The Board requested submissions from the Appellant, the Director and Approval Holder (collectively, the "Parties") regarding whether the Appellant is directly affected by the Approval. The Board requested additional submissions from the Parties regarding the Appellant's stay application.

[3] The Board has reviewed the written submissions received from the Parties and has determined the Appellant is directly affected and has standing.

[4] The Board has reviewed the written submissions received from the Parties and has decided to not to issue a stay.

[5] The Board's reasons for both decisions are provided below.

2. BACKGROUND

2.1. The Project

[6] The Approval Holder is registered[1] to operate a dry gravel pit (the "Project")[2], at a location northeast of the Town of Cochrane, Alberta, within Rocky View County. The Approval Holder was required to seek approval under the *Water Act*, RSA 2000, c W-3, due to the presence of several wetlands. A Development Approval from Rocky View County was also required.[3]

---

[1] The Approval Holder holds its registration pursuant to the *Activities Designation Regulation*, Alta. Reg. 276/2003 (the "Registration"), and is subject to the requirements in the Code of Practice for Pits, pursuant to section 3.1 of the *Conservation and Reclamation Regulation*, Alta. Reg. 115/1993.

[2] The Board understands that a "dry gravel pit" is one that does not entail excavation into the groundwater.

[3] Approval Holder's Response Submission, October 27, 2023 ("Approval Holder's Response Submission") at paragraph 4.

[7] The Project will be developed in phases and will eventually disturb 208 acres (84 hectares). The Project site lies approximately 1,300 metres upstream of the Big Hill Springs Provincial Park (the "Park") and is located within the surface water catchment of an unnamed watercourse which forms a tributary to the larger Bighill Creek. Bighill Creek (the "Creek") is considered to be of provincial environmental significance based on the presence of the natural springs that feed the perennial creek. No surface water bodies (streams or lakes) were identified within the Project site itself; however, there are two large temporary graminoid marsh wetlands in the northwest corner and several other smaller wetlands mainly classified as Class I ephemeral water bodies that were farmed through. The groundwater in assessment boreholes was between 20 and 24 metres below ground surface and above the bedrock. Gravel extraction will occur to within 1.0 metre of the groundwater surface (i.e. not into the groundwater). The wetlands are perched on the glacial till and are not groundwater fed.[4]

[8] On March 2, 2021, the Approval Holder received approval from Rocky View County Council for its Land Use Amendment Application and Master Site Development Plan.[5]

[9] On July 13, 2021, the Approval Holder received approval from Rocky View County for the Development Permit associated with the Project.[6]

2.2. The Approval and Appeal Process

[10] On July 20, 2023, the Director issued the Approval under the *Water Act* to Approval Holder.

[11] The Approval authorizes:

- placing, constructing, operating, maintaining, removing, disturbing works, in or on any land, water or waterbody;
- maintaining, removing or disturbing ground, vegetation or other material in or on any land, water or water body; and
- altering flow, direction of flow or level of water;

for the purpose of aggregate extraction (collectively the "Activities").[7]

---

4 Approval Holder's Response Submission at Tab B and Tab C.

5 Approval Holder's Response Submission at paragraph 6.

6 Approval Holder's Response Submission at paragraph 6.

7 *Water Act* Approval No. DAUT0012841 at page 1.

[12] On July 26, 2023, the Appellant filed a Notice of Appeal with the Board appealing the Approval. Between July 26 and August 11, 2023, the Board received additional notices of appeals from several persons, including the Alberta Wilderness Association (the "Association"), Keith Koebisch, Tako Koning, and Wendell Koning,[8] also appealing the Director's decision to issue the Approval.

[13] On September 25, 2023, the Appellant requested a stay of the Approval pending resolution of the appeal.

[14] On September 28, 2023, the Board requested submissions from the Parties regarding the directly affected status of the Appellant and its stay application.

[15] On October 12, 2023, the Appellant provided its submission on its directly affected status and its stay application (the "Appellant's Initial Submission"). The submission included a report titled *Mountain Ash Limited Partnership Summit Gravel Pit: Review of hydrogeology, geochemistry, fish and aquatics, and climate change* prepared by Dr. Jon Fennell on behalf of Friends of Big Hill Springs Provincial Park and the Appellant, dated January 2021 (the "Fennell Report").

[16] On October 27, 2023, the Approval Holder provided its response submission. The submission included a report titled *Mountain Ash Limited Partnership Summit Pit Technical Hydrogeologic Comment on Stay Request* prepared by SLR Consulting (Canada) Ltd. ("SLR") dated October 26, 2023 (the "SLR Report").

[17] On October 27, 2023, the Director provided his response submission (the "Director's Response Submission").

[18] On November 8, 2023, the Appellant provided its rebuttal submission (the "Appellant's Rebuttal Submission").

---

[8] Note: On October 3, 2023, the Approval Holder filed a motion with the Board challenging the directly affected status of the Association and Keith Koebisch, Tako Koning, and Wendell Koning. The Board acknowledged the Approval Holder's October 3 letter on October 17, 2023, and set a submission process regarding whether the Association, Wendell Koning, Tako Koning, and Keith Koebisch are directly affected by the Director's decision to issue the Approval. The decision on the Approval Holder's challenge to the standing of these appellants is addressed in a separate decision.

3. ISSUES

[19] The Board received submissions from the Parties on the following questions regarding the stay application:

1. Is the Appellant directly affected by the Director's decision to issue the Approval?
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 the stay, pending a decision of the Board?
5. Would the overall public interest warrant a stay?[9]

[20] During the submissions process the Appellant argued the Director exceeded his jurisdiction in making substantive arguments on the test for "directly affected" and the Board's authority to issue a stay of the Approval under *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("EPEA").[10] The Board acknowledges the Appellant's concerns and notes that the Approval Holder commented on the Director's role. The Board will not be analysing the arguments presented, as the Director's position on this matter did not affect the Board's decision.

