Appeal No. 05-071-ID1

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 6, 2007

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

-and-

IN THE MATTER OF an appeal filed by Wayne Sommerstad with respect to an Enforcement Order issued on January 24, 2006, under the *Water Act* to Wayne Sommerstad by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Stay Decision: *Sommerstad* v. *Director, Southern Region, Regional Services, Alberta Environment* (6 March 2007), Appeal No. 05-071-ID1 (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudey, Chair.

SUBMISSIONS BY:

Appellant: Mr. Wayne Sommerstad.

Director: Mr. Martin Foy, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Erika Gerlock, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Enforcement Order to Mr. Wayne Sommerstad for an alleged contravention of section 36(1) of the *Water Act* for the construction of a dam and a culvert and the diversion of water, on his land, in the Municipal District of Foothills near Okotoks, Alberta. Mr. Sommerstad appealed the Enforcement Order and requested a Stay.

The Board received submissions on whether the Stay should be granted. After reviewing the submissions and the Enforcement Order, the Board determined that although there is a serious issue that needs to be determined, the Stay should not be granted. The Board found the harm that could result to Mr. Sommerstad could be compensated for monetarily, and the public interest in this case was particularly relevant as neighbouring properties were being affected by the works.

TABLE OF CONTENTS

I. BACKGROUND 1

II. SUBMISSIONS 2

A. Appellant 2

B. Director 5

III. ANALYSIS OF STAY APPLICATION 8

A. Legal Basis for a Stay 8

B. Analysis 11

1. Serious Issue 11
2. Irreparable Harm 11
3. Balance of Convenience 13
4. The Public Interest 14
5. Summary 16

IV. CONCLUSION 17

I. BACKGROUND

[1] On January 24, 2006, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued an Enforcement Order (the "Order") to Mr. Wayne Sommerstad for an alleged contravention of section 36(1) of the *Water Act*, R.S.A. 2000, c. W-3, for the construction of a dam and a culvert and the diversion of water (the "Works") on Mr. Sommerstad's land in NW 1-20-2-W5M in the Municipal District of Foothills (the "Municipal District") near Okotoks, Alberta.

[2] On February 1, 2006, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Mr. Wayne Sommerstad (the "Appellant") appealing the Order and requesting a Stay.

[3] On February 2, 2006, the Board wrote to the Appellant and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal and Stay request. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to this appeal and to provide comments with respect to the Stay request. The Parties were asked to provide available dates for a mediation meeting, preliminary meeting, or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] On February 10, 2006, the Director notified the Board that he was unable to consent to a Stay of the Order, because he continued to have concerns for the downstream landowners.

[6] On February 10, 2006, the Board asked the Appellant to answer the following questions regarding his Stay request:

> "1. What are the serious concerns of Mr. Sommerstad that should be heard by the Board?
>
> 2. Would Mr. Sommerstad suffer irreparable harm if the Stay is refused?

3. Would Mr. Sommerstad suffer greater harm if the Stay was refused pending a decision of the Board, than those that may be affected by his activities?

4. Would the overall public interest warrant a Stay?"

[7] The Appellant provided his submission on February 16, 2006, and the Director submitted his response on February 24, 2006. The Appellant's rebuttal submission was received February 28, 2006.

[8] On March 3, 2006, the Board notified the Parties that it was denying the Stay. The following are the Board's reasons.

II. SUBMISSIONS

A. Appellant

[9] The Appellant explained the Director met with him on February 15, 2006, and they agreed that all available options would negatively impact someone, and the dugout was not the source of the problem.

[10] The Appellant argued the Stay should be granted because the dugout was properly registered with full disclosure and subsequent approval. The Appellant stated removal of the dugout would impair his future farming operations and would endanger downstream acreage properties during spring snowmelt and runoff. He argued this action would constitute gross negligence and invite permanent legal liability.

[11] The Appellant stated removal of the water from the dugout would negatively impact someone. He explained that if the water was pumped onto his alfalfa field, the crop would suffer winterkill, and the loss of the crop would mean years of extra costs to return it to full productivity with loss of income in the interim. The Appellant also explained that although flooding of some of the acreage land downstream is not a good thing, "…they do not make their living from the land and in a few months, the ice covering the ground will be gone."[1] Therefore, according to the Appellant, he would have a greater potential economic loss than others if the Stay was refused.

