ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 28, 2024

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

-and-

IN THE MATTER OF respect to the decision of the Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas, to issue Environmental Protection Orders EPO-EPEA-35659-11 and EPO-EPEA-35659-12 to Mantle Materials Group Ltd., previously JMB Crushing Systems Inc., Byron Levkulich, Director, JMB Crushing Systems Inc., and Aaron Patsch, Director, JMB Crushing Systems Inc.

Cite as: Stay Decision: *Mantle Materials Group Ltd. et al.* v. *Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas* (28 March 2024), Appeal Nos. 23-096-101-IDl (AEAB), 2024 ABEAB 10.

BEFORE:		Barbara Johnston, Board Chair.
PARTIES:	**Appellants:**	Mantle Materials Group Ltd., Byron Levkulich, and Aaron Patsch, represented by Alison Gray, Gowling WLG (Canada) LLP.
	Inspector:	Colette Strap, Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas, represented by Vivienne Ball and Lee Plumb, Alberta Justice.

EXECUTIVE SUMMARY

The Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas (Inspector) issued two Environmental Protection Orders (Orders) under the *Environmental Protection and Enhancement Act* (EPEA) to Mantle Materials Group Ltd. (Mantle), Byron Levkulich, and Aaron Patsch (Appellants). Byron Levkulich and Aaron Patsch are directors of Mantle. The Orders required Mantle to perform reclamation work with respect to two aggregate pits located in the County of St. Paul No. 1 (the St. Paul Pits).

The Environmental Appeals Board (the Board) received Notices of Appeal from the Appellants accompanied by a request for a stay of the Orders. The Board received submissions from the parties on whether a stay of the Orders should be granted.

In considering the stay applications, the Board asked the Appellants and the Inspector to answer the following questions:

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 appeals, 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 Appellants met the Board's test for a stay. The Appellants raised serious concerns that the Orders created an immediate obligation to reclaim the St. Paul Pits, irreparably harming Mantle's ability to sell the St. Paul Pits as part of a restructuring proposal under the *Bankruptcy and Insolvency Act* (the BIA). The Appellants demonstrated that, if the St. Paul Pits were sold as part of the restructuring proposal under the BIA, the balance of convenience favoured the Appellants, and the overall public interest warranted a stay because the environmental obligations associated with the St. Paul Pits would be assumed by the purchasers in accordance with legislation and policy. Considering these factors together, the Board determined it was just and equitable to grant the stay. The Board granted a stay of the Orders.

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1. INTRODUCTION

[1] These are the Environmental Appeal Board's (the "Board") reasons for the Board's decision regarding Mantle Materials Group Ltd. ("Mantle"), Byron Levkulich and Aaron Patsch (collectively the "Appellants") application for a stay in respect of the decisions of the Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas (the "Inspector"), to issue Environmental Protection Orders No. EPO-EPEA-35659-11 ("Order 11") and No. EPO-EPEA-35659-12 ("Order 12") under the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 ("EPEA") to the Appellants (collectively, the "Orders").[1] The Orders direct Mantle to complete reclamation work and monitoring, as well as apply for a reclamation certificate for two aggregate pits located in the County of St. Paul No. 1 (the "Havener Pit" and the "Shankowski Pit", collectively the "St. Paul Pits").

[2] On November 23, 2023, the Board received Notices of Appeal from the Appellants together with a request for a stay of the Orders. The Board requested and received submissions from the Appellants and the Inspector (the "Parties") regarding the Appellants' stay application.

[3] The Board reviewed the written submissions received from the Parties and on December 18, 2023, decided to issue a stay of the Orders.

[4] The Board's reasons for its decision are provided below.

2. BACKGROUND

[5] Byron Levkulich and Aaron Patsch are the former directors of JMB Crushing Systems Inc. ("JMB Crushing") and 2161889 Alberta Ltd. ("216 Alberta"), and are the current directors of Mantle.

[6] JMB Crushing and 216 Alberta amalgamated and continued as Mantle on May 1, 2020, as part of a restructuring arrangement (the "CCAA Reorganization Transaction") under the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36, as amended ("CCAA").

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[1] Environmental Protection Order Nos. EPO-EPEA-35659-11 and EPO-EPEA-35659-12 issued on September 21, 2023, by the Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas, to Mantle Materials Group Ltd., previously JMB Crushing Systems Inc., Byron Levkulich, Director, JMB Crushing Systems Inc., and Aaron Pratsch, Director, JMB Crushing Systems Inc.

[7] Mantle operates the Havener Pit under Registration No. 17395-01-00 and the Shankowski Pit under Registration No. 308161-00-00. The Havener Pit is located on land owned by Lynn Havener and Gail Havener. The Shankowski Pit is located on land owned by Jerry Shankowski (collectively the "Landowners").

[8] Mantle acquired the Havener Pit and the Shankowski Pit as part of the CCAA Reorganization Transaction.

[9] On July 13, 2023, Mantle filed a Notice of Intention to Make a Proposal (the "Proposal Proceedings") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "BIA").