[21] Additionally, the Appellant argued against the Board's use of the directly affected test for a group as set out in 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-IDl (AEAB), 2023 ABEAB 9 ("*Jeans-Moline*"). The Board acknowledges the Appellant's concerns, but will not be analysing the Appellant's arguments, as the Board has chosen to not to apply the *Jeans-Moline* test in this appeal.

---

9 See the Board's Letter to the Parties dated September 28, 2023.

10 Appellant's Rebuttal Submission at paragraph 2.

4. IS THE APPELLANT DIRECTLY AFFECTED

[22] The Board in *Jeans-Moline* set out a test to determine the directly affected status of a group. However, the Board in paragraph 85 of *Jeans-Moline* wrote:

> "In this decision, the Board clearly distinguishes associations or organizations that have distinctive personal or private interests separate from their members, such as property rights or other recognized interests. Each association or organization with its own distinctive personal or private interest will be considered in its own right or merit under the EPEA and the *Water Act*."

[23] The Appellant submitted that the *Jeans-Moline* approach defeats the purpose of appeals before the Board, which is to encourage submissions from parties with the capacity, knowledge, funds or other resources to engage on issues which facilitates the Board's role of providing the Minister with its findings and recommendations on an approval or other decision under the *Water Act*. According to the Appellant, it is often only a group such as the Appellant, which can provide the type of engagement that is envisioned by the participatory provisions of EPEA.[11]

[24] The Approval Holder stated the Appellant appears to assert that it has standing in its own right, as opposed to relying on the private interests of its members to ground its standing.[12]

[25] The Board agrees with the Appellant and the Approval Holder that the applicable test for standing in this appeal is that applied in *McMillan et al* v *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp* (31 May 2022), Appeal Nos. 19-066 to 071, 074, 081, and 083-085-ID4 (AEAB), 2022 ABEAB 22 ("*McMillan*") to an individual not that applied in *Jeans-Moline* for a group.[13]

[26] The Director took no position on whether the Appellant is "directly affected" by the Director's decision; however, the Director indicated he was interested in the reasonable

---

11 Appellant's Initial Submission at paragraph 46.

12 Approval Holder's Response Submission at paragraph 26.

13 The Board acknowledges that the Appellant has argued for use of the *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board, 2020 ABCA 456* ("*Normtek*") test rather than *McMillan*. The Board will address this later in the Decision.

applications of the test for determining an appellant's directly affected status and pointed to the Board's previous decisions regarding standing.[14]

[27] The Director noted that section 115(1)(a) of the *Water Act* provides that only persons who previously submitted a statement of concern and who are directly affected by the Director's decision to issue an approval may appeal that decision to the Board. The Appellant submitted a statement of concern to the Director respecting the Approval Holder's *Water Act* approval application on January 26, 2022, and the Director accepted the statement of concern.[15]

4.1. Is There a Personal or Private Interest, Consistent With the Underlying Policies of the Applicable Statutes, Being Asserted by a Person?

4.1.1. Appellant

[28] The Appellant explained that Bighill Creek Preservation Society is an Alberta-based registered society with a mandate to develop a watershed plan for the entire Bighill Creek drainage and to ensure the long-term preservation of the ecological and historical values of the region.[16]

[29] While the society's 100 members are regionally dispersed, its core membership is comprised of local residents. All society directors are volunteers. Two of the directors live next to the Creek. They are the only residents of the valley between the Town of Cochrane and the Park. Three more of the directors live on the escarpment above the Creek. The Franciscan Community at Mount St. Francis Retreat, who own and reside on approximately four hundred acres of land which straddles the Creek, are also members. Three of the members, Harry Hodgson, Morley Kostecky, and Tom Foss live within 1.6 kilometres of the Park.[17]

[30] Big Hill Springs Provincial Park, one of Alberta's original provincial parks, lies at the approximate centre of the Bighill Creek watershed. The Appellant's work is solely dedicated

---

14 Director's Response Submission at paragraphs 5 and 6.

15 Director's Response Submission at paragraphs 11 and 12. See also the Resume Attachment 1 SOC Table, Director's Record at Tab 48.

16 Appellant's Initial Submission at paragraph 2.

17 Appellant's Initial Submission at Appendix A, #4. The Board notes that Mr. Foss and Mr. Kostecky filed separate Notices of Appeal (23-045 and 23-052, respectively).

to advocating for the preservation of the Park's ecological integrity, including the nationally significant thermal springs located at the Park.[18]

[31] The Appellant filed a statement of concern under the *Water Act* in relation to the Approval Holder's application for the Approval, and the statement of concern was accepted by the Director on May 31, 2022.[19]

[32] The Appellant stated that the Approval and the activity authorized by the Approval have an immediate, direct, and unbroken connection to the Park, the thermal springs, the Creek, and the Appellant's work in relation to each of them.[20]

[33] The Appellant stated its concern with the Approval is also very specific and distinct. It is not a generalized concern.[21]

[34] The Appellant submitted that the Approval Holder applies a narrow reading of "directly affected" that was rejected by the Court of Appeal in *Normtek*, by asserting that the Appellant must demonstrate a proprietary or pecuniary interest of its own, or evidence consistent with standing based on the private interests of its members. The Appellant further submitted that these criteria are not set out in the legislation, and the *Normtek* decision directs the Board to avoid this rigid, narrow approach towards determining standing.[22]

4.1.2. Approval Holder

[35] The Approval Holder submitted that the Appellant is a society whose self-appointed mandate is to advocate for the Park and surrounding region. The Approval Holder further submitted that the Appellant is an independent entity and has not advised that it acts in this matter for any particular "members".

