ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 20, 2011

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 appeals filed by Trevor Warne, Christopher Wenslaw, John Stephen and Linda Overell, Jo Towers, and Simon Weekley with respect to *Water Act* Approval No. 00275343-00-00 issued to Dave McDougall by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: *Warne et al.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *Dave McDougall* (20 May 2011), Appeal Nos. 10-025-029-ID1 (A.E.A.B.).

BEFORE:	Justice Delmar W. Perras (ret.), Chair; Dr. Alan J. Kennedy, Board Member; and Mr. Eric O. McAvity, Q.C., Board Member.
BOARD STAFF:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Denise Black, Board Secretary; and Ms. Marian Fluker, Associate Counsel.
SUBMISSIONS BY:	
Appellants:	Mr. Trevor Warne; Mr. Christopher Wenslaw; Dr. John Stephen and Ms. Linda Overell; Dr. Jo Towers; and Mr. Simon Weekley.
Director:	Mr. Brock Rush, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Alison Altmiks and Ms. Aurelia Nicholls, Alberta Justice.
Approval Holder:	Mr. Dave McDougall.
WITNESSES:	
Appellants:	Mr. Trevor Warne; Mr. Christopher Wenslaw; Dr. Jo Towers, representing herself and Mr. Simon Weekley; and Mr. Clint Docken, representing Dr. John Stephen and Ms. Linda Overell.
Director:	Mr. Brock Rush, Director, Southern Region, Environmental Management, Alberta Environment.
Approval Holder:	Mr. Dave McDougall; and Mr. Wayne Hallstrom, Hallstrom Associates Environmental.

EXECUTIVE SUMMARY

Alberta Environment issued an approval under the *Water Act* to Dave McDougall, authorizing the filling in of 0.023 hectares of wetland at SE 10-23-05-W5M near Bragg Creek, Alberta, for the purpose of constructing an access road to his property.

The Board received Notices of Appeal and requests for a stay from Mr. Trevor Warne, Mr. Christopher Wenslaw, Dr. John Stephen and Ms. Linda Overell, Dr. Jo Towers, and Mr. Simon Weekley (collectively, the Appellants).

The Board reviewed the stay submissions and granted a temporary stay until the preliminary matters were heard. The Board determined the following issues would be heard at the Preliminary Motions Hearing:

1. Are the Appellants directly affected by the Approval?
2. Should the Board grant a Stay of the Approval until the Board can hear the merits of the appeals, should any of the Appellants be found directly affected?

The Board held a Preliminary Motions Hearing on November 8, 2010. At the Preliminary Motions Hearing the Board delivered an oral decision with written reasons to follow. After the Preliminary Motions Hearing, the participants agreed to attend a mediation meeting prior to setting a date for a hearing.

The Board dismissed the appeals of Dr. Towers, Mr. Weekley, and Dr. and Ms. Overell because the Board found they were not directly affected. The Board found Mr. Warne and Mr. Wenslaw directly affected because their wells and septic fields are sufficiently close to the wetland that there was a reasonable probability that they could be impacted by changes in the water level in the wetland.

The Board determined there was a serious issue to be addressed, there was a reasonable probability of irreparable harm to the environment (wetland), and the balance of convenience and public interest support the Stay. Therefore, the Board ordered the Stay remain in place until the appeals of Mr. Warne and Mr. Wenslaw were concluded or until the Board ordered otherwise.

TABLE OF CONTENTS

II. BACKGROUND

[1] On October 19, 2010, the Director, Southern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 00275343-00-00 (the "Approval") under the *Water Act*, R.S.A. 2000, c. W-3, to Mr. Dave McDougall (the "Approval Holder") authorizing the filling in of 0.023 hectares of wetland for the purpose of constructing an access road to his property at SE 10-23-05-W5M near Bragg Creek, Alberta.

[2] Between October 22 and October 26, 2010, the Environmental Appeals Board (the "Board") received Notices of Appeal and requests for a Stay from Mr. Trevor Warne (10-025), Mr. Christopher Wenslaw (10-026), Dr. John Stephen and Ms. Linda Overell (10-027), Dr. Jo Towers (10-028), and Mr. Simon Weekley (09-029) (collectively, the "Appellants").

[3] The Board notified the Approval Holder and the Director of the Notices of Appeal, and requested the Director provide the Board with a copy of the application filed by the Approval Holder and all the Statements of Concerns filed and the responses to the Statements of Concern (the "Documents").[1] The Board also asked the Appellants to answer questions in relation to their Stay requests.[2] The Board received responses from the Appellants regarding the Stay questions between October 25 and 27, 2010.