[10] Mantle and the trustee under the Proposal Proceedings (the "Proposal Trustee") commenced a sale and solicitation process (the "Sale Process") for the active aggregate pits, including the St. Paul Pits, (the "Active Aggregate Pits") acquired by Mantle as part of the CCAA Reorganization Transaction, with the intent of selling or assigning the Active Aggregate Pits to new owners.

[11] On September 21, 2023, the Inspector issued Order 11 against the Appellants ordering amongst other things, that the Havener Pit be reclaimed by October 31, 2023, and that a reclamation certificate be applied for by January 1, 2024.

[12] On September 21, 2023, the Inspector issued Order 12 against the Appellants ordering amongst other things, that the Shankowski Pit be reclaimed by October 31, 2023, and that a reclamation certificate be applied for by January 1, 2024.

[13] On September 28, 2023, the Board received Notices of Appeal of the Orders from the Appellants and a request for a stay.

[14] On October 5, 2023, the Board acknowledged receipt of the Notices of Appeal and the stay application. The Board requested the Inspector advise if the Inspector would consent to the stay motion or undertake not to enforce the Orders. On October 13, 2023, the Inspector advised she did not consent to the stay motions and would not make such an undertaking.

[15] On October 16, 2023, the Board requested that the Appellants provide an application for a stay of the Orders.

[16] On October 20, 2023, the Appellants provided their initial submissions respecting the stay application (the "Appellants' Initial Submissions").

[17] On October 31, 2023, the Board advised the Parties that the Board had determined the Appellants had made a *prima facie* case for a stay and established a process for the Parties to make submissions.

[18] On November 7, 2023, the Board received the Inspector's response submissions (the "Inspector's Response Submissions") and on November 14, 2023, the Board received the Appellants' rebuttal submissions (the "Appellants' Rebuttal Submissions") regarding the stay.

[19] On November 16, 2023, the Inspector requested she be permitted to provide the Board with a reply response to the Appellants' Rebuttal Submissions because the Appellants' Rebuttal Submissions contained new evidence and argument (the "Additional Evidence"). On November 16, 2023, the Board agreed to the Inspector's request and set the process for the Parties to make response submissions regarding the Appellants' Rebuttal Submissions.

[20] On November 24, 2023, the Inspector provided submissions responding to the Appellants' Rebuttal Submissions (the "Inspector's Reply Submissions") and made a motion to have the Additional Evidence struck from the record.

[21] On December 1, 2023, the Board received the Appellants' response to the Inspector's Reply Submissions (the "Appellants' Response Submissions").

[22] On December 18, 2023, the Board informed the Parties that the Board had reviewed the Parties' submissions and had decided to grant a stay of the Orders, which would remain in place until the appeals are addressed.

[23] The Board's reasons for its decision are provided below.

3. ISSUES

[24] The Board received comments from the Parties on the following questions regarding the stay applications:

1. What are the serious concerns raised by the Appellants that should be heard by the Board?

2. Would the Appellants suffer irreparable harm if the stay were refused?

3. Would the Appellants suffer greater harm if the stay were refused pending a decision of the Board on the appeals, than the harm that could occur from the granting of a stay?

4. Would the overall public interest warrant a stay?

4. LEGISLATION AND CASELAW

[25] The fundamental question before the Board in a stay application is whether granting the stay would be just and equitable in all the circumstances.[2]

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

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

[27] Granting a stay is an extraordinary remedy. To guide the Board in exercising its discretion, the Board adapted its test for a stay from the Supreme Court of Canada decision in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*") as stated in previous decisions.[3] The steps of the test, as stated 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."[4]

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

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 (AEAB), 2021 ABEAB 34; *Pryzbylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd.* (1 April 1997), Appeal No. 96-070 (AEAB), 1997 ABEAB 5; *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rentals Ltd*. (14 May 1998), Appeal No. 97-051 (AEAB), 1998 ABEAB 16; and Stay Decision: *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.

4 *RJR-MacDonald* at paragraph 43.

[28] 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."[5]

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

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

> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."[6]

[31] 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.[7]

[32] 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."[8] The Board is required to weigh the burden the stay would impose on the Inspector against the benefit the Appellants would receive. This weighing is not strictly a cost-benefit analysis, but rather, a consideration of significant factors, such as the

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5 *RJR-MacDonald* at paragraph 50.

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

7 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp.*, 147 AR 113 (AB KB) ("*Edmonton Northlands*") at paragraph 78.

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

cumulative effect of granting a stay,[9] third parties who may suffer damage,[10] or the reputation and goodwill of a party will be affected.[11]

[33] 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."[12] 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*, 10-034 & 11-002-ID1, 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." [13]

In this respect, the Inspector is representing the environment and the public interest.