[36] The Approval Holder noted that while the Appellant has engaged in advocacy and information sharing activities, it has not detailed any proprietary, pecuniary, or other specific interest that is affected by this appeal. The Approval Holder further argued that the Appellant may

18 Appellant's Initial Submission at paragraph 4.
19 Appellant's Initial Submission at paragraph 6.
20 Appellant's Initial Submission at paragraph 53.
21 Appellant's Initial Submission at paragraph 55.
22 Appellant's Rebuttal Submission at paragraph 15.

be genuine in its interest, but that it has not provided evidence of a specified interest that would qualify it as a directly affected party.[23]

[37] The Approval Holder stated that the Appellant has not provided evidence of the membership of the group, which would enable a determination of how many of the Appellant's members would be directly affected personally, and therefore have standing in their own right.[24]

[38] The Approval Holder submitted that the Appellant has alleged consequences related to the Approval but has failed to show it has an interest consistent with *Normtek*, arguing that the Appellant's submission does not demonstrate a proprietary or pecuniary interest of its own, or provide any evidence consistent with standing based on the private interests of its members.[25]

[39] The Approval Holder stated that the Appellant has not shown that its membership asserts a personal or private interest.[26]

[40] The Approval Holder concluded by arguing that the Appellant has not shown that its interest is grounded in any ownership entitlement or economic impact either of its own or its members, nor that its interest is related to the Approval. As a result, the Appellant does not pass the first element of the test.[27]

4.2. Is there an Adverse Effect to the Identified Interest?

4.2.1. Appellant

[41] The Appellant submitted that the Fennell Report determined the Project would create a real risk of contamination of groundwater from weathering and leaching of chemicals such as arsenic, cadmium, chromium, and selenium. The Fennell Report noted that the Approval Holder's testing indicated presence of those toxins above concentrations listed for the protection of freshwater aquatic life.[28]

---

23 Approval Holder's Response Submission at paragraph 1.
24 Approval Holder's Response Submission at paragraph 42.
25 Approval Holder's Response Submission at paragraph 41.
26 Approval Holder's Response Submission at paragraph 42.
27 Approval Holder's Response Submission at paragraph 44.
28 Appellant's Initial Submission at paragraph 8.

[42] The Appellant stated that the Approval Holder has commenced stripping of soil, extraction of till, and the creation of perimeter berms, and provided the Board with photographs of the activity.[29]

[43] The Appellant argued the Approval Holder's submission incorrectly holds the Appellant to an onus of establishing conclusively that the Approval will adversely impact the Park. The Appellant argued that the law requires the Appellant to establish a reasonable possibility of an adverse impact, and the Appellant submits that the materials and submissions properly before the Board demonstrate that it has met this onus.[30]

4.2.2. Approval Holder

[44] The Approval Holder submitted that the Appellant must show that there is a reasonable possibility of an adverse impact to an identified interest. In particular, the Approval Holder argued that because the Appellant does not have a proprietary or pecuniary interest in the activities related to the Approval it cannot show it will suffer any adverse impacts on that basis.[31]

[45] The Approval Holder submitted that even if it is accepted that some interest the Appellant has proposed is sufficient, there is no evidence that the Approval will have any negative impacts or will result in the alleged harm. The Approval Holder argued the alleged impact must be both reasonable and possible, and that the alleged impacts are not made out on the available science. In this circumstance, the impacts alleged by the Appellant are too remote and speculative to be considered direct.[32]

[46] The Approval Holder further argued that to the extent that the Appellant is interested in the Park, Big Hill Spring, and the Creek, each are located too far away from the Project site for there to be any direct impact.[33]

---

29 Appellant's Initial Submission at paragraph 58.
30 Appellant's Rebuttal Submission at paragraph 17.
31 Approval Holder's Response Submission at paragraph 45.
32 Approval Holder's Response Submission at paragraph 46.
33 Approval Holder's Response Submission at paragraph 50.

4.3. Is the Adverse Effect to the Identified Interest Direct

4.3.1. Appellant

[47] The Appellant stated that it had participated in Rocky View County's planning and regulatory processes impacting the Park and the Creek.[34]

[48] In 2016, the Appellant assumed stewardship of the Rocky View County environmental reserves in the Creek and commissioned several environmental studies in preparation of a comprehensive Watershed Plan for the Creek.[35] Therefore, the Appellant argued, it will be directly affected by any harm to Big Hill Spring, the Park, and the Creek.[36]

4.3.2. Approval Holder

[49] The Approval Holder submitted that the Appellant has not shown that there is a direct adverse interest arising from the Approval that would directly affect an interest of the Appellant's members.[37]

4.4. Board's Analysis

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

> "A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:
>
> > (a) if the Director issues or amends an approval, a notice of appeal may be submitted
> >
> > > (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108,"

[51] Section 115(1)(a)(i) requires that a person filing a Notice of Appeal must be directly affected by the Director's decision. The Board has recently considered the term "directly affected", following the direction of the Court of Appeal in *Normtek*. The Board avoids defining in advance or limiting the circumstances in which an appellant might be found directly affected.

---

34 Appellant's Initial Submission at paragraph 5.

35 Appellant's Initial Submission at paragraph 5.

36 Appellant's Initial Submission at Appendix A, #2.

37 Approval Holder's Response Submission at paragraph 42.

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.[38]

[52] Section 95(5)(a)(ii) of EPEA provides that the Board may dismiss a notice of appeal if:

> "(ii) in the case of a notice of appeal submitted under section … 115(1)(a)(i) … of the *Water Act*, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation…"

[53] Considering the direction of the Alberta Court of Appeal in *Normtek*, the Board, in *McMillan*, set out the following framework to determine the directly affected status of an individual, under section 91(1) of EPEA (the "McMillan Test"). An appellant must meet all three parts of the test:

1. Is there is 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?

[54] In *Bailey et al.* v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation*, 2001 ABEAB 10 ("*Bailey*")[39] the Lake Wabamun Environmental Protection Association ("LWEPA") was one of the appellants against the approval issued to TransAlta Utilities Corporation for the Wabamun Thermal Electric Power Plant. LWEPA alleged that its members were owners and occupants who made use of the lake and had been party to the approval application process with the Director and TransAlta. Upon reviewing LWEPA's membership list, the Board found that most members of LWEPA were probably riparian owners, and at least two LWEPA members were appellants with established standing before the Board.

