ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 15, 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 appeals filed with respect to the decision of the Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas, to issue Environmental Protection Order EPO-EPEA-35659-13 under the *Environmental Protection and Enhancement Act* to Mantle Materials Group Ltd., previously JMB Crushing Systems Inc., Byron Levkulich, Director, JMB Crushing Systems Inc. and Mantle Materials Group Ltd., and Aaron Patsch, Director, JMB Crushing Systems Inc. and Mantle Materials Group Ltd.

Cite as: Stay Decision: *Mantle Materials Group Ltd. et al.* v. *Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas* (15 April 2024), Appeal Nos. 23-142-144-IDl (AEAB), 2024 ABEAB 14.

BEFORE:		Barbara Johnston, Board Chair.
PARTIES:	**Appellant:**	Mantle Materials Group Ltd., Byron Levkulich, and Aaron Patsch, represented by Alison Gray, Gowling WLG (Canada) LLP.
	Inspector:	Heather Dent, 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 (the Inspector) issued an Environmental Protection Order (the Order) under the *Environmental Protection and Enhancement Act* (EPEA) to Mantle Materials Group Ltd. (Mantle), Byron Levkulich, and Aaron Patsch (the Appellants). Byron Levkulich and Aaron Patsch are directors of Mantle. The Orders directed Mantle to perform reclamation work with respect to a gravel pit located in the County of Smoky Lake (the Smoky Lake Pit).

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

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

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

The Board found the Appellants met the Board's test for a stay. The Appellants raised serious concerns that the Order created an immediate obligation to reclaim the Smoky Lake Pit, irreparably harming Mantle's ability to sell Smoky Lake Pit as part of a restructuring proposal under the *Companies Creditors Arrangement Act* (the CCAA). The Appellants demonstrated that the balance of convenience favoured the Appellants if the Smoky Lake Pit is sold as part of the restructuring proposal under the CCAA. Moreover, the overall public interest warranted a stay because the environmental obligations associated with the Smoky Lake Pit would be assumed by the purchaser in accordance with legislation and policy.

Considering these factors together, the Board determined it was just and equitable to grant a stay. The Board granted a stay of the Order.

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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 decision of the Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas (the "Inspector"), to issue Environmental Protection Order No. EPO-EPEA-35659-13 (the "Order") to the Appellants under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("EPEA").[1] The Order directs Mantle to complete reclamation work and monitoring, as well as apply for a reclamation certificate for a gravel pit located in the County of Smoky Lake (the "Smoky Lake Pit").

[2] On January 31, 2024, the Board received a Notices of Appeal from the Appellants together with a request for a stay of the Order.

[3] The Board reviewed the written submissions received from Inspector and the Appellants (the "Parties") and decided to issue a stay of the Order.

[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"), 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 *Companies Creditors Arrangement Act*, RSC 1985, c C-36, as amended ("CCAA").

[7] Mantle acquired the Smoky Lake Pit as part of the CCAA Reorganization Transaction. Mantle operates the Smoky Lake Pit under Surface Material Lease 110045.

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[1] Environmental Protection Order No. EPO-EPEA-35659-13 issued on January 30, 2024, by the Inspector, Regulatory Assurance Division North, Environment and Protected Areas, to Mantle Materials Group Ltd., Byron Levkulich, Director, JMB Crushing Systems Inc. and Mantle Materials Group Ltd., and Aaron Patsch, Director, JMB Crushing Systems Inc. and Mantle Materials Group Ltd.

[8] 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").

[9] 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 Smoky Lake Pit, (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. The bid deadline for the Sale Process was October 25, 2023.

[10] On October 18, 2023, EPA issued five environmental protection orders against certain of the Active Aggregate Pits located in the County of Smoky Lake (the "Active Smoky Lake Pits") being the Order, EP0-EPEA-35659-14 ("Order 14"), EP0-EPEA-35659-15 ("Order 15"), EP0-EPEA-35659-16 ("Order 16"), and EP0-EPEA-35659-17 ("Order 17"), (collectively the "Environmental Protection Orders"). Order 15 and Order 17 were served on Mantle on October 18, 2023, Order 14 was served Mantle on November 14, 2023. Order 17 and the Order were served on Mantle on January 30, 2024. Mantle filed notices of appeal and requested the Board issue stays of all five Environmental Protection Orders. On December 18, 2023, the Board granted a stay of Order 14, Order 15, and Order 17. The Board issued its reasons for the decisions on March 28, 2024.[2]