[4] On October 27, 2010, the Board notified the Appellants, Approval Holder, and Director (collectively the "Participants") that after reviewing the Appellants' submissions provided in response to the Stay questions, there appeared to be sufficient information for the Board to consider issuing a Stay. The Board asked the Approval Holder and Director to provide comments in response to the Appellants' submissions. Responses were received from the Approval Holder and Director on October 28 and 29, 2010, respectively.

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[1] These Documents were received on October 29, 2010. The Director's record was received on November 17, 2010.

[2] The Appellants were asked 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 was refused pending a decision of the Board, than the Approval Holder would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are the Appellants directly affected by the Approval issued to the Approval Holder?

[5] On October 29, 2010, the Board notified the Participants that it was granting a temporary Stay to enable the Board to hold an expedited Preliminary Motions Hearing to hear the following issues:

1. Are the Appellants directly affected by the Approval?

2. Should the Board grant a Stay of the Approval until the Board can hear the merits of the appeals, should any of the Appellants be found directly affected?

The Board explained the temporary Stay prohibited the removal or alteration to the 0.023 hectares of wetland described in the Approval until the Board made a decision at the end of the Preliminary Motions Hearing.

[6] Rebuttal submissions on the Stay issue were received November 4, 2010, from Mr. Warne, Mr. Wenslaw, Dr. Towers, and Mr. Weekley.

[7] The Board held the Preliminary Motions Hearing on November 8, 2010, in Calgary, Alberta. At the Preliminary Motions Hearing the Board delivered an oral decision with written reasons to the follow. The Board stated that Mr. Warne and Mr. Wenslaw are directly affected, and the Stay would remain in place until the appeals of Mr. Warne and Mr. Wenslaw are concluded or until the Board orders otherwise. The Board believed irreparable harm to the wetland could occur if work under the Approval was carried out. After the Preliminary Motions Hearing, the Participants agreed to attend a mediation meeting prior to setting a date for a hearing.

[8] A mediation meeting was held on November 25, 2010, in Calgary, Alberta, with the Approval Holder, Director, and Mr. Warne and Mr. Wenslaw. An interim agreement was reached at the mediation meeting. At this time, the appeals are ongoing and remain in mediation.

III. DIRECTLY AFFECTED

A. Submissions

1. Mr. Trevor Warne

[9] Mr. Warne argued he is directly affected because altering the hydrology in the area by constructing a new road could turn the southwest corner of his property into an unusable bog, disrupt discharge from his septic field causing significant health risk and expense, and

potentially compromise the water well on his property which is his source of drinking and household water.

2. Mr. Christopher Wenslaw

[10] Mr. Wenslaw explained his property is 15 metres from the proposed road, and any changes in the hydrology in the area would have an immediate impact on his property, trees cut along the proposed road right-of-way are visible from his house, and migratory paths and territories of various animals would be interrupted.

3. Dr. John Stephen and Ms. Linda Overell

[11] The Overells stated they are directly affected because Wild Rose Close is the only access road to their property. They argued that, if the proposed road changes the drainage patterns, there is the possibility of seasonal flooding of their access road.

4. Dr. Jo Towers

[12] Dr. Towers considered herself directly affected because the proposed road would irreparably destroy a significant area of sensitive wetland close to her home. She stated the Agricultural Services department of Rocky View County recommended against the proposed road due to concerns about flooding and disruption of hydrology patterns. Dr. Towers argued the proposed road will exacerbate the risk of flooding in the area, specifically Wild Rose Close, and would put her family and 25 other families living east of the proposed road at increased risk. Dr. Towers argued the risk is unacceptable given the alternatives available.

5. Mr. Simon Weekley

[13] Mr. Weekley argued that, since the proposed road could potentially impact his ability to access his property and will affect wildlife in the area, he is directly affected.

6. Approval Holder

[14] The Approval Holder argued the Appellants are not directly affected. He stated all of their hydrological and biophysical concerns were addressed in the biophysical impact assessment completed by Hallstrom Associates Environmental (the “Hallstrom Report”). The Approval Holder argued the concerns expressed by the Appellants were either general in nature

and no different than the concerns of the average Albertan or were not within the Director's jurisdiction.

[15] The Approval Holder stated the two closest Appellants do not have a legal right or entitlement to the lands directly adjacent to the proposed road as the lands directly adjacent are owned by Rocky View County. The Approval Holder noted the closest Appellants are approximately 155 metres from the proposed road. The Approval Holder explained the proposed road is essentially an extended driveway. He stated the elevation of the two closest Appellants' properties show that flooding could not occur where the Appellants indicated.