[34] In most cases, if all the steps of the stay test are not met a stay will not be granted. In all cases, however, the fundamental question before the Board remains whether the granting of a stay is just and equitable in the circumstances.[14] As stated by the Alberta Court of Queen's Bench in *Cleanit Greenit Composting System Inc.* v. *Director (Alberta Environment and Parks)*, 2022 ABQB 582, "[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."[15]

[35] Further, the Board notes in *Cleanit Greenit*, 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

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9 *MacMillan Bloedel* v. *Mullin*, [1985] BCJ No. 2355 (CA) at paragraph 121.
10 *Edmonton Northlands* at paragraph 78.
11 *Edmonton Northlands* at paragraph 79.
12 *RJR-MacDonald* at paragraph 66.
13 *Gas Plus* at paragraph 65.
14 *Cleanit Greenit* at paragraph 47.
15 *Cleanit Greenit* at paragraph 33.

'inexorably linked and should be considered together'."[16] Together, all these factors guide the Board's exercise of discretion.

[36] The standard of proof in a stay application is the balance of probabilities, and the onus is on the Appellants to establish that the stay test is met.[17]

5. INTERLOCUTORY MOTION TO STRIKE ADDITIONAL EVIDENCE

[37] The Inspector made a motion to have the Additional Evidence struck from the record for case splitting (the "Motion to Strike Additional Evidence") as the Inspector alleged the Additional Evidence was improperly submitted as part of the Appellants' Rebuttal Submissions:

> "The Inspector requests that the Board strike:
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> a) the six affidavits and exhibits submitted by the Appellants in support of their November 14, 2023 submissions, and
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> b) the arguments that the Appellants introduced for the first time in their November 14, 2023 submissions, which the Inspector has struck out in the blacklined version of the Appellants' rebuttal…
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> and not consider these arguments and evidence when deciding the stay application."[18]

[38] On considering the evidence and arguments provided by the Parties, the Board denied the Motion to Strike Additional Evidence.

5.1. Submissions

5.1.1. The Inspector

[39] The Inspector submitted the Appellants improperly used the Appellants' Rebuttal Submissions to make new arguments, introduce new evidence, and provide case law they should have included in the Appellants' Initial Submissions, which was procedurally unfair, circumvented the Board's process for submissions, and was an improper splitting of the Appellants' case.

[40] The Inspector argued the purpose of rebuttal submissions is to respond to new issues raised in a response submission that an appellant could not have anticipated at the time of

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16 *Cleanit Greenit* at paragraph 32.

17 *Cleanit Greenit* at paragraph 30.

18 Inspector's Reply Submissions at page 1.

their initial submissions. The Inspector submitted it is contrary to the principle of procedural fairness for a party to present their case in fragments and presenting the complete case in the first instance ensures a party has a fair and equal opportunity to understand and respond to the full case put forward by the other party.

[41] The Inspector noted that the Board in *Decker Management Ltd.* v. *Director, Southern Region, Regional Services, Alberta Environment* (01 November 2007), Appeal No. 07-118-D (AEAB), 2007 ABEAB 39 (*"Decker"*) made the following statement regarding the purpose of rebuttal submissions:

> "The purpose of a rebuttal submission is not to bring in new arguments. An appellant, who has the onus of proving its position, is given the opportunity to provide a rebuttal submission in order to respond to any unanticipated evidence or argument that is brought forward by the other participants in their submissions ... One of the reasons no new arguments can be presented in rebuttal is so that there will be an end to the submission process. If an appellant is allowed to split its evidence and arguments, there is a danger that the submission process would not end."[19]

[42] The Inspector submitted that if the Additional Evidence was of vital importance, it should have been included in the Appellants' Initial Submissions not in the Appellants' Rebuttal Submissions because to do so was:

1. intrinsically unfair, unnecessarily complicated, and inefficient; and
2. allowed the Appellants to improperly correct evidentiary and substantive deficiencies in and bolster the Appellants' Initial Submissions.

[43] The Inspector requested the Additional Evidence be struck by the Board. In the alternative, if the Board did not strike the Additional Evidence, the Inspector requested the Board provide no weight to the Additional Evidence when considering the stay applications.

5.1.2. The Appellants

[44] The Appellants submitted the case law cited by the Inspector is clear that the mischief trying to be prevented is "unfair surprise, prejudice and confusion" and a lack of "fair

19 *Decker* at paragraph 23.

and equal opportunity to develop and present" a case.[20] The Appellants submitted that none of those concerns arose in the current circumstances because the Inspector:

1. had already received the evidence through the Proposal Proceedings or other communications;
2. did not identify any "new issues" raised by the Appellants that she did not anticipate or had been unable to respond to;
3. had not provided evidence of what prejudice she suffered; and
4. had been permitted by the Board to reply to the Appellants' Rebuttal Submissions.

[45] The Appellants submitted the Additional Evidence should not be struck from the record.