[11] On December 4, 2023, Mantle and the Proposal Trustee applied to convert the Proposal Proceedings to CCAA proceedings (the "CCAA Proceedings"), and this application was granted on January 10, 2024. The Proposal Proceedings were continued under CCAA as Mantle and the Proposal Trustee were both of the view that this was the best option for ensuring the environmental obligations associated with the Active Aggregate Pits are fulfilled, because the CCAA Proceedings "…allow for the completion of the Reclamation Work, [the] complet[ion of]

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[2] See: Stay Decision: Stay Decision: *Mantle Materials Group Ltd. et al.* v. *Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas* (28 March 2024), Appeal Nos. 23-103-108-ID1 (AEAB), 2024 ABEAB 11; Stay Decision: *Mantle Materials Group Ltd. et al.* v. *Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas* (28 March 2024), Appeal Nos. 23-110-112-IDl (AEAB), 2024 ABEAB 12.

the [Sales Process], and ensure provisions are made for any reclamation work to be addressed on any Active Aggregate Pits that cannot be sold."[3]

[12] On January 30, 2024, as previously noted, the Inspector served the Order on the Appellants, which required amongst other things, that the Smoky Lake Pit be reclaimed by November 24, 2024, and that a reclamation certificate be applied for by May 1, 2026. The majority of the reclamation work must be completed by September 20, 2024.

[13] On January 31, 2024, the Board received a Notice of Appeal from the Appellants appealing the Order accompanied by a request for a stay.

[14] On February 2, 2024, the Board acknowledged receipt of the Notice of Appeal and requested that the Appellants provide additional information in support of their stay application.

[15] On February 8, 2024, the Appellants advised the Board the Sale Process had closed on October 25, 2023, and Mantle and a third-party purchaser were in the process of finalizing a draft purchase and sale agreement with respect to certain surface material leases held by Mantle, including the Smoky Lake Pit surface material lease. The Appellants advised the draft purchase and sale agreement was subject to a sealing order and a confidentiality provision so it could not be provided to the Board without consent of the Court. The Appellants requested the appeal of the Order be held in abeyance until all necessary court orders and regulatory approvals were obtained with respect to the sale of the Smoky Lake Pit to a third-party purchaser (the "Abeyance Request").

[16] On February 9, 2024, the Board received the Appellants' initial submissions respecting the stay application (the "Appellants' Initial Submissions").

[17] On February 14, 2024, 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 February 15, 2024, the Board received the Inspector's response to the Abeyance Request. The Board advised the Parties on February 16, 2024, that it would not hold the appeal in abeyance and set up a process to determine a hearing date. The Board requested the Appellants

[3] Appellants' Initial Submissions at page 4.

provide the Board a status report on the bankruptcy proceedings on March 1, April 2, May 1, June 3, and July 2, 2024.

[19] On February 21, 2024, the Board received the Inspector's response (the "Inspector's Response Submissions") and on February 28, 2024, the Board received the Appellants' rebuttal submissions (the "Appellants' Rebuttal Submissions") regarding the stay.

[20] On February 23, 2024, the Court of King's Bench of Alberta issued a Sale Approval and Vesting Order (the "Sale and Vesting Order") approving, amongst other things, the sale of certain Active Aggregate Pits, including the Active Smoky Lake Pits, (the "Purchased Smoky Lake Pits") to PEA Holdings Incorporation pursuant to an asset purchase agreement dated February 9, 2024 (the "Asset Purchase Agreement").[4] On March 13, 2024, the Board wrote to the parties informing them the Board had reviewed the parties' submissions and that the Board had decided to grant the stay of the Order and Order 16, which would remain in place until the appeal is addressed.

[21] These are the Board's reasons for the decision.

3. ISSUES

[22] The Board received comments from the Appellants and the Inspector on the following questions regarding the stay application:

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 is refused?
3. Would the Appellants suffer greater harm if the stay was 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] The Asset Purchase Agreement is attached as Exhibit "E" to the Affidavit of Byron Levkulich sworn February 13, 2024.