[12] The Appellant stated the two acreage owners who are negatively impacted by "…this act of mother nature," refuse to spend money to mitigate the problem.

[13] In response to the question of whether the public interest warrants a Stay, the Appellant submitted that the matter involves only three people, so the public is not affected. He further submitted the possible exception would be the Municipal District, which may represent the public, and has had similar problems around the Municipal District and has indicated it does not want water pumped into the municipal ditches this winter because the resultant icing blocks roadway culverts.

[14] The Appellant submitted that more harm would be caused if the Stay is not accepted.

[15] In his rebuttal submission, the Appellant stated there are two issues, a short term issue and a long term issue. He explained the short term issue is the temporary icing of the land of two downstream neighbours resulting from water flowing from natural springs on his property. However, when the water stops freezing, the water will flow into the municipal roadway ditches and not bother anyone.

[16] The Appellant explained the long term issue is whether his dugout is legal under the *Water Act*, and he argued there was no reason to immediately remove this long-standing dugout. He stated his dugout is not causing the water that is flowing downstream, and the dugout has been in existence for about a decade. The Appellant explained that he combined two older side-by-side dugouts into one, strengthening it, and leveling the top of the berm[2] to provide a better roadway between fields.

[17] The Appellant stated the only immediate serious matter is the temporary icing problems. He argued that if the dugout did not exist, there would be no solution to the problem, as the dugout is a holding area from which water can be removed and prevented from flowing downstream. According to the Appellant, the neighbours could remove the water at their own expense, but they refused. Furthermore, he offered to do it at his own expense and labour if the Director would accept his dugout, but the Director refused. The Appellant questioned how

---

1 Appellant's submission, dated February 16, 2006.

2 The berm is referred to as a "dam" in the Enforcement Order and in the Director's submission.

serious can the problem be if the affected parties and the Director will not accept the offer to mitigate the problems.

[18] The Appellant stated he would suffer irreparable harm if the Stay was refused. He reiterated that immediate pumping of the water onto his alfalfa fields in the winter would winterkill his crop, and it would take years and great expense to restore this crop to full production. The Appellant stated the partial or complete removal of the dugout would restrict operation options in the future. The Appellant explained that in most years, the dugout catches snowmelt in the spring and is closer to dry instead of full. He stated a smaller dugout would more likely be dry in the summer, which could affect livestock operations. The Appellant also raised the cost involved in altering the dugout.

[19] The Appellant stated the downstream acreages would suffer in the short term because of the water icing over the next couple of months, but according to the Appellant, the adjacent landowners have the option of mitigating their problems if they choose to. The Appellant stated he would suffer in the short and long term from the huge costs, the loss of perennial crops and a reduced livelihood, and restrictions on future farming operations.

[20] The Appellant explained a third party mentioned in the Director's submission is now satisfied with the ditching done to redirect the water, and the Appellant had paid for a third of the costs of the ditching. The Appellant also explained the roadway joining the fields does not require an approval, because the culvert is less than one and a half metres in diameter and does not traverse a watercourse. He stated the land in question is a few metres wide and is left in grass to prevent soil erosion during spring runoff, and it does not meet the definition of a watercourse.

[21] The Appellant stated he contacted Alberta Environment regarding registering the dugout and was told it was acceptable. He explained the legal land description was correct on the form with the map indicating the location and size of the dugout, but on the other form, he mistakenly used the legal land description of his home quarter. At the time he registered the dugout he was told he would receive a Traditional Agricultural User Registration, but he did not check the registration when he received it in the mail. The Appellant stated he had no problem

until now. Although Alberta Environment had years to question the application, inspect the dugout, and change the registration, nothing was said or done until now.

B. Director

[22] The Director explained the Enforcement Order states the Works requires an approval under section 36(1) of the *Water Act*,[3] because it falls within the definition of an activity.[4] The Director stated neither the dugout nor the dam was approved, and the Enforcement Order requires the Works be removed as it is causing adverse effects to the downstream landowners.