[55] The Board found that, in essence, LWEPA was created for the express purpose of engaging in the regulatory approval process by the lake resident owners and occupants. Most, if not all, of the members of LWEPA could have filed individual appeals given their proximity to

---

38 *Jeans-Moline* at paragraph 72.

39 *Bailey* at paragraphs 47 to 56.

the lake. The Board concluded that there was sufficient evidence to determine that LWEPA, whose member owners and occupants surround and use the lake, had standing as an appellant.

[56] In *Bailey*, the Board clearly distinguished associations and organizations that have distinctive personal or private interests separate from their members, such as property rights or other recognized interests. Each association or organization with its own distinctive personal or private interest will be considered in its own right or merit under *EPEA*.

[57] The Board notes that the Appellant is similar in nature to LWEPA: (1) it has members living in proximity to the Project; (2) some of its members filed Notices of Appeal in their own right; (3) it was formed with a mandate to develop a watershed plan for the entire Bighill Creek drainage and to ensure the long-term preservation of the ecological and historical values of the region; (4) it has participated in Rocky View County planning and regulatory processes impacting the Park and the Creek; and (5) in 2016 it assumed stewardship of the Rocky View County environmental reserves in the Creek. Consequently, the Board considers the Appellant to be an individual rather than a group as defined in *Jeans-Moline*, and will apply the McMillan Test to determine the directly affected status of the Appellant.

[58] Each part of the McMillan Test is discussed below.

4.4.1. Is there a Personal or Private Interest, Consistent with the Underlying Policies of the Applicable Statutes, Being Asserted by a Person?

[59] The Appellant explained that its core membership consists of local residents, some of whom live near the Park or the Creek and are therefore directly affected by the Approval. The Appellant's interest stems from its mandate to develop a watershed plan for the entire Creek drainage and to ensure the long-term preservation of the ecological and historical values of the region.

[60] The Appellant stated that the Approval and the activity authorized by the Approval have an immediate, direct, and unbroken connection to the Park, the thermal springs, the Creek, and the Appellant's work in relation to each of them.

[61] The Approval Holder argued that while the Appellant has engaged in advocacy and information sharing activities, it has not detailed any proprietary, pecuniary, or other specific

interest that is affected by this appeal. While it may be genuine in its interest, it has not provided evidence of a specified interest that would qualify it as a directly affected party.

[62] The Approval Holder concluded that the Appellant has not shown that its interest is grounded in any ownership entitlement or economic impact either of its own or its members, nor that its interest is related to the Approval.

[63] The Appellant submitted that the Approval Holder applies a narrow reading of directly affected that was rejected by the Court of Appeal in *Normtek*, by asserting that the Appellant must demonstrate a proprietary or pecuniary interest of its own, or evidence consistent with standing based on the private interests of its members.

[64] Having reviewed the submissions, the Board finds that the Appellant has shown that it has a relevant interest that may be affected by the Approval, specifically with regard to potential impacts to the Park.

[65] Therefore, the Board finds the Appellant has met the first part of the test.

4.4.2. Is there an Adverse Effect to the Identified Interest?

[66] The Appellant submitted that the Fennell Report determined the Project would create a real risk of contamination of groundwater (i.e. an adverse effect).

[67] The Approval Holder drew the Board's attention to paragraph 53 of *Bogdan* v. *Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks,* re: *Trenchuk*, 2022 ABEAB 10, where the Board wrote:

> "In *Normtek*, the Court of Appeal noted the appellant has the onus to establish they will be directly affected by the Director's decision. When an appellant's standing is challenged, their onus is not to prove conclusively they are directly affected, but to establish a *reasonable possibility* they will be directly affected by the Director's decision. The effect must be *reasonable and possible*. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find a person directly affected." (*Emphasis* added by the Approval Holder.)

[68] The Approval Holder submitted that there is no evidence that the Approval will have any negative impacts or will result in the alleged harm. The alleged impacts are not made out on the available science. The alleged impact must be both reasonable and possible. In this

circumstance, the impacts alleged by the Appellant are too remote and speculative to be considered direct.

[69] The Appellant disagreed, stating that the Approval Holder's submissions incorrectly hold the Appellant to an onus of establishing conclusively that the Approval will adversely impact the Park. The Appellant argued the law instead requires the Appellant to establish a reasonable possibility of an adverse impact, and the Appellant submitted that its materials and submissions demonstrate that it has met this onus. In support of this argument, the Appellant paraphrased *Normtek* at paragraph 141:

> "The onus on a prospective appellant is only to establish a reasonable possibility that it will be directly affected by the Director's decision or the activity approved; a prospective appellant does not bear the onus of establishing conclusively that it is or may be directly affected."

[70] The Board notes that the Fennell Report alleges the potential for aquifer contamination, and the Approval Holder's counterview that the science does not support this claim. The Board also notes the Appellant's photographs that show construction activities appear to have begun at the Project. If development had not started, the Board may have been less inclined to believe the potential harm could arise in the timeframe required to hear the appeal. However, as the Fennell Report suggests the overburden at the site is an important factor in protecting the aquifer the Board is inclined to take a more precautionary view.

[71] The Board finds that the Appellant has shown there is a reasonable possibility that the Approval and its associated activities may cause harm to the groundwater and therefore the Appellant's interest in the Park. In making its finding, the Board is relying on prima facie evidence; this evidence will be further tested through examination and cross-examination at the hearing of the appeals.

[72] Therefore, the Board finds that the Appellant has met the second part of the test.