4. LEGISLATION AND CASELAW

[23] The fundamental question before the Board in a stay application is whether granting of the stay would be just and equitable in all the circumstances.[5]

[24] 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."

[25] 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.[6] The steps in 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."[7]

[26] 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."[8]

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

6 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.* (6 June 1997), Appeal No. 96-070 (A.E.A.B.); *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd*. (14 May 1998), Appeal No. 97-051 (AEAB); 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).

7 *RJR-MacDonald* at paragraph 43.

8 *RJR-MacDonald* at paragraph 50.

[27] The second step of the test requires the Board to decide whether the applicant seeking the stay would suffer irreparable harm if the stay were 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.

[28] 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."[9]

[29] 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.[10]

[30] 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."[11] 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 cumulative effect of granting a stay,[12] third parties who may suffer damage,[13] or the reputation and goodwill of a party will be affected.[14]

[31] 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."[15] The environmental mandate of the Board requires the Board to consider

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

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

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

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

13 *Edmonton Northlands* at paragraph 78.

14 *Edmonton Northlands* at paragraph 79.

15 *RJR-MacDonald* at paragraph 66.

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." [16]

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

[32] 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, as previously noted, the fundamental question before the Board remains whether the granting of a stay is just and equitable in the circumstances.[17] As stated by Justice Feth in the Alberta Court of Queen's Bench decision 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."[18]

[33] 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 "inexorably linked and should be considered together."[19] Together, all these factors guide the Board's exercise of discretion.

[34] 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.[20]

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16 *Gas Plus* at paragraph 65.
17 *Cleanit Greenit* at paragraph 47.
18 *Cleanit Greenit* at paragraph 33.
19 *Cleanit Greenit* at paragraph 32.
20 *Cleanit Greenit* at paragraph 30.

5. SUBMISSIONS

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

5.1. Appellants

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

5.1.1. Serious Concerns to be Heard by the Board

[37] The Appellants submitted there are serious concerns to be heard by the Board. The Appellants submitted the test to be met at this stage was a low one and that the Appellants need only show the appeals are not frivolous and there is an arguable issue to be determined on appeal.[21]

[38] The Appellants argued the issues in the appeal are whether the Inspector had the factual basis to issue the Order, and whether it was proper for the Inspector to issue the Order when she knew the Smoky Lake Pit was the subject of the Sales Process, the CCAA Proceedings and the Asset Purchase Agreement. The Appellants argued the Inspector erred by relying on her opinion that Mantle did not have the financial ability or the intention of reclaiming the Smoky Lake Pit, which the Appellants asserted that the evidence showed was factually incorrect.

[39] The Appellants submitted the Inspector knew that the Smoky Lake Pit was subject to the Sale Process and that Mantle was negotiating the sale of the Smoky Lake Pit with a third-party purchaser who would assume the associated reclamation obligations. The Appellants submitted Environment and Protected Areas ("EPA") was notified by email of the Sales Process and provided the 'teaser' on September 23, 2023, was provided a draft Asset Purchase Agreement on December 12, 2023,[22] and as a stakeholder, was served with all insolvency proceeding materials. [23] The Appellants argued that the Appellants have provided sworn evidence that Mantle

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21 Appellants' Initial Submissions at page 6.

22 See Affidavit of Byron Levkulich dated February 13, 2024, at paragraph 54.

23 See letter dated December 17, 2023, from Gowling WLG to Field Law and EPA at page 2, attached to the Affidavit of Bryron Levkulich, sworn December 18, 2023.

intends to ensure the reclamation work is completed, and that the Smoky Lake Pit is sold to a purchaser acceptable to EPA.

[40] The Appellants submitted the deadlines set out in the Order were unreasonable as the reclamation work required to be completed under the Order could not be completed within the stated timelines.

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

5.1.2. Irreparable Harm

[42] The Appellants submitted they would suffer irreparable harm if the stay were denied as the Order negatively impacted the CCAA Proceedings, the Sale Process, and the negotiation and sale of the Smoky Lake Pit to a third-party purchaser who would assume the associated environmental obligations under the resulting Asset Purchase Agreement.

[43] The Appellants submitted the purchase and sale of the Smoky Lake Pit is predicated on the Smoky Lake Pit being an active aggregate pit. The Appellants stated it is common sense that a purchaser is not going to be interested in purchasing an aggregate pit that it cannot operate because the aggregate pit must be reclaimed to comply with the terms of an environmental protection order.