[23] The Director stated the Appellant has not submitted a written request for a change of the land location, even though the Appellant stated he registered another quarter section of land on his registration by mistake. The Director stated he would consider the request to correct the registration. However, the Director explained that if the registration is amended to reflect the

---

[3] Section 36(1) of the *Water Act* provides: "Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act."

[4] Under section 1(1)(b) of the *Water Act*, an activity is defined as follows:

> "Activity means:
>
> (i) placing, constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material, or carrying out any undertaking, including but not limited to groundwater exploration, in or on any land, water or water body, that
>
> (A) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means including drainage,
>
> (B) changes, may change or may become capable of changing the location of water or the direction of flow of water, including water in a water body, by drainage or otherwise,
>
> (C) causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body, or
>
> (D) causes, may cause or may become capable of causing an effect on the aquatic environment;
>
> (ii) altering the flow, direction of flow or level of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose;
>
> (iii) drilling or reclaiming a water well or borehole;
>
> (iv) anything defined as an activity in the regulations for the purposes of this Act
>
> but does not include an activity described in subclause (i) or (ii) that is conducted by a licensee in a works that is owned by the licensee, unless specified in the regulations."

quarter section, only the dugout the size that existed as of January 1, 1999, can be registered and to a maximum of 6,250 m^3. According to the Director, since that time, the dugout has been enlarged and the dam was constructed. He stated the water used pursuant to a Traditional Agricultural User Registration may only be used for the purposes of raising animals or applying pesticides and it cannot be used for irrigation.

[24] The Director explained there is a moratorium on the Highwood River Basin, where the Works is located, since August 15, 1985, and the moratorium does not permit any licences to be issued for water use in the basin, except in limited cases for stock watering and municipal use.

[25] The Director explained the dam was not built to any engineered standards as would be required in the approval process. The Director also explained the Appellant uses the top of the dam as a roadway, which being in a waterway requires an approval. The Director stated the dam "…acts to impound water which is not permitted for a roadway crossing over a waterbody, so could not be approved in its present form."[5]

[26] The Director stated the Appellant uses the water from the dugout to irrigate crops during the dry summer months, which is clearly not permitted under a Traditional Agricultural User Registration. The Director submitted that even though the Appellant may be required to reduce the size of the dugout and have less water as a result, he may not actually need as much water as he calculated because of the restrictions on the purposes for which the water may be used. The Director commented there were no cattle on the quarter section where the Works is located.

[27] The Director did not deny that downstream landowners may have been impacted in any event by the natural flow of water, but what is not known is "…what that natural impact would have been *but for* the dugout and the dam."[6] (Emphasis in original.) The Director stated the flow may have been much slower and at a less concentrated rate than it flows now, because now the water is directed through a culvert in the dam.

---

5 Director's submission, dated February 24, 2006, at page 3.

6 Director's submission, dated February 24, 2006, at page 4.

[28] The Director explained there is a risk to downstream landowners should the dam fail, and therefore, the Appellant has already accepted some of the liability for the downstream landowners because of the Works.

[29] The Director submitted the concerns raised by the Appellant are not so serious as to justify issuing a Stay.

[30] In response to the question on whether one party would suffer greater harm if the Stay was refused, the Director submitted the Appellant would not suffer harm at all, but if the Stay was granted, third parties would continue to be adversely affected, and there were public safety concerns.

[31] The Director argued it would be in the public interest to refuse the Stay. According to the Director, the downstream landowners are an identifiable group whose interests must be considered, and these residents are being adversely affected by the continuing flow of water resulting from the mild winter conditions, which freezes and causes property damage and losses.

[32] The Director submitted that granting a Stay would "…undermine the Alberta public's confidence in the enforcement program of Alberta Environment under the *Water Act* to not condone illegal structures that may be causing an adverse impact on another landowner. It is clearly the mandate of Alberta Environment to take actions in these situations, and particularly where third parties are being impacted."[7] The Director stated he has the duty to uphold the *Water Act*, and he addressed the unauthorized activities and the concerns for impacts on downstream landowners.

[33] The Director submitted the overall public interest would not warrant a Stay in this case.

---

[7] Director's submission, dated February 24, 2006, at page 6.