[16] The Approval Holder stated the Appellants did not substantiate any of their claims with evidence. The Approval Holder explained Rocky View County required him to retain an expert in biology and wetlands to produce a report to address the biological and hydrological concerns within and around the construction site of the proposed road. The Approval Holder noted the Director considered the Hallstrom Report to be very comprehensive for such a small project, and it was publicly available and read by some if not all of the Appellants. The Approval Holder noted that he donated some of his private property to the municipality to minimize the impact.

7. Director

[17] The Director submitted Mr. Wenslaw, Dr. and Ms. Overell, Dr. Towers, and Mr. Weekley were not directly affected by the Approval. The Director explained he did not accept their Statements of Concern because the issues raised were general in nature, outside the scope of the proposed project, or outside of the Director's mandate. The Director further stated these Appellants did not demonstrate a use of the wetland that was personal or unique or an impact that was personal or unique. The Director noted that many of the Appellants alleged bias on the part of Hallstrom Associates Environmental in preparing its report because the Approval Holder paid for the report. The Director stated the report was prepared by a professional biologist who is bound to follow the ethics rules and code of conduct of the Alberta Society of Professional Biologists. The Director stated there is no reason to suspect bias or breach of the professional code. The Director submitted that he was entitled to rely on the Hallstrom Report and, absent any evidence to the contrary, has no obligation to question the results and conclusions of the report.

[18] The Director acknowledged he accepted the Statement of Concern filed by Mr. Warne on the basis of his proximity to the project and his concern the project might impact his water well and septic field. The Director submitted that Mr. Warne may be directly affected by the proposed project.

[19] The Director noted Mr. Wenslaw's property is directly adjacent to the proposed project, but Mr. Wenslaw's lands would not be disturbed as no construction would be conducted on his property. The Director stated some of the issues raised by Mr. Wenslaw are outside of the Director's jurisdiction, including traffic issues, road maintenance, economic matters, and property values. The Director stated the policy issues raised by Mr. Wenslaw are issues of concern to the public at large and are not specifically related to Mr. Wenslaw or the use of his lands. The Director stated it would be highly unlikely that Mr. Weslaw's property would flood as a result of the proposed road, because the topography in the vicinity slopes down from north to south. He explained the proposed road also goes in a north-south direction, and it would not create any barriers to surface water flow. The Director stated a culvert would be installed underneath the proposed road to mitigate any potential blocking of the ditch running along Wild Rose Close. The Director stated a blockage of the culvert would not result in flooding of Mr. Wenslaw's property due to the direction of the flow of water and the location of the existing culvert between Mr. Wenslaw's property and the proposed road. The Director did not have concerns about flooding or back up on the main road, and if flooding did occur, it would likely be caused by flood events within the main watershed of Iron Creek located on the opposite side of the existing Wild Rose Close road.

[20] The Director noted the Overells' concerns were the potential for flooding of Wild Rose Close, the interference with the wetlands, impacts to wildlife, effects on water quality in the recreational lakes in the area, and alternative access. As stated above, the Director believed the proposed road could create only a minimal risk of flooding. The Director explained that avoiding a disturbance within wetlands is a general policy concern of the public at large, but he noted avoidance was followed in this application since alternatives would have had a larger environmental impact. The Director explained the alternate route would have to travel through Bragg Creek, riparian wetlands, and aspen uplands. The Director stated that building the proposed road through the wetland would minimize the impacts and much less wetland would be disturbed. The Director stated that, even though the proposed road would likely have a low

traffic volume with little impact on wildlife movement, construction would not take place between May 15 and July 31. The Director explained the proposed project is not directly linked to the recreational lake. He stated there would not be an impact on the water quality of the recreation lake for the following reasons:

1. the construction of the proposed road would have a small, temporary impact on water quality at the location of the proposed road;
2. the installation of sediment and erosion control is required and will mitigate any potential sediment release to Iron Creek; and
3. the significant distance between the construction site and the recreation lakes.

[21] The Director summarized Dr. Towers' concerns as: policy issues related to the avoiding disturbance to wetlands; Rocky View County's decision to allow the construction of the road in an environmental reserve; wildlife corridor impacts; wetland compensation that will not benefit residents of Wild Rose Close; alterations to natural flow patterns and flooding risks; and contraventions of the riparian buffer policy and Bragg Creek Area Structure Plan. In addition to the explanations provided above, the Director stated the environmental reserve is managed by Rocky View County and he does not have jurisdiction to make land use decisions or to enforce the policies or plans of Rocky View County. In response to the concern expressed about the location of the wetland compensation, the Director stated the public at large would benefit when wetlands are restored regardless of the specific location of the restoration.

[22] The Director stated Mr. Weekley's concerns were with respect to policies regarding the avoidance of impacts to wetlands and concerns of flooding of Wild Rose Close. Both of these matters were discussed above.

[23] The Director noted Mr. Warne raised similar issues to the other Appellants. In addition, the Director noted Mr. Warne's concern that impacts to the hydrology could affect his septic field and drinking water well demonstrated a personal and direct affect.

[24] The Director pointed out the proposed project would impact a very small portion of a large wetland complex.

B. Analysis

1. Legislative and Judicial Background

[25] The Board has discussed the issue of "directly affected" in numerous prior decisions. The Board received guidance on this issue from the Court of Queen's Bench in *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*").

[26] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

> "First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. …
>
> Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. …
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> Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:
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> > What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.
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> Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

> [T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

> While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated."[3] [Emphasis omitted.]

Justice McIntyre concluded by stating:

> "To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted…."[4]

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[3] *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson* v. *Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) ("*Bildson*"); *Mizera et al.* v. *Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) ("*Mizera*"); and *Vetsch* v. *Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

[4] *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

[27] When the Board assesses the directly affected status of an appellant, the Board looks at how the person uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.[5]

[28] The Court of Queen's Bench in *Court*[6] stated an appellant only needs to show there is a potential for an effect on that person's interests. This potential effect must still be within reason, plausible, and relevant to the Board's jurisdiction in order for the Board to consider it sufficient to grant standing.

2. Application

a) Wetland Policy

[29] The first argument advanced by all of the Appellants is the Director's application of the wetland policy. The Appellants argued the Director should have applied the principle of avoidance, instead of the principles of minimization, mitigation, and compensation when he issued the Approval. Whether this policy has been applied correctly may be a relevant issue to be considered under appeal. However, how the policy has been applied is not relevant to the question of whether any of the Appellants are directly affected. There is nothing in the policy, in and of itself, that creates the type of factual nexus that is required for a directly affected finding.

b) Municipal Decisions

[30] The second argument advanced by the Appellants is that there is something inappropriate about a municipality authorizing the construction of the proposed road across a municipal reserve to access private land and then, once the proposed road is constructed, to take ownership of the proposed road and the associated culvert. This is a land use planning issue and

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[5] See: *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

[6] *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

is not within the jurisdiction of the Board. As such, it does not contribute to the Appellants' argument that they are directly affected.

c) Flooding

[31] The third argument advanced by the Appellants is that the construction of the proposed road will make the Wild Rose Close road prone to flooding. The Appellants argued they will be directly affected by such flooding, because the Wild Rose Close road is their only means of access to and from the subdivision. In support of their positions the Appellants presented evidence about a previous flooding of Wild Rose Close.

[32] Previous flooding in the subdivision occurred further along in the subdivision, to the southeast of the location of the wetland in question, where the Wild Rose Close road forms a loop. Evidence presented by the Participants showed Iron Creek is south of the subdivision. The loop was constructed in such a manner that the subdivision road crosses the original path of Iron Creek twice. At each location where the subdivision road crosses the original path of Iron Creek, the road has been designed to create an impoundment, creating two ponds. One of the impoundments contains a control structure that regulates the water levels in the ponds. The flooding that occurred was the result of increased flows in Iron Creek, causing an increase in water levels that overwhelmed the ability of the control structure to release water beyond the second impoundment.

[33] The Board does not accept the Appellants' argument that the proposed road will cause additional flooding of the Wild Rose Close road. The flooding that occurred in the past that resulted in increased flows in Iron Creek had nothing to do with the proposed road that has been approved. The argument advanced by the Appellants is speculation, and as such, does not form a basis for finding the Appellants directly affected.

d) Use and Enjoyment of the Wetland

[34] The fourth argument advanced by the Appellants is that they are directly affected because the proposed road will diminish their use and enjoyment of the wetland. With respect to Mr. Weekly, Dr. Towers, and Dr. and Ms. Overell, the type of use and enjoyment made by these Appellants is too general and remote to be the basis for finding them directly affected. Mr. Weekly and Dr. Towers live three lots away for the wetland, and Dr. and Ms. Overell live even

further than that. In the context of the overall area, any impact the construction of the proposed road may have on these Appellants is negligible. In the Board's view, the use that Mr. Weekly, Dr. Towers, and Dr. and Ms. Overell make of the wetland and their desire to protect it is a generalized interest that all Albertans have for protecting the environment for their own use and enjoyment.

e) Mr. Warne and Mr. Wenslaw

[35] The situation that Mr. Warne and Mr. Wenslaw face is different than Mr. Weekly, Dr. Towers, and Dr. and Ms. Overell. Mr. Warne's and Mr. Wenslaw's properties are adjacent to the wetland and the proposed road. In the case of Mr. Warne, the wetland is either immediately adjacent to his land or, at times, may even extend onto his land. In the case of Mr. Wenslaw, the wetland extends significantly onto his land, and he indicated this is one of the reasons that he purchased this particular lot.

[36] These findings are supported by Exhibit 15,[7] which was entered by the Approval Holder. This Exhibit is a map of the wetland with the extent of the wetland in different years plotted on the map. There are two years (1946 and 1980) that predate the construction of the subdivision road (Wild Rose Close). However, the remaining plots are various years after the Wild Rose Close road was constructed. These plots clearly demonstrate the wetland is either immediately adjacent to or extends onto Mr. Warne's land and extends, to different degrees depending on the year, onto Mr. Wenslaw's land. As the proposed road has the potential to affect water levels in the wetland, and the wetland affects the lands owned by Mr. Warne and Mr. Wenslaw, both Mr. Warne and Mr. Wenslaw are directly affected.

[37] This position is further supported by the potential for Mr. Warne's and Mr. Wenslaw's domestic water wells and septic systems to be affected by the wetland. The evidence currently before the Board is that the wells and septic fields are sufficiently close to the wetland that there is a reasonable probability that they could be impacted by changes in the water level in the wetland. Therefore, the Board finds Mr. Warne and Mr. Wenslaw are directly affected by the Director's decision.

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[7] See: Exhibit 15: Appendix 7, page 118, Hallstrom Report August 2010 (Biophysical Impact Assessment) Aerial photo interpretation showing change in extent of wetlands from 1946 to 2008.

IV. STAY

A. Submissions

[38] Only a party to an appeal can request a Stay. Therefore, in this case, the Board can only consider those submissions provided by the Appellants deemed to be directly affected in these appeals. As the Board has dismissed the appeals of Dr. Towers, Mr. Weekley, and Dr. and Ms. Overell, the Board can only consider the submissions regarding the Stay application provided by Mr. Warne, Mr. Wenslaw, the Approval Holder, and the Director.

1. Mr. Trevor Warne

[39] Mr. Warne expressed concern regarding the scope and insufficient analysis of the reports used as the basis for granting the Approval. Specifically, he noted the following:

1. The proposed road could alter the hydrology and affect properties upstream. The southwest corner of his property boundary includes part of the wetland. His septic field is located in that vicinity, and he was concerned the outflow from the septic field could be impacted by the proposed road. He has a well on his property used for drinking and household use that could be impacted by the proposed road. A report prepared for Rocky View County in May 2009 indicated there was concern about the impact of road construction in the low lying wet area. This contradicts the Hallstrom Report that was prepared for the Approval Holder and which the Director relied on. The Hallstrom Report did not analyze the impact of the road on properties upstream and does not provide proof that his property will not be affected by the proposed road.
2. There is a lack of an analysis for the need of the proposed road and potential alternate routes. A third house on the Approval Holder's land can be built without destroying any wetland area using existing access. The analysis of the alternate route was not sufficiently analyzed to make a proper conclusion and it was conducted without consideration of all the facts and alternatives. The *Water Act* requires the primary choice to be "avoidance," so there is concern the Director granted approval of infill and development of a wetland without a full analysis of options that would avoid destruction of wetland.
3. The secondary course of action under the *Water Act* is to minimize the impact. The proposed road only serves a single house, so it is unnecessary for it to be dual lane width. The Director has a duty to ensure a road design with minimal impacts, and it is unacceptable to defer the road design to Rocky View County.
4. The Director has a duty to ensure mitigation and compensation for wetland destruction. No information or proof was provided to indicate the

mitigation site is near the proposed road. If the mitigation site is not near to the proposed road site, there would be negative impacts to the wildlife around the site as well as the residents' enjoyment of the natural environment.

5. By allowing construction on lands marked as environmental reserve, the Director is making a land use decision and approving development on land designated as environmental reserve that is subject to restraint on development as covered in the *Municipal Government Act*, R.S.A. 2000, c. M-26. This could create a dangerous precedent for future land use abuses.

[40] Mr. Warne stated he would likely suffer irreparable harm if the Stay is not granted due to the alteration of the hydrology without a full assessment of the upstream implications. He said the noise and disturbance and the partial blocking of Wild Rose Close for vehicles involved in building the proposed road will affect his enjoyment of his property and surroundings. Mr. Warne argued that if an alternate road location or design is not chosen, then the impact on the hydrology in the area would be irreparable.

[41] Mr. Warne clarified that he was asking for a Stay only until a full analysis of his concerns was completed. Therefore, according to Mr. Warne, the