[44] The Appellants noted that the Environmental Protection Orders served on the Appellants in 2023 were stayed by the Board which enabled negotiations with the third-party purchaser to continue under the Sale Process. The Appellants argued the Order negatively impacts those negotiations because third-party purchaser intends to continue to operate the Smoky Lake Pit with the other related Purchased Smoky Lake Pits. The Appellants argued this would prevent Mantle from mitigating its environmental liabilities associated with the Smoky Lake Pit and from maximizing proceeds available through the CCAA Proceedings to address Mantle's reclamation obligations, ahead of distribution to secured and unsecured creditors.

[45] The Appellants subsequently submitted the Order jeopardized the Asset Purchase Agreement in a manner that could not be compensated in damages. The Appellants stated the Sale and Vesting Order recognizes that under the Asset Purchase Agreement a third-party purchaser

will assume and perform all past and future reclamation liabilities associated with the Smoky Lake Pit, and that the transfer of the Smoky Lake Pit was subject to the consent of the designated director under the *Public Lands Act*, RSA 2000, c P-40.[24] The Appellants argued that the Order interfered with the Asset Purchase Agreement by creating an immediate liability to reclaim the Smoky Lake Pit.

[46] The Appellants submitted that if they are unable to complete the Asset Purchase Agreement, Mantle's creditors, and stakeholders, including EPA and the public, will be negatively impacted because the risk that the Smoky Lake Pit will not be reclaimed increases. The Appellants stated the costs of reclamation exceed the cash in Mantle's estate and the interim financing facility is fully drawn down.[25] The Appellants submitted there is no assurance that financing for the immediate reclamation of the Smoky Lake Pit would be available in the context of the regulatory requirements of the CCAA Proceedings. The Appellants noted Byron Levkulich and Aaron Patsch do not have the financial ability to fund the immediate reclamation of the Smoky Lake Pit.

[47] The Appellants submitted they will suffer irreparable harm if Mantle is required to commence reclaiming the Smoky Lake Pit in the spring of 2024. The Appellants stated the Smoky Lake Pit has been sold as an active aggregate pit, and consequently, the Appellants cannot begin reclamation activities, because doing so will put the Appellants in breach of the Asset Purchase Agreement and the Sale and Vesting Order. The Appellants further argued the Inspector's agreement "not to take any steps to enforce the Order prior to September 20, 2024,"[26] is insufficient, as it may take longer for transfer applications to be processed, and September 20, 2024, is the date on which the Order requires the majority of the reclamation work to be completed. The Appellants argued that as a result, the Appellants will be in breach of the Order and at risk of further regulatory action through no fault of their own.

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

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24 Appellants' Rebuttal Submissions at page 2.
25 Appellants' Initial Submissions at page 8.
26 Inspector's Response Submissions at page 1.

5.1.3. Balance of Convenience and Public Interest

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

[50] The Appellants noted and argued that Inspector's willingness to discuss EPA's requirements for lifting or closing the Order with prospective buyers or parties interested in assuming the obligations of the surface materials lease for the Smoky Lake Pit, including associated end-of-life reclamation obligations, is contradictory to the Inspector's position in opposing a stay and the requirement that Appellants immediately reclaim the Smoky Lake Pit.[27]

[51] The Appellants submitted Mantle, the Monitor and the Court are aware they must comply with Supreme Court of Canada decision in *Orphan Well Association* v. *Grant Thornton Limited and ATB Financial*, 2019 SCC 5 ("*Redwater*"), which the Appellants stated "…requires the estate of the insolvent to address any reclamation obligations prior to any distributions being made to creditors."[28] The Appellants argued that given the Asset Purchase Agreement for the sale of the Smoky Lake Pit was under negotiation, and the steps taken by Mantle and the Monitor to maximize the value of Mantle's estate which includes concluding the Sale Process and the Asset Purchase Agreement, it could not be said that the Smoky Lake Pit would not be reclaimed.