III. ANALYSIS OF STAY APPLICATION

A. Legal Basis for a Stay

[34] The Board is empowered to grant a Stay pursuant to section 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). This section 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 the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."[8]

[35] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*[9] and *Stelter*,[10] is based on the Supreme Court of Canada case of *RJR MacDonald.*[11] The steps in the test, as stated in *RJR MacDonald*, are:

---

[8] Section 97 of EPEA also provides:

> "(3) Where an application for a stay relates to the issuing of an enforcement order or an environmental protection order or to a water management order or enforcement order under the *Water Act* and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out,
>
> (a) order the Director under this Act or the Director under the *Water Act* to take whatever action the Director considers to be necessary to carry out those terms and conditions and to determine the costs of doing so, and
>
> (b) order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the *Water Act* in the form and amount the Board considers necessary to cover the costs referred to in clause (a)."

[9] *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.).

[10] *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (14 May 1998), Appeal No. 97-051 (A.E.A.B.).

[11] *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR MacDonald"*). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 ("*Metropolitan Stores"*) and *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

> "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."[12]

[36] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is some basis on which to present an argument. As not all of the evidence will be before the Board at the time the decision is made regarding a Stay application, "…a prolonged examination of the merits is generally neither necessary nor desirable."[13]

[37] The second step in the test to determine whether a Stay is warranted requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.[14] Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. 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. In *Ominayak* v. *Norcen Energy Resources*,[15] the Alberta Court of Appeal defined irreparable harm by stating:

> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be 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 denial of justice."[16]

The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.[17] The damage that may be suffered by third parties may also be taken into consideration.[18]

---

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

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

14 *Manitoba (Attorney General)* v. *Metropolitan Stores,* [1987] 1 S.C.R. 110.

15 *Ominayak* v. *Norcen Energy Resources,* [1985] 3 W.W.R. 193 (Alta. C.A.).

16 *Ominayak* v. *Norcen Energy Resources,* [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

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

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

[38] The third step in the test is the balance of convenience: "…which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[19] The decision-maker is required to weigh the burden that the remedy would impose on the defendant against the benefit the plaintiff would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The Courts have considered factors such as the cumulative effect of granting a Stay,[20] third parties who may suffer damage,[21] or if the reputation and goodwill of a party will be affected.[22]

[39] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. In *Metropolitan Stores*, it was recognized the public interest is a special factor in constitutional cases.[23]

[40] The environmental mandate of this Board requires the public interest be considered in appeals before the Board, and therefore the public interest will be considered in the balance of convenience.[24] The Board has, therefore, stated the public interest is a separate step in the test when applying for a Stay. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "…concerns of society generally and the particular interests of identifiable groups."[25] The effect on the public may sway the balance for one party over the other.[26]

---

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

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

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

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

23 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 90.

24 The Court in *RJR MacDonald*, at paragraph 64, stated: "The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants."

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

26 The Court in *RJR MacDonald*, at paragraph 68, stated:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large…. Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon

B. Analysis

1. Serious Issue

[41] As indicated in *RJR MacDonald*, the first step in determining if a Stay should be granted requires the Appellant to demonstrate that there is a serious issue to be tried and the claim is not frivolous or vexatious.

[42] The Appellant raised the issue of the effects of removing the dugout on adjacent landowners and whether the Order was issued properly. According to the Appellant, the Director agreed, after a site visit, that other landowners may be affected if the Works was removed. Essentially, different neighbouring properties could be affected if the Works was removed. The actual impact would have to be determined at a hearing of the substantive issues, should one be held. These are valid issues. Therefore, based on the Appellant's submissions, the Board accepts there is a serious issue to be tried, and the first part of the test for a Stay has been met.

2. Irreparable Harm

[43] In assessing irreparable harm, the Supreme Court of Canada states that it must be determined "…whether the refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."[27]

[44] To determine if the harm is irreparable, the Board looks at whether the Appellant could not be compensated for any damages that may result from the refusal to grant a Stay. The onus is on the Appellant to demonstrate he will suffer irreparable harm if the Stay is not granted.