5.2. Analysis and Findings

[46] As stated by the Board in *Decker* "[t]he purpose of a rebuttal submission is not to bring in new arguments".[21] However, the Board notes that the Board in *Decker* further stated:

> "If counsel for the Director had requested an opportunity to respond to the new argument raised in rebuttal by the Appellant, the Board would have had to consider allowing the request in order to maintain fairness to all participants."[22]

[47] The Board finds that procedural fairness has been maintained because at the Inspector's request, the Inspector was permitted to respond to the Appellants' Rebuttal Submissions, including the Additional Evidence. Further to maintain procedural fairness for the Parties, the Board notes that the Appellants had also been requested to provide the Appellants' Response Submissions. However, the Board notes that the additional process established by the Board to maintain procedural fairness would have been unnecessary and the submission process would have been more efficient and less complicated had the Appellants provided the Additional Evidence when submitting the Appellants' Initial Submissions.

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20 Appellants' Response Submissions at page 1.

21 *Decker* at paragraph 23.

22 *Decker* at paragraph 23.

[48] The Board denies the Motion to Strike Additional Evidence. When considering the evidence and arguments of the Parties respecting the stay, the Board will determine the weight to be given to the Additional Evidence.

6. SUBMISSIONS

[49] The Board has reviewed the evidence and arguments submitted by the Parties regarding the application to stay the Orders. The following is a summary of the most salient submissions considered by the Board.

6.1. Appellants

[50] The Appellants submitted a stay should be granted as the test in *RJR-MacDonald* test was satisfied.

6.1.1. Serious Concerns to be Heard by the Board

[51] The Appellants submitted there are serious concerns to be heard by the Board. The Appellants submitted the test to be met at this stage is a low one and that the Appellants need only show the appeals were not frivolous and there is an arguable issue to be determined on appeal.[23]

[52] The Appellants argued the issues in the appeals are whether the Inspector had the authority or factual basis to issue the Orders, and whether Mantle could complete the reclamation work and apply for a reclamation certificate by the deadlines set in the Orders. The Appellants submitted it was not possible to complete the required reclamation work by October 31, 2023, as the deadline was only six weeks after the issuance of the Orders. The Appellants also submitted the authority of the Inspector to issue the Orders was at issue because the Inspector erred in making her decisions as she relied on her opinion that Mantle did not have the financial ability or the intention of reclaiming the St. Paul Pits, which the Appellants asserted was not factually correct.

[53] On this basis, the Appellants submitted there are serious issues to be considered by the Board and the first element of the *RJR-MacDonald* test was satisfied.

6.1.2. Irreparable Harm

[54] The Appellants submitted they would suffer irreparable harm if the stay was denied. The Appellant submitted the Orders negatively impacted the Proposal Proceedings and the Sale

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[23] Appellants' Rebuttal Submissions at page 5.

Process in a manner that could not be compensated in damages to the Appellants and the success of the Sale Process was thwarted by the requirement that the St. Paul Pits be reclaimed by October 31, 2023.

[55] The Appellants submitted the irreparable harm suffered by the Appellants was not speculative or hypothetical. The Orders interfere with the Sale Process by creating an immediate liability to reclaim the St. Paul Pits. The Appellants argued the interference caused by the Orders would negatively impact the marketing of the St. Paul Pits under the Sale Process and prevent Mantle from finding third-party purchasers who would assume the associated environmental obligations as part of the Sale Process. The Appellants argued this would prevent Mantle from mitigating its environmental liability associated with the St. Paul Pits and maximizing proceeds available through the Proposal Proceedings to address Mantle's reclamation obligations, ahead of distribution to secured and unsecured creditors.

[56] The Appellants submitted that the irreparable harm is not that there is a failure to mine or sell the St. Paul Pits but that the Orders interfere in the Sale Process because of the Inspector's decision to proceed with enforcement action. The Appellants argued the marketability of the St. Paul Pits would be harmed because the Orders represent an immediate rather than a long-term reclamation liability. A prospective purchaser would not want to purchase an aggregate pit that could not be operated and must be reclaimed immediately such that the cost of reclamation could not be spread over the life of the St. Paul Pits. The Appellants argued there should be no immediate obligation to reclaim the St. Paul Pits as the Appellants are marketing the St. Paul Pits under the Sale Process as active operating aggregate pits with reclamation obligations to be assumed by the purchasers.

[57] The Appellants further submitted they suffered irreparable harm because the reclamation work required under the Orders could not be completed in the timelines ordered causing the Appellants to be in non-compliance with the Orders and at risk of further regulatory action through no fault of their own. The Appellants submitted there is no assurance that financing for the immediate reclamation of the St. Paul Pits would be available in the context of the regulatory requirements of the Proposal Proceedings. The Appellants noted Byron Levkulich and

Aaron Patsch do not have the financial ability to fund the immediate reclamation of the St. Paul Pits.

[58] The Appellants asserted the Landowners would also suffer irreparable harm if the Orders were enforced and the St. Paul Pits were required to be reclaimed immediately because the St. Paul Pits would no longer be operable which would interfere with the ability of the Landowners to enter future mining contracts. The Appellants argued evidenced showed Mr. Shankowski wanted the Shankowski Pit to be sold and continue to operate so he could continue to benefit from the revenue the Shankowski Pit generates.