4.4.3. Is the Adverse Effect to the Identified Interest Direct

[73] The Appellant assumed stewardship of the Rocky View County environmental reserves in the Bighill Creek and commissioned several environmental studies in preparation of a

comprehensive Watershed Plan for Bighill Creek.[40] According to the Appellant, they will be directly affected by any harm to Big Hill Spring, Big Hill Springs Provincial Park, and Bighill Creek.

[74] The Approval Holder submitted that the Appellant has not shown that there is a direct adverse interest arising from the Approval that would directly affect an interest of its membership.

[75] The Board notes that there were few submissions specifically on this part of the test but is persuaded that the interests of the Appellant in the Park and its associated aquifer, and the potential for contamination alleged in the Fennell Report, provide a direct link between their interest and the potential adverse effect.

[76] Therefore, the Board finds Appellant has met the third part of the test.

4.4.4. Directly Affected

[77] In summary, the Board finds that the Appellant has met all three of the directly affected tests as set out in *McMillan*, is directly affected, and has standing in the appeal.

5. APPELLANT'S STAY REQUEST

[78] The Appellant seeks a stay of the Approval to ensure no irreversible damage to the Park, the thermal springs, or the Creek watershed, occurs before the impacts of mining to the groundwater, and the assessment of same by the Director, are fully assessed and considered in a hearing before the Board.[41]

[79] The Approval Holder submitted that the Appellant does not meet the test for standing and as a result, it has no standing to request a stay and its request should therefore be denied. The Approval Holder further argued that even if the Appellant is found to have standing, the Appellant's request for a stay should be denied because it relies upon: (1) insufficient evidence to establish a reasonable probability of adverse effects; and (2) non-appealable issues.

[80] The Approval Holder agreed with the Appellant that the Board has the authority to stay the Approval, although not the Registration for the Project, pursuant to section 97(2) of

40 Appellant's Initial Submission at paragraph 5.

41 Appellant's Initial Submission at paragraph 59.

EPEA.[42] The Approval Holder further agreed with the Appellant that the test for a stay pending appeal is laid out in *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-Macdonald*").[43]

[81] The Director took no position on the Appellant's stay application; however, the Director indicated he was interested in the reasonable applications of the test for determining the test for a stay and pointed to the Board's previous decisions regarding stays.[44]

5.1. What are the Serious Concerns Raised by the Appellant that Should be Heard by the Board?

5.1.1. Appellant

[82] The Appellant submitted that the issues it raised in its Notice of Appeal are not frivolous or vexatious.[45]

[83] The Appellant stated that the Approval Holder has commenced stripping of soil, extraction of till, and the creation of perimeter berms, and provided the Board with photographs of the activity.[46]

[84] The Appellant submitted that the Approval allows for the construction and operation of a pit[47] located on 323 acres of land overlying the aquifer which creates the nationally significant thermal springs in the Park and sustains the Creek. The pit constitutes a material risk to the region's groundwater resources and as a result, to the thermal springs, the Park, and the Creek.[48]

[85] The Park's ecology was created and is sustained by the thermal springs that come from an aquifer extending approximately 30 square kilometres to the north and west. The Approval Holder's pit site is located on the aquifer approximately 800 metres from the Park

---

42 Approval Holder's Response Submission at paragraph 37.

43 Approval Holder's Response Submission at paragraph 38.

44 Director's Response Submission at paragraphs 5 and 6.

45 Appellant's Initial Submission at paragraph 68.

46 Appellant's Initial Submission at paragraph 58.

47 The Board notes that the Appellant used the term "mine" to describe the Mountain Ash development, but the correct regulatory term is a pit (the definition of a mine is found in EPEA section 1(kk), and the definition of a pit in EPEA section 1(xx)).

48 Appellant's Initial Submission at paragraph 64.

boundary and the springs in the Park. The aquifer's water nourishes the Park and provides about half of the flow into the Creek. Between the Park and the Town of Cochrane, some five miles, the Creek flows through a deeply incised valley of extensive and healthy wetlands and riparian zones.[49]

[86] The Approval makes no substantial reference to impacts on groundwater or the aquifer. The Appellant was provided with assurances by the Director that Environment and Protected Areas ("EPA") would consider groundwater impacts. Correspondence with the Director in this regard is included as an attachment to the Appellant's Notice of Appeal filed with the Board.[50]

5.1.2. Approval Holder

[87] The Approval Holder agreed that the threshold is low in the first stage of the test, but argued that it is not so low that a decision maker should decline to consider it entirely.[51] In assessing the first part of the stay test, the Board is entitled to consider the issues raised on appeal, the reasonableness of the affects alleged (i.e. are they too remote or speculative), and whether they are within the jurisdiction of the Board.[52]

[88] The Approval Holder submitted that the Appellant's concerns are not reasonable. The Approval Holder further submitted these concerns are fully addressed in the SLR Report and that the attachments authored by SLR address the concerns raised in the Fennell Report.[53]

[89] The Approval Holder stated that a central question for the Board to consider is whether the Board has jurisdiction to consider all of the issues raised by the Appellant in this appeal. Specifically, the Approval Holder argued only the elements of the appeal related to the Approval are possible areas for the Board's consideration, and that the Registration for the pit is not open to the Board's consideration.[54]

---

49 Appellant's Initial Submission at paragraph 66.
50 Appellant's Initial Submission at paragraph 67.
51 Approval Holder's Submission at paragraph 55.
52 Approval Holder's Submission at paragraph 56.
53 Approval Holder's Submission at paragraph 57.
54 Approval Holder's Submission at paragraph 58.