[45] The Appellant in this case explained how he would suffer harm if the Order was not stayed. He explained his hay crop would be damaged and it would take years to re-establish the growth. Although this may be true, the value of his losses can be calculated, and if he is required to purchase additional hay for his livestock, the price of this expense is easily

---

some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

[27] *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 58.

calculated. Normally hay crops can be reseeded and re-established. Therefore, the effect is not irreparable.

[46] What is at issue here is the effect of the Works on neighbouring properties. The adjoining properties could be harmed by the water flowing from the Works in the same way the Appellant's property could be harmed in that vegetation could freeze. We do not know how the neighbouring properties are used, other than as households. If the Appellant's losses could be compensated for monetarily, the same would be true for the adjacent landowners. The Appellant expressed concern that he could be liable for any damages resulting from the removal of the Works if different properties are harmed, but the same can be said for those properties currently being affected. At this point, the potential for harming other landowners is speculation, but the Director identified an adverse affect is occurring to neighbouring properties. The Board is unwilling to grant a Stay on what *may* occur, but relies, in this case, on the Director's finding of an adverse affect sufficient to warrant the issuance of the Order.

[47] In previous decisions, the Board has acknowledged the additional adverse effect of having to remove an activity once completed.[28] In this case, the Order requires the Appellant to remove water from a dugout, limit the amount of water in the dugout, and remove a roadway on top of the berm around the dugout. If the Appellant followed the Order and then the Board heard the substantive arguments and decided the Order should be reversed or varied, it normally would not be difficult to replenish the water supply in the dugout either through rainfall or spring runoff.

[48] The Appellant is required to remove water from the dugout and keep water levels lower so that there is a one metre freeboard between the level of the water and the spillway. Although the Appellant stated the release of the water would winterkill his hay crop, he has the option of trucking the water offsite if necessary, and thereby preventing his hay crop from freezing due to the released water. There are alternatives available that can prevent crop damage from occurring.

---

[28] *Martin* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal No. 00-065-R (A.E.A.B.) and *Gilmore and Fitzgerald* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal Nos. 00-071-072-R (A.E.A.B.).

[49] If the roadway was removed as required under the Order, it could be replaced and the costs associated with the removal and reconstruction of the road could be calculated. Removing the roadway could have the potential of affecting the water body. The Appellant is required to provide the Director with a proposal on how to remove the roadway. The proposal needs to be approved by the Director prior to any work being undertaken to ensure any negative effects are minimized.

[50] As the effects of not granting the Stay can be compensated for monetarily or reversed, the Board does not find the Appellant will suffer irreparable harm.

3. Balance of Convenience

[51] The Board must look at which Party would suffer the greatest harm if the Stay was granted.

[52] Under the Order, the Appellant is required to submit a remedial plan to the Director on how to deal with the removal of the Works and restore the natural drainage pattern in the water body. The Appellant is also required to control the flow of water through the culvert and over the Works. The Director did not specify the method in which the water level had to be controlled. He also left it to the Appellant to develop the remedial plan and submit it to the Director for approval. The Board notes the remedial plan was to be submitted to the Director by February 22, 2006, and the work completed by May 1, 2006. The Director did not agree to a Stay, presumably on the basis that adjacent lands needed to be protected during the spring runoffs. The Director's request does not seem to be unreasonable, based on the information currently before the Board.

[53] It appears from the information provided by the Appellant that any harm associated with not granting a Stay is economical in nature. There is also some inconvenience as the Appellant would have to remove some of the water from the dugout in a safe manner so as not to affect other landowners.

[54] The Appellant is required to provide a remedial plan to the Director outlining the steps to be undertaken to remove the Works and control water flow from the dugout. If during

this planning phase the Appellant identifies potential negative effects to other neighbouring properties, this can be noted in the report and brought to the Director's attention. Also, the Board is confident the Director would allow additional time to comply with the Order and to complete the work required if necessary, providing adjacent landowners are not being adversely affected.