[59] On this basis, the Appellants submitted they would suffer irreparable harm if the Board did not grant a stay of the Orders and the second element of the *RJR-MacDonald* test was satisfied.

6.1.3. Balance of Convenience and Public Interest

[60] On the balance of convenience test, the Appellants submitted if the stay were denied, they would suffer greater harm.

[61] The Appellants submitted the immediate obligation to reclaim the St. Paul Pits was created by the issuance of the Orders and is not coextensive with the legal obligation to reclaim the St. Paul Pits pursuant to EPEA. It was the decision to issue the Orders that caused irreparable harm to the Appellants and tips the balance in favour of granting of the stay.

[62] The Appellants submitted Mantle, the Proposal Trustee and the Court are aware they must comply with the Supreme Court of Canada decision in *Orphan Well Association* v. *Grant Thornton Limited and ATB Financial*, 2019 SCC 5 (*"Redwater")* which the Appellants stated "stands for the proposition that any monies in the insolvent's estate cannot be distributed to creditors until such time as any end-of-life reclamation obligations are completed".[24] The Appellants argued that a stay was consistent with the *Redwater* decision as it allows for the Sale Process to proceed unfettered by the Orders and offers the best opportunity for all associated reclamation obligations to be met.

[24] Appellants' Rebuttal Submissions at page 13.

[63] The Appellants submitted the Inspector is aware the Sale Process is not complete and is a Court confidential process so detailed evidence of the process cannot be put before the Board and Environment and Protected Areas ("EPA"). The Appellants acknowledged there is inherent uncertainty in insolvency proceedings. The Appellants argued that the "uncertainty is not enough to rise to the level of irreparable harm to the public interest".[25] As previously discussed, the Appellants noted EPA has been updated regularly on the status of the Proposal Proceedings. The Appellants asserted that until the Sale Process is completed, there cannot be certainty as to how and what legal entity will fund and carry out the reclamation of the St. Paul Pits, which is why a stay should be granted.

[64] The Appellants submitted their interests align with the public interest in seeing the St. Paul Pits reclaimed. The Appellants stated that one of the stated purposes of the Proposal Proceedings was to satisfy Mantle's environmental obligations in a manner acceptable to EPA, which the Appellants submitted focused on the public interest not the Appellants' private interests. The Appellants argued if a stay of the Orders is denied, Mantle will have to commence reclaiming the St. Paul Pits immediately and the St. Paul Pits could not be marketed under the Sale Process as operating aggregate pits with significant reserves. The Appellants stated there was no certainty that the Appellants could access the financing necessary to immediately reclaim the St. Paul Pits. The Appellants argued it was in the overall public interest to stay the Orders because the value of the St. Paul Pits is more than the cost of the associated environmental reclamation obligations. The Appellants submitted this makes the St. Paul Pits attractive to purchasers under the Sale Process and as discussed, if the St. Paul Pits are sold under the Sale Process, the purchaser would be required to assume the associated environmental obligations subject to legislative requirements and EPA policy, which is in the public interest.

[65] The Appellants submitted the interests of the Landowners must also be considered in the public interest assessment. The Appellants submitted the enforcement of the Orders would impede the Landowners' ability to financially benefit from their lands because mining operations would not continue, and the St. Paul Pits would be remediated immediately.

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[25] Appellants' Rebuttal Submissions at page 11.

[66] Based on the foregoing, the Appellant submitted the balance of convenience favoured the Appellants and the overall public interest warranted a stay. The Appellants submitted they had met the *RJR-MacDonald* test, and the Board should stay the Orders.

6.2. Inspector

[67] The Inspector submitted the stay should be denied as the Appellants had not satisfied the tripartite test in *RJR-MacDonald.*

6.2.1. Serious Concerns to be Heard by the Board

[68] The Inspector submitted there is no serious issue to be tried because the Appellants are out of compliance with the Orders as they failed to meet the ordered deadlines.

[69] The Inspector submitted she had the authority to issue the Orders as she had concerns about the financial ability and intention of Mantle to reclaim the St. Paul Pits. The Inspector asserted Mantle had not completed any progressive reclamation work at the St. Paul Pits since it had acquired the St. Paul Pits under the CCAA Reorganization Transaction.

[70] The Inspector argued the Appellants took no steps to comply with the Orders and the Appellants missed the deadlines in the Orders due to their own inaction. The Inspector submitted the deadlines in the Orders were reasonable because there is uncertainty if Mantle will be in existence at the conclusion of the Proposal Proceedings and if funding for reclamation will be available.

[71] On this basis the Inspector submitted the Appellants had not met the first prong of the *RJR-MacDonald* test.

6.2.2. Irreparable Harm

[72] The Inspector submitted the Appellants had not met the second part of the *RJR-MacDonald* test.

[73] The Inspector submitted "irreparable" refers to the nature of the harm not the magnitude and an irreparable harm is a harm that cannot be quantified in monetary terms nor be cured, usually because one party cannot collect damages from the other. The Inspector, citing *RJR-MacDonald,* submitted the issue to be decided was: "whether a refusal to grant relief could

so adversely affect the applicants' own interests that harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory applications."[26]

[74] The Inspector submitted evidence of irreparable harm is required.[27] The Inspector argued any harm alleged by the Appellants was hypothetical and speculative and not supported by evidence.