[90] The Approval addresses how the Project can interact with the wetlands on the site, and provides permission for certain activities to commence, continue, or discontinue in relation to the wetlands within the Project area, as defined in the Approval as "the Activity." The Approval does not address any aspects of the Registration, or proposed activities under the Registration, because there is no need: The Project is a dry pit and involves no excavation below or at the groundwater table.[55]

[91] The Approval Holder questioned whether the issues identified by the Appellant and in the Fennell Report have any relationship to the Approval, given their focus on operational aspects of the Project. The Approval Holder argued that to the extent any issues raised are connected with anything other than the Approval, they are outside the jurisdiction of the Board. The Appellant argued that the Approval does not reference impacts on groundwater or the aquifer. However, the Approval specifically directs the Approval Holder to prepare a written report to monitor groundwater.[56],[57]

[92] The Approval Holder submitted that the Appellant did not raise issues that are connected to the Approval or sufficiently likely to meet the threshold for the first element of the test.[58]

5.2. Would the Appellant Suffer Irreparable Harm if the Stay is Refused?

5.2.1. Appellant

[93] The Appellant submitted the Approval Holder's mining activities represent a material and permanent risk of irreparable harm to the region's groundwater resources and as a result, to the thermal springs, Park, the Creek, and related wetlands, fish and riparian habitats. These are harms which cannot be mitigated or reversed, if the Approval is subsequently varied or rescinded.[59]

---

55 Approval Holder's Submission at paragraphs 63 and 64.

56 Approval Holder's Submission at paragraphs 66 and 67.

57 Condition 5830 of the Approval provides:
"The Approval Holder shall:
(a) implement the Water Monitoring Program as described in DAPP0001717-R002 Appendix H."

58 Approval Holder's Submission at paragraph 69.

59 Appellant's Initial Submission at paragraph 74.

5.2.2. Approval Holder

[94] The Approval Holder submitted that the Fennell Report alleges several harms, including: contamination risk; cumulative effects; reduced filtering mechanism; inadequate remediation proposal; and harm to groundwater. The Approval Holder argued that the science as outlined in the Fennell Report does not support these allegations and these harms had already been considered by the Director in granting the Approval.[60]

[95] The Approval Holder stated that the SLR Report, prepared in response to the Appellant's Statements of Concern, found no measurable effects on hydrogeology at Big Hill Springs will occur, and therefore no irreparable harm to the Appellant will occur. Any harm alleged is too speculative and should be given little weight.[61]

5.3. Would the Appellant Suffer Greater Harm if the Stay was Refused than the Approval Holder Would Suffer if the Board Granted the Stay, Pending a Decision of the Board?

5.3.1. Appellant

[96] The Appellant submits the balance of convenience favours a stay of the Approval until the Board decides this appeal.[62]

5.3.2. Approval Holder

[97] The Approval Holder submitted that the harms alleged by the Appellant are speculative, and are not immediate risks that could arise upon commencement of the activities under the Approval. The Approval Holder cited, as an example, the question of leaching into groundwater, although unsupportable based on the chemical composition of the materials at issue, and unconnected to the Approval, would in any event not occur during the preparation and initial operation of the Project. This risk could not occur until several years down the line, and well into the excavation and operation of the Project. As a result, this and the other alleged harms are too remote to warrant halting the Project entirely.[63]

---

60 Approval Holder's Submission at paragraph 71.

61 Approval Holder's Submission at paragraphs 72 and 73.

62 Appellant's Initial Submission at paragraph 76.

63 Approval Holder's Submission at paragraph 94.

[98] The Approval Holder stated that it is not reasonable to put the economic burden of a stay on the proponent of an activity without establishing a sound scientific basis for the evidence of the harm alleged. The balance of convenience favours refusing the stay request.[64]

5.4. Would the Overall Public Interest Warrant a Stay?

5.4.1. Appellant

[99] The Appellant submitted that a consideration of the public interest favours a stay of the Approval until the Board decides this appeal.[65]

[100] The Appellant stated that Alberta government officials responsible for provincial parks have also expressed concern about the impact of the Approval Holder's mining on the Park. In a letter submitted to Rocky View County on February 17, 2021, Alberta Environment and Parks specifically referenced the concerns raised in the Fennell Report and observed that the Approval Holder's impact assessment failed to fully assess impacts of the pit to groundwater quality and exposure to contaminants[66]. The Appellant submitted this is very strong evidence that the public interest requires a stay of the Approval until this appeal is heard and the impacts of mining to the groundwater, and the assessment of same by the Director in issuing the Approval, are fully assessed and considered in a hearing before the Board.[67]

[101] The Appellant submitted any delay of the Approval Holder's Project resultant from the appeal process will have no material impact on gravel supplies to the Calgary region. The more than 20 operating mines in Rocky View County, plus those mines in surrounding municipal districts, are fully capable of supplying the demand, especially during the winter as construction activity and gravel demand decline.[68]

[102] The lands on which mining is currently underway have been held by Mr. Bruce Waterman, the principal of the Approval Holder since at least 2008 and accordingly there is no

---

64 Approval Holder's Submission at paragraphs 96 and 97.

65 Appellant's Initial Submission at paragraph 76.

66 At the time the letter was written Parks was part of Alberta Environment and Parks, however Parks is now part of Alberta Forestry and Parks, and Alberta Environment and Parks has been renamed Alberta Environment and Protected Areas.