[52] The Appellants argued staying the Order aligns with the public interest as one of the stated purposes of the CCAA Proceedings is ensuring the Mantle can complete the reclamation work. The Appellants further argued the best opportunity to ensure the current and future reclamation obligations are addressed is through the transfer of the Smoky Lake Pit.[29] The Appellants noted EPA has been updated on the status of the CCAA Proceedings at every step, including the provision of a copy of a confidential draft plan regarding how Mantle would address reclamation of any Active Aggregate Pits not sold during the Sale Process as well as draft of the Asset Purchase Agreement.[30]

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27 Appellants' Initial Submission at page 10, citing the Affidavit of Byron Levkulich dated November 13, 2023, at paragraph 30, Exhibit "I", and the Affidavit of Byron Levkulich dated November 27, 2023, at paragraph 91.

28 Appellants' Initial Submissions at page 6.

29 Appellants' Initial Submissions at page 8.

30 See Appellants' Initial Submissions at page 3.

[53] The Appellants submitted their interests aligned with the public interest in seeing the Smoky Lake Pit reclaimed. The Appellants stated that one of the stated purposes of the CCAA Proceedings was to satisfy Mantle's environmental obligations in a manner acceptable to EPA, which the Appellants submitted focused on the public interest and not the Appellants' private interests.

[54] The Appellants argued that a stay of the Order would permit Mantle to sell the Smoky Lake Pit under the Sale Process as an operating aggregate pit with significant reserves and finalize the Asset Purchase Agreement. The Appellants asserted a stay of the Order serves the public interest as a sale of the Smoky Lake Pit would require a purchaser to assume the associated environmental obligations in accordance with legislation and EPA policy, benefiting all stakeholders.

[55] The Appellants argued it was in the overall public interest to stay the Order because the value of the Smoky Lake Pit is greater than the cost of the associated environmental reclamation obligations. The Appellants submitted this makes the Smoky Lake Pit attractive to purchasers under the Sale Process and as discussed, if the Smoky Lake Pit is sold under the Sale Process, the purchaser would be required to assume the associated environmental obligations.

[56] The Appellants submitted that if the Order is not stayed and Mantle is unable to complete the Asset Purchase Agreement, Mantle would have to acquire additional funding to complete the reclamation work required under the Order. The Appellants argued that Mantle may not be able to acquire such funding, noting that the Court would have to approve the funding and may question why the funding is required when the Smoky Lake Pit is subject to the Asset Purchase Agreement.[31]

[57] The Appellants concluded by submitting that the Court in issuing the Sale and Vesting Order, requested the aid and recognition of regulatory, tribunal, and administrative bodies, to give effect to the Sale and Vesting Order and assist Mantle and the Monitor in carrying out the

[31] The Board infers that the Appellants are suggesting they may not be able to obtain the approval of the Court for funding for the reclamation work, in light of the Smoky Lake Pit having been sold under the Asset Purchase Agreement and the Sale and Vesting Order as an active aggregate pit.

terms of the Sale and Vesting Order. The Appellants argued issuing a stay of the Order was consistent with this request.

[58] 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 Order.

5.2. Inspector

[1] The Inspector submitted that she was willing to agree to not take steps to enforce the Order until September 20, 2024. The Inspector stated that "[g]iven this… the Inspector will not respond further to the February 9, 2024 Application by the Appellants, which does not constitute the Inspector's agreement… or admission"[32] to any legal argument or fact.

6. ANALYSIS AND FINDINGS

[59] The Board has the authority to grant a stay under section 97 of EPEA.[33]

[60] As previously noted, granting a stay is an extraordinary remedy. To guide the Board in its discretion, 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."[34]

[61] 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."[35] As stated by the Court in

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32 Inspector's Response Submission at page 1.

33 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."

34 *RJR-MacDonald* at paragraph 43.

35 *Cleanit Greenit* at paragraph 32.

Cleanit Greenit, "… the fundamental question remains whether granting a stay is just and equitable in all the circumstances."[36]

6.1. Serious Concerns

[62] At this step of the test, the Court usually undertakes "an extremely limited review of the case on the merits."[37] As stated by the Court in *Cleanit Greenit*, "[t]his factor is generally a threshold to be satisfied, rather than an attempt to measure the strength of the applicant's underlying claim."[38] 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."[39] The Appellants must demonstrate through the evidence submitted there is some basis on which to present an argument.

[63] The Appellants have raised concerns that the Inspector did not have the factual basis to issue the Order, whether it was proper for the Inspector to issue the Order when she knew the Smoky Lake Pit was subject to the Sales Process, the CCAA Proceedings and the Asset Purchase Agreement and that the deadlines in the Order were unreasonable because they were unattainable.

[64] At this stage of the test, it is sufficient that the Appellants have shown 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 Order and they are serious in nature.

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

6.2. Irreparable Harm

[66] 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 was not granted. Irreparable harm is harm that cannot be quantified in monetary terms or harm that cannot be cured, usually

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36 *Cleanit Greenit* at paragraph 33.
37 *Cleanit Greenit* at paragraph 47.
38 *Cleanit Greenit* at paragraph 47.
39 *RJR-MacDonald* at paragraph 50.

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 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'".[40]

[67] 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.[41]

[68] 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." [42]

[69] 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.[43]

[70] The Board finds the Order interfered with Mantle's ability to sell the Smoky Lake Pit as part of the Proposal Proceedings and subsequent CCAA Proceedings. The Board is of the view the Order negatively affected the Sale Process by creating regulatory uncertainty and an immediate financial obligation to reclaim the Smoky Lake Pit. The Board is also of the view the third-party purchaser would take into consideration the regulatory risk that the Smoky Lake Pit is subject to an Order, the risk EPA may not withdraw or amend the Order, and that compliance with the Order requires the immediate reclamation of the Smoky Lake Pit prior to the commencement

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

41 *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.

42 *Syncrude* at paragraph 53.

43 *Cleanit Greenit* at paragraph 100.

of any mining operations increasing the risk the Asset Purchase Agreement may not be completed.[44]

[71] The Board notes that if Mantle does not complete most of the reclamation work by September 20, 2024, Mantle will be in non-compliance with the Order and the Appellants could be subject to further regulatory action. If Mantle undertakes the reclamation work to comply with the Order, it will be in breach to the Asset Purchase Agreement and the Sale and Vesting Order, and the Board is of the view there is a significant risk the third-party purchaser would not complete the Asset Purchase Agreement. In such circumstances, the obligation to reclaim the Smoky Lake Pit will remain with Mantle and Mantle would not likely be able to fund the reclamation of the Smoky Lake Pit as its interim financing instrument is fully drawn and Mantle will be insolvent. The Board finds that while the nature of the harm is financial, it is impossible to quantify the monetary impact of the regulatory uncertainty caused by the Order being issued and enforced. The purpose of the CCAA is to allow a debtor to restructure its liabilities under the supervision of the Court and it is impossible to quantify the impact on the Appellants if this process is thwarted by the Order and Mantle enters bankruptcy proceedings. On this basis, the Board finds the Appellants would suffer irreparable harm if the Order is not stayed.

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

6.3. Balance of Convenience and Public Interest

[73] The final 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."[45] 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

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[44] Section 4.3.3 of the Asset Purchase Agreement, attached as Exhibit "E" to the Affidavit of Byron Levkulich sworn February 13, 2024, provides that it is a mutual condition that the obligations of the Vendor and Purchaser to complete the transaction are subject to the satisfaction of the condition precedent that at or prior to the closing "AEPA shall have terminated the EPOs".

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

factors. The courts have considered factors such as the cumulative effect of granting a stay,[46] third parties who may suffer damage,[47] or if the reputation and goodwill of a party will be affected.[48]

[74] 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."[49]

[75] The Board is of the view that if a stay is denied, the acceleration of long-term reclamation obligations and the regulatory uncertainty caused by the issuance of the Order would cause more harm to the Appellants by interfering with the CCAA Proceedings, the Sale Process, and Asset Purchase Agreement, than the public interest would suffer if a stay was issued and EPA's ability to enforce the Order is delayed. The Board accepts the Appellants' evidence that if the Smoky Lake Pit can be sold under the CCAA Proceedings, subject to the Asset Purchase Agreement and the Sale and Vesting Order, the associated environmental obligations will be assumed by a purchaser subject to legislative and regulatory requirements and on terms and conditions acceptable to EPA. The Board finds the assumption by a purchaser of the environmental obligations associated with the Smoky Lake Pit under the Asset Purchase Agreement and Sale and Vesting Order would be in the public interest.

[76] The Board is of the view that the Inspector's offer to not take steps to enforce the Order until after September 20, 2024, is insufficient to mitigate the regulatory uncertainty caused by the Order. If the Inspector takes steps to enforce the Order after September 20, 2024, it will negatively impact the likelihood of the Smoky Lake Pit being sold as part of the Sale Process. The Board finds it is not reasonable to expect a purchaser of the Smoky Lake Pit 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

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46 *MacMillan Bloedel* v. *Mullin*, [1985] BCJ No. 2355 (CA) at paragraph 121.
47 *Edmonton Northlands* at paragraph 78.
48 *Edmonton Northlands* at paragraph 79.
49 *RJR-MacDonald* at paragraph 66.

for the Smoky Lake Pit to be operated as an active aggregate pit, and to be reclaimed in due course at its end-of-life by the operator and in accordance with EPEA legislative and regulatory requirements.

[77] The Board also accepts the Appellants' evidence that the costs of reclamation exceed the cash in Mantle's estate, its interim financing facility is fully drawn down, and that Mantle will likely become insolvent if the Inspector enforces the Order. If Mantle were to become insolvent, it is unlikely that the Smoky Lake Pit will be reclaimed, which is contrary to the Inspector's stated intentions in issuing the Order. Moreover, if Mantle is unable to complete the reclamation, it may fall to EPA and taxpayers to finance the reclamation of the Smoky Lake Pit, which is not in the public interest.

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

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

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

[80] 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.[50]

[81] The Board notes the Parties are taking steps to ensure the Smoky Lake Pit is 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 Smoky Lake Pit, and if reclaimed, the Smoky Lake Pit would likely have to be removed from the CCAA Proceedings and Mantle may not be able to complete the Asset Purchase Agreement. None of the Parties benefit from the Appellants being unable to sell the Smoky Lake Pit in the CCAA Proceedings, or from Mantle becoming insolvent if forced to immediately reclaim the Smoky Lake Pit. This situation will not

50 *Cleanit Greenit* at paragraph 33.

only cause harm to Mantle, but also leaves a great deal of uncertainty regarding the ultimate reclamation of the Smoky Lake Pit.

[82] A more just and equitable solution for the Parties is to grant a stay of the Order to allow time for the CCAA Proceedings to continue unimpeded by the Order. If the CCAA Proceedings are successfully concluded, the Parties may be able to meet their long-term objectives as the Smoky Lake Pit could be operated as an active aggregate pit and reclaimed at its end-of-life by the new operator in accordance with EPEA legislative and regulatory requirements. While this outcome is not guaranteed, it is preferable to the uncertainty created if Mantle were to become insolvent.

[83] As one final note, the Board accepts the Appellants' evidence that EPA was aware of the Sale Process, and that the Smoky Lake Pit was included in the Sale Process, by as early as September 22, 2023, having been provided a copy of the Mantle 'Pits Teaser' by email.[51] The Board also accepts the evidence of the Appellants that the Inspector had expressed a willingness to discuss lifting or closing the environmental protection orders it issued in relation to the Sale Process with prospective purchasers.[52] The Board does not view this offer to be sufficient to significantly reduce the uncertainty created by the environmental protection orders issued, but does note that such a discussion may be consistent with the Court's request in the Sale and Vesting Order for the assistance of regulatory agencies.

[84] In light of this, while the Board may have denied the Appellants' request to hold the appeal in abeyance as noted above, the Board is of the view that it may be beneficial for the Parties to proceed with such discussion prior to the scheduling and commencement of the hearings.

8. DECISION

[85] On the application by the Appellants for a stay of the Order, the Board finds the Appellants have met the test for the stay. The Board finds the Appellants have raised serious issues, would suffer irreparable harm, the balance of convenience favours the Appellants, and that the overall public interest warrants a stay.

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51 Affidavit of Byron Levkulich, sworn November 27, 2023 at paragraph 99 and 105.

52 The Board notes this evidence also appears to be supported in respect to Orders 15 and 17, by the Affidavit of Heather Dent, sworn November 30, 2024, at paragraph 13.

[86] The Board finds that it would be just and equitable to issue a stay of the Order.

[87] The Board grants a stay of Environmental Protection Order EPO-EPEA-35659-13. The stay will remain in effect until the appeals are resolved unless otherwise ordered by the Board or the Minister.

Dated on April 15, 2024 at Edmonton, Alberta.

Barbara Johnston
Board Chair