[75] The Inspector argued the Orders do not thwart the Proposal Proceedings or negatively impact the marketability of the St. Paul Pits under the Sale Process, and that the deadlines set in the Orders were reasonable. The Inspector further argued issuing the Orders to reclaim the St. Paul Pits did not cause irreparable harm because the reclamation obligations already existed under the disposition, legislation and EPA policy.

[76] The Inspector submitted the Appellants made no attempt to meet the deadlines set in the Orders and that any harm incurred was speculative and due to the Appellants' own inaction. The Inspector argued the Appellants had over two years to mine and reclaim the St. Paul Pits and failed to do so. The Inspector further argued the Appellants had over two years since the CCAA Restructuring Transaction to sell or assign the St. Paul Pits and had not done so and therefore, the Orders did not cause or contribute to the failure of the Sale Process or any other sale of the St. Paul Pits. The Inspector submitted the Appellants did not provide any evidence of a failed sale or a required reduction in purchase price because of the issuance of the Orders.

[77] In the alternative, the Inspector argued that if the Appellants suffered harm, it was financial in nature, and due to the Appellants' decisions regarding Mantle's business, not the Orders. [28]

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[26] Inspector's Response Submissions at page 6.

[27] See Inspector's Response Submissions at pages 6 and 7 where the Inspector, citing *Cleanit Greenit,* submitted:

1. the threat of irreparable harm must be met by the evidence;
2. the evidence must be "at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted";
3. evidence of hypothetical or merely possible harm is not sufficient; and
4. where the actual harm is financial, clear, and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence.

[28] See Inspector's Reply Submissions at page 10 where the Inspector referred to the Affidavit of Byron Levkulich sworn August 7, 2023 at paragraph 34.

[78] The Inspector submitted that the Orders protected the Landowners private rights by ensuring the St. Paul Pits were reclaimed. The Inspector argued, however, that harm to the Landowners was not a relevant consideration when determining if irreparable harm had occurred as the Supreme Court of Canada was clear that the second part of the *RJR-MacDonald* did not consider harm suffered by third parties.

[79] Based on the foregoing the Inspector submitted the Appellants would not suffer irreparable harm if the stay were denied.

6.2.3. Balance of Convenience and Public Interest

[80] The Inspector submitted the Appellants failed to satisfy the third part of the *RJR-MacDonald* test because the balance of convenience favours the public interest over the interests of the Appellants.

[81] The Inspector submitted the balance of convenience test is a determination of which of the parties will suffer the greater harm from the granting or refusal of the stay, pending the decision on the merits. The factors considered in assessing the balance of convenience vary in each case and are fact specific.[29]

[82] The Inspector submitted this is not a cost-benefit analysis but the balancing of the burden granting a stay would have on the public interest in the administration and effective enforcement of EPEA against the benefit to the Appellants if the stay is granted.[30]

[83] The Inspector submitted a stay of the Orders would harm EPA's authority to take enforcement action under the Orders and the broader public interest inherent in the policies of the protection of the environment, which outweighs any potential inconvenience the Appellants might suffer if the stay is not granted. As previously discussed, the Inspector was concerned about the financial ability and intent of the Appellants to reclaim the St Paul Pits, and the uncertainty surrounding the outcome of the restructuring proceedings. The Inspector argued that given the uncertainty about Mantle's future, the Orders requiring Mantle to reclaim the St. Paul Pits were

29 Inspector's Response Submissions at page 8.
30 Inspector's Response Submissions at page 8.

issued to protect the public interest, and to ensure the failure to reclaim the St. Paul Pits would not continue indefinitely.

[84] The Inspector submitted that if the Appellants alleged the public interest is at risk if a stay is denied, the Appellants must demonstrate harm because private applicants are presumed to be pursuing their own private interests rather than those of the public at large. The Inspector submitted, in the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant and that harm to the public interest is presumed if the actions of the public authority are restrained.[31]

[85] The Inspector submitted the facts showed the Appellants were pursuing their own private interests by speculating on how the Orders impact the Proposal Proceedings and focusing on their own private interests and Mantle's creditors rather than those of the public at large.

[86] The Inspector also submitted that if the Aggregate Pits are not sold, the Landowners may be left with the reclamation obligations and to mitigate this risk, it was in the public interest to require Mantle to carry out this work immediately, as Mantle was best positioned to do so.

[87] The Inspector argued that denying a stay would be consistent with the decision of the Supreme Court of Canada in *Redwater*. The Inspector submitted that the Court in *Redwater* found that end-of-life environmental obligations must be completed before any creditors can recover money from the estate. The Inspector argued that the fact there are remaining reserves at

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[31] See Inspector's Response Submissions at page 9 where the Inspector cited the following statement of the Supreme Court of Canada in *RJR-MacDonald* at paragraph 76*:*

> "In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."

Further at page 10 of the Inspector's Response Submissions, the Inspector cited the following statement of the Court in *Cleanit Greenit* at paragraph 115:

> "[H]arm to the public is presumed where the relief sought would restrain a government regulator from carrying out its mandate. Where a governmental authority is charged with promoting the public interest and actions are taken by that governmental authority in discharging that responsibility, a court must assume harm to the public if the actions are restrained."

the St. Paul Pits does not relieve Mantle of its reclamation obligations and the objective of the Orders was to ensure the St. Paul Pits were reclaimed immediately or accounted for in Mantle's insolvency proceedings in accordance with *Redwater*.

[88] The Inspector submitted the third prong of the *RJR-MacDonald* test was not met and a stay should be denied by the Board.

7. ANALYSIS AND FINDINGS

[89] The Board has the authority to grant a stay under section 97 of EPEA.[32]

[90] As previously noted, granting a stay is an extraordinary remedy. The Board has adapted its test for a stay 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."[33]

[91] These factors guide the Board's exercise of its discretion in a stay application. However, "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.'"[34] As stated by the Court in *Cleanit Greenit*, "… the fundamental question remains whether granting a stay is just and equitable in all the circumstances."[35]

7.1. Serious Concerns

[92] At this step of the test, a Court usually undertakes "an extremely limited review of the case on the merits."[36] As stated by Court in *Cleanit Greenit*, "[t]his factor is generally a

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[32] Section 97 of EPEA provides in part:
> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
> (2) The Board may, on application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[33] *RJR-MacDonald* at paragraph 43.

[34] *Cleanit Greenit* at paragraph 32.

[35] *Cleanit Greenit* at paragraph 33.

[36] *Cleanit Greenit* at paragraph 47.

threshold to be satisfied, rather than an attempt to measure the strength of the applicant's underlying claim."[37] The first step of the test requires the Appellants to show there is a serious issue to be tried. 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."[38] The Appellants must demonstrate through the evidence submitted there is some basis on which to present an argument.

[93] The Appellants have raised concerns the Inspector did not have the authority to issue the Orders, and that the deadlines in the Orders were unreasonable because they were unattainable.

[94] At this stage of the test, it is sufficient that the Appellants show a basis for their 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 Appellants directly relate to the Orders and they are serious in nature.

[95] The Board notes the Parties have provided contradictory evidence regarding the status of progressive reclamation and mining at the St. Paul Pits and the overall intention of Mantle to reclaim the St. Paul Pits. In the Board's view, these matters go to the merits of the appeals and are not part of the Board's considerations in this stay application.

[96] The Board finds the first step of the test in *RJR-MacDonald* is met.

7.2. Irreparable Harm

[97] The second step in the test requires the decision-maker to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted. 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*, "[t]he Court examines 'whether a refusal to grant relief could so adversely affect the

37 *Cleanit Greenit* at paragraph 47.
38 *RJR-MacDonald* at paragraph 50.

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.'"[39]

[98] It is the nature of the harm that is relevant, 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.[40]

[99] As well, the harm cannot be hypothetical or merely possible. As stated by the Court of King's Bench 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." [41]

[100] 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.[42]

[101] The Board finds the Appellants suffered irreparable harm because the Orders interfered with Mantle's ability to sell the St. Paul Pits as part of the Proposal Proceedings. The Board is of the view that the Orders negatively affected the Sale Process by creating regulatory uncertainty and an immediate financial obligation to reclaim the St. Paul Pits. The Board concurs with the Appellants' view that when determining an offer price, a prospective purchaser would take into consideration the regulatory risk that the St. Paul Pits were subject to the Orders, the risk EPA may not withdraw or amend the Orders, and that compliance with the Orders requires immediate reclamation of the St. Paul Pits prior to the commencement of any mining operations. These factors would negatively affect a valuation of the St. Paul Pits by a prospective purchaser in

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39 *Cleanit Greenit* at paragraph 98, citing *RJR-MacDonald* at paragraph 30.

40 *Cleanit Greenit* 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.

41 *Syncrude* at paragraph 53.

42 *Cleanit Greenit* at paragraph 100.

such a manner that the prospective purchaser may choose not to submit an offer or submit an offer at a reduced price. The Inspector's submissions that they would be willing to discuss the Orders with prospective purchasers is, in the Board's view, not sufficient to significantly reduce the uncertainty created by the Orders.

[102] The Board finds that while the nature of the harm is financial, it is not possible to quantify the impact of the harm on the Sale Process as the Orders were issued after the commencement of the Sale Process and prior to the final bid date. It would be impossible to quantify the monetary impact of additional regulatory uncertainty associated with the issuance of the Orders as this would require a comparison of what prospective purchasers would have offered had the Orders not been issued during the Sale Process to what successful purchasers paid for the St. Paul Pits under the Sale Process.

[103] The Board finds that the second step of the *RJR-MacDonald* test has been met.

7.3. Balance of Convenience and Public Interest

[104] The third step of the *RJR-MacDonald* test requires the Board to consider the balance of convenience and the public interest. The balance of convenience is determined by asking, "...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[43] The decision maker is required to weigh the burden the stay would impose on the respondent against the benefit the applicant would receive. This weighing is not strictly a cost-benefit analysis, but rather, a consideration of significant factors. The courts have considered factors such as the cumulative effect of granting a stay,[44] third parties who may suffer damage,[45] or if the reputation and goodwill of a party will be affected.[46]

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

44 *MacMillan Bloedel* v. *Mullin*, [1985] BCJ No. 2355 (CA) at paragraph 121.

45 *Edmonton Northlands* at paragraph 78.

46 *Edmonton Northlands* at paragraph 79.

[105] The courts have recognized that any alleged harm to the public is to be assessed at the third stage of the test. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."[47]

[106] The Board appreciates that the Inspector has argued that the Orders were issued to ensure the long-term reclamation obligations were accounted for in Mantle's insolvency proceedings. However, it is the Board's view that if a stay is denied, the acceleration of long-term reclamation obligations and the regulatory uncertainty caused by the issuance of the Orders would cause more harm to the Appellants by interfering with the Proposal Proceedings and the Sale Process than the public interest would suffer if a stay was issued and EPA's ability to enforce the Orders were delayed. The Board accepts the Appellants' evidence that if the St. Paul Pits can be sold under the Sale Process, the associated environmental obligations will be assumed by the purchasers subject to legislative and regulatory requirements and on terms and conditions acceptable to EPA. The Board finds the assumption of environmental obligations by the purchasers of the St. Paul Pits under the Sale Process would be in the public interest.

[107] The Board is of the view that if the Inspector takes steps to enforce the Orders, it will negatively impact the likelihood of the St. Paul Pits being sold as part of the Sale Process, and it is uncertain if the Appellants will be able to finance the immediate reclamation of the St. Paul Pits in the context of the regulatory requirements of the Proposal Proceedings. The Board finds it is not reasonable to expect purchasers of the St. Paul Pits to complete end-of-life associated reclamation obligations before commencing mining operations and then at some time in the future after reserves have been depleted, complete the same end-of-life reclamation obligations to satisfy regulatory and legislative requirements. Moreover, sand and gravel are a scarce resource in Alberta, and it is in the overall public interest to provide the best opportunity for the St. Paul Pits to be operated as active aggregate pits and be reclaimed in due course at their end-of-life by the operator in accordance with EPEA legislative and regulatory requirements.

[108] The Board finds the balance of convenience and the overall public interest warrant the issuance of a stay of the Orders.

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47 *RJR-MacDonald* at paragraph 66.

[109] The Board finds the test for granting a stay as set out in *RJR-MacDonald* has been met.

8. IS IT JUST AND EQUITABLE TO GRANT A STAY?

[110] The *RJR-MacDonald* test for a stay guides the Board's exercise of discretion when considering a stay application, but the fundamental question before the Board remains whether granting a stay is just and equitable in all the circumstances.[48]

[111] The Board notes the Parties are taking steps to ensure that the St. Paul Pits are reclaimed pursuant to regulatory and legislative requirements. Where the Parties disagree, is in the timing of the reclamation, by whom, and how this is best achieved. The Appellants have stated they do not have the financial means to immediately reclaim the St. Paul Pits, and if reclaimed, they would likely have to be removed from the Proposal Proceedings. None of the Parties benefit from the Appellants being unable to sell the St. Paul Pits in the Proposal Proceedings, or from Mantle becoming insolvent if forced to immediately reclaim the St. Paul Pits. This situation will not only cause harm to Mantle, but also leaves a great deal of uncertainty regarding the ultimate reclamation of the pits.

[112] A more just and equitable solution is to grant a stay of the Orders to allow time for the Proposal Proceedings to continue unimpeded by the Orders. If the Proposal Proceedings are successfully concluded, the Parties may meet their long-term objectives, as the St. Paul Pits could be operated as active aggregate pits and reclaimed at their end-of-life by the new operators in accordance with EPEA legislative and regulatory requirements.

[113] In summary, the Board is of the view that granting a stay would be just and equitable and therefore, grants a stay of the Orders.

9. DECISION

[114] On the application by the Appellants for a stay of the Orders, the Board finds the Appellants have met the test for the stay. The Board finds the Appellants have raised a serious

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48 *Cleanit Greenit* at paragraph 33.

issue, would suffer irreparable harm, the balance of convenience favours the Appellants, and the overall public interest warrants a stay.

[115] The Board finds it would be just and equitable to grant a stay of the Orders.

[116] The Board grants a stay of Environmental Protection Order EPO-EPEA-35659-11 and Environmental Protection Order EPO-EPEA-35659-12. The stay will remain in effect until the appeals are resolved unless otherwise ordered by the Board or the Minister.

Dated on March 28, 2024, at Edmonton, Alberta.

Barbara Johnston
Board Chair