67 Appellant's Initial Submission at paragraph 81.

68 Appellant's Initial Submission at paragraph 82.

apparent need to commence activities under the Approval before this appeal is heard by the Board.[69]

[103] The Appellant also noted that Rocky View County has commenced a review of its draft Aggregate Resource Plan intended to establish more comprehensive guidelines to the development of gravel resources throughout the county. This review is scheduled for completion early in 2024 and the outcome may impact the Project.[70]

5.4.2. Approval Holder

[104] The Approval Holder submitted that the public interest is served by ensuring the determination of whether to grant a stay is based on reliable science and due process. The public interest is not served when a project can be put on hold simply by the allegation of potential harms, without reliable science to support the contention. The Approval Holder argued in this case, the harms proposed by the Appellant are speculative, the science presented by the Appellant is insufficient, and that even if the alleged harms are accepted, the proposed consequences would not occur until some unspecified but remote time in the future.[71]

[105] The Approval Holder submitted that after considering the available scientific information on the nature and type of harm alleged, the likelihood of it occurring, and the stage of operation of the Project in proximity to the alleged harm, it is reasonable to conclude that the overall public interest does not warrant a stay.[72]

5.5. Board's Analysis

[106] The fundamental question before the Board in a stay application is whether granting the stay would be just and equitable in all the circumstances.[73]

[107] The Board's the authority to grant a stay is found in section 97 of EPEA, which provides in part:

---

69 Appellant's Initial Submission at paragraph 82.

70 Appellant's Initial Submission at paragraph 83.

71 Approval Holder's Submission at paragraphs 98, 99, and 101.

72 Approval Holder's Submission at paragraph 102.

73 *Cleanit Greenit Composting System Inc* v. *Director* (*Alberta Environment and Parks*), 2022 ABQB 582 ("*Cleanit Greenit*") at paragraph 33.

> "(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."

[108] Granting a stay is an extraordinary remedy. To guide the Board in exercising its discretion, the Board has adapted its test for a stay from the Supreme Court of Canada case of *RJR-MacDonald* [74] as stated in previous decisions.[75] The steps in the test, as set out by the Court 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."[76]

[109] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant must demonstrate through the evidence submitted that there is some basis for presenting an argument. Often when a stay application is made, the Board does not have all the evidence before it, therefore, "…a prolonged examination of the merits is generally neither necessary nor desirable."[77]

[110] The second step of the test requires the Board to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to

---

74 In *RJR-MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the courts have stated the application for a stay should be assessed using the same three steps. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 SCR 110 at paragraph 30 and *RJR-MacDonald* at paragraph 41.

75 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 (AEAB), 2021 ABEAB 34; *Przybylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection, re: Cool Spring Farms Dairy Ltd.* (6 June 1997), Appeal No. 96-070 (AEAB), 1997 ABEAB 10; *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 (AEAB), 1998 ABEAB 16; 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 (AEAB), 2005 ABEAB 6.

76 *RJR-MacDonald* at paragraph 43.

77 *RJR-MacDonald* at paragraph 50.

the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other.

[111] Irreparable harm was defined by the Alberta Court of Appeal in *Ominayak* v. *Norcen Energy Resources*, 1985 ABCA 12 ("*Ominayak*"):

> "[b]y irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."[78]

[112] 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 speculation. Damages that third parties suffer can also be considered.[79]

[113] The third step in the test is the balance of convenience. Here the Board must determine which of the parties will suffer the greater harm from the granting or refusal of a stay pending a decision on the merits."[80] The Board is required to weigh the burden the stay would impose on the Approval Holder against the benefit the Appellant would receive. This weighing is not strictly a cost-benefit analysis but, rather, a consideration of significant factors, such as the cumulative effect of granting a stay,[81] third parties who may suffer damage, [82] or the reputation and goodwill of a party will be affected.[83]

[114] In the third stage of the test, any alleged harm to the public is to be assessed. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."[84] 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 Stay Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region,*

---

78 *Ominayak* at paragraph 31, citing *The Law of Injunctions*, 4th edition, volume 1, at page 34.

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

80 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 SCR 110 at paragraph 36.

81 *MacMillan Bloedel* v. *Mullin*, [1985] BCJ No. 2355 (C.A.) at paragraph 121.

82 *Edmonton Northlands* at paragraph 78.

83 *Edmonton Northlands* at paragraph 79.

84 *RJR MacDonald* at paragraph 66.

Operations Division, Alberta Environment (8 July 2011), Appeal Nos. 10-034 & 11-002-ID1 (AEAB), 2011 ABEAB 21 ("*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."[85]

[115] In most cases, if all the steps of the test in *RJR-MacDonald* are not met a stay will not be granted. In all cases, however, as previously noted, the fundamental question before the Board remains whether the granting of a stay is just and equitable in the circumstances.[86] As stated by Justice Feth in the Alberta Court of Kings Bench decision in *Cleanit Greenit*, "[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." [87]

[116] Further, Justice Feth, found that "The three stages are not airtight compartments. To some extent, strength in one part of the analysis can compensate for weakness in another, especially the second and third branches which are 'inexorably linked and should be considered together'".[88] Together, all these factors guide the Board's exercise of discretion.

[117] 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.[89]

[118] Each part of the *RJR-MacDonald* test is discussed below.

5.5.1. What are the Serious Concerns Raised by the Appellant that Should be Heard by the Board?

[119] The first step of the test requires the Appellant to show there is a serious issue to be heard. The Appellant must be able to demonstrate there is some basis on which an argument can be presented. As noted, the evidence does not need to be complete at this preliminary stage.

---

85 *Gas Plus* at paragraph 65.
86 *Cleanit Greenit* at paragraph 47.
87 *Cleanit Greenit* at paragraph 33.
88 *Cleanit Greenit* at paragraph 32.
89 *Cleanit Greenit* at paragraph 30.

[120] The Appellant submitted that the pit constitutes a material risk to the region's groundwater resources and as a result, to the thermal springs, the Park, and the Creek. The Appellant noted the Project site is located on the aquifer approximately 800 metres from the Park boundary and the springs in the Park. The aquifer's water nourishes the Park and provides about half the flow into the Creek.

[121] The Appellant also submitted that the Approval makes no substantial reference to impacts on groundwater or the aquifer.

[122] The Approval Holder agreed that the threshold is low in the first stage of the test; however, the Approval Holder argued that it is not so low that a decision maker should decline to consider it entirely. The Approval Holder submitted that the concerns raised by Appellant are not reasonable.

[123] The Approval Holder noted that the Project is a dry pit and involves no excavation below or at the groundwater table and submitted that the Appellant did not raise issues that are connected to the Approval or sufficiently likely to meet the threshold for the first element of the test. However, the Approval Holder also mentioned that the Approval specifically directs the Approval Holder to prepare a written report to monitor groundwater.

[124] The Board finds that the Appellant has raised a serious concern, specifically that there is a risk of groundwater contamination occurring that could affect the springs and the Park. The Board acknowledges that the Approval Holder has challenged the groundwater contamination conclusions in the Fennell Report; these are points that can be explored further in the merits hearing.

[125] The Board is of the view that the Appellant has met the low bar for the first test.

5.5.2. Would the Appellant Suffer Irreparable Harm if the Stay is Refused?

[126] The Appellant submitted the Approval Holder's mining activities represent a material and permanent risk of irreparable harm to the region's groundwater resources and as a result, to the thermal springs, the Park, the Creek, and related wetlands, fish and riparian habitats. These are harms which cannot be mitigated or reversed, if the Approval is subsequently varied or rescinded.

[127] The Approval Holder submitted that the Fennell Report alleges several harms, including: contamination risk; cumulative effects; reduced filtering mechanism; inadequate remediation proposal; and harm to groundwater. The Approval Holder argued that the science as outlined in the Fennell Report does not support the alleged harms, and that these harms have already been considered by the Director in granting the Approval. The SLR Report, prepared in response to the Appellants' Statements of Concern, found no measurable effects on hydrogeology at Big Hill Springs will occur, and therefore no irreparable harm to the Appellant will occur. Any harm alleged is too speculative and should be given little weight.

[128] Given the interests of the Appellant in preserving the ecological integrity of the Park and Bighill springs, the Board is persuaded that the Appellant's interest would suffer irreparable harm if the groundwater contamination risk identified in the Fennell Report were to occur.

5.5.3. Would the Appellant Suffer Greater Harm if the Stay was Refused than the Approval Holder Would Suffer if the Board Granted the Stay, Pending a Decision of the Board?

[129] The Appellant submits the balance of convenience favours a stay of the Approval until the Board decides this appeal.

[130] The Approval Holder stated that it is not reasonable to put the economic burden of a stay on the proponent of an activity without establishing a sound scientific basis for the evidence of the harm alleged. The Approval Holder argued the balance of convenience favours refusing the stay request.

[131] The Approval Holder submitted that the harms alleged by the Appellant are speculative, and most certainly are not immediate risks that could arise upon commencement of activities under the Approval.

[132] In deciding whether to issue a stay, the Board considers whether the alleged harms are likely to arise in the time it takes to resolve the appeals. The Board acknowledges the Approval Holder's comments that the impacts to groundwater, if they were to occur, could not occur until several years into the future, and well into the excavation and operation of the Pit. The Board also

acknowledges the Appellant's photographic evidence, not challenged by the Approval Holder, that work has already commenced on the site.

[133] Having considered the submissions and that a stay application is not the place to test the allegations of potential harm raised by the Appellant, the Board is of the view that the Approval Holder is likely to suffer greater harm than the Appellant if a stay is granted.

5.5.4. Would the Overall Public Interest Warrant a Stay?

[134] The Appellant submitted any delay of the Approval Holder's Project resultant from the appeal process will have no material impact on gravel supplies to the Calgary region. Rocky View County, with in excess of 20 operating mines plus those mines in surrounding municipal districts are fully capable of supplying the demand, especially during the winter as construction activity and gravel demand decline. Furthermore, they noted that the lands on which mining is currently underway have been held by Mr. Bruce Waterman, the principal of the Approval Holder since at least 2008 and accordingly there is no apparent need to commence activities under the Approval before this appeal is heard by the Board.

[135] The Approval Holder submitted that the public interest is served by ensuring the determination of whether to grant a stay is based on reliable science and due process. The public interest is not served when a project can be put on hold simply by the allegation of potential harms, without reliable science to support the contention. After considering the available scientific information on the nature and type of harm alleged, the likelihood of it occurring, and the stage of operations of the Project in proximity to the alleged harm, it is reasonable to conclude that the overall public interest does not warrant a stay.

[136] The Board understands the Approval Holder's position that a project should not be put on hold simply by the allegation of potential harms. However, the Board also notes that once an appeal is filed an approval holder who continues development work is at risk that the Board may recommend to the Minister that the Director's decision be reversed. This would result in the approval holder having to stop all activities and reclaim the disturbance.

[137] Having reviewed the submissions and considering that a stay application is not the place to test the allegations of potential harm raised by the Appellant, the Board finds that a stay would not be in the public interest.

5.5.5. Is a Stay Just and Equitable?

[138] The three parts of the stay test guide the Board's exercise of discretion, but the fundamental question remains whether granting a stay is just and equitable in all the circumstances.[90]

[139] As previously mentioned, the Board is mindful that the appeal is dealing only with the Approval, and not the activities covered by the EPEA Registration for the pit. Therefore, a stay of the *Water Act* portion of the regulatory authorizations would not necessarily halt or limit development at the site. Moreover, as the Approval Holder has pointed out, the Board notes that many of the concerns raised by the Appellant in their submissions relate to the Registration.

[140] The Board finds that although the Appellant was successful in some parts of the test, a stay is unlikely to achieve what the Appellant hopes to achieve in terms of stopping the development of the pit and will harm the Approval Holder.

[141] In summary, the Board is of the view that granting a stay would not be just and equitable and declines to grant a stay.

6. DECISION

[142] The Appellant is directly affected by the Approval therefore the Bighill Creek Preservation Society has standing.

[143] The Board declines to issue a stay of the Approval.

Dated on March 6, 2024, at Edmonton, Alberta.

"*original signed by*"

Chris Powter
Acting Board Chair

90 *Cleanit Greenit* at paragraph 33.