[55] The Board is concerned that it is unknown what effect the removal of the Works will have on other landowners in the area. Although it may alleviate problems for some neighbours, it could cause concerns for other neighbours. The Director determined it would be in the interest of others to have the Appellant perform certain tasks to reduce the risk of further harm to downstream landowners. At this stage of the appeal process, the Board does not have all of the substantive details of the site. The Board must base its decision regarding the Stay on the submissions provided by the Parties. Both the Director and the Appellant have concerns about the potential consequences on neighbouring landowners. At this point in the process, the Appellant has not provided enough evidence that other neighbours will be affected if the Stay was not granted. For the Director to issue the Order, the Director determined that something had to be done to prevent harm to other landowners and to have the Appellant conform to the requirements of the legislation.

[56] In this case, for the purpose of the Stay decision, the Board will accept the Director's analysis. The Board believes the balance of convenience favours the Order remaining in place, because the additional information gathered to prepare the remedial plan would benefit the Appellant, Director, and adjacent landowners.

[57] The Board's decision to grant or deny the Stay could have an effect on other landowners. Therefore, the Board must weigh the public interest element of the Stay request.

4. The Public Interest

[58] On the question of the public interest, the Supreme Court in *RJR MacDonald* stated:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large…. Rather, the

> applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

[59] It is the public interest that is important in this appeal. The Director explained the Order was put into place because of the adverse impact on the adjacent landowners resulting from water flowing from the Appellant's property. The Appellant argues that if the Works is removed, other landowners will be affected because water that is currently being held in the dugout would flow onto adjacent lands. The Board does not have all of the evidence before it to make a decision in this regard. This would be decided if a hearing on the substantial issues was held.

[60] It is not necessary for a participant to provide all of their evidence and arguments when the Board is considering a Stay request. Because the Board does not have all of the evidence, it must make a decision based on the arguments presented.

[61] In this situation, the Director has issued an Order against the Appellant. Enforcement orders are issued when the Director believes there has been a contravention of the *Water Act*, and in most cases, the Director has tried to speak with the person receiving the enforcement order prior to issuing the order in an attempt to resolve the matter. In this case, the Director did attempt to reach the Appellant, but was unsuccessful in reaching him. The Director issued the Order when it was confirmed the Works was causing an adverse impact on the neighbouring lands.

[62] When the Director issues an enforcement order, it is in response to a recognized environmental issue that is causing or has the potential to cause an adverse effect. An enforcement order is issued to protect the public. The assumption is that if it is issued, it is for the public interest. The Appellant in this case acknowledged there was an impact on the neighbouring properties due to the water flow from his lands, although there are questions as to the effect removing the Works would have on the neighbouring properties and other properties in the area.

[63] Based on the reasons provided by the Supreme Court in *RJR McDonald*, the Director needs to provide proof of the Director's duty to promote the public interest and that the Order was issued pursuant to that responsibility. There is no doubt the Director's role is to protect the environment and to ensure actions are not taken by others that would cause an adverse impact to others. The Director issued the Order pursuant to section 135 of the *Water Act*. He visited the Appellant's property and noted water flowing from the Works onto adjacent properties and causing an adverse impact on the neighbouring lands. As the impact has been shown, and the Appellant has not argued that there is no impact to other landowners, the Board believes it is in the public interest to deny the Stay request. The Order was issued with the intention of protecting the public, and the Appellant did not provide sufficient argument to demonstrate the public interest supports a Stay.

[64] The public interest in these circumstances warrants denying the Stay request.

5. Summary

[65] The Appellant did raise serious issues that should be heard and therefore part of the Stay test is satisfied. The Appellant could be monetarily compensated for any damages that may occur should the Stay be denied or the damages could be reversed. Therefore, the Appellant would not be irreparably harmed if the Stay was not granted. The balance of convenience favours the Order remain in effect, as the Order requires the Appellant to collect information and data and to prepare a remedial plan prior to work starting on the removal of the Works. It is not certain if removal of the Works will cause adverse effect to other landowners, but there is evidence of adjacent properties currently being affected. Additional information may clarify who will be affected and how they will be affected with changes to the Works. The Director issued the Order in the public interest with the intent of protecting adjacent lands from further damage due to the Works.

IV. CONCLUSION

[66] The Board denies the Stay request of the Appellant, and the Order remains in place.

Dated on March 6, 2007 at Edmonton, Alberta.

"*original signed by*"

_____

Dr. Steve E. Hrudey, FRSC, PEng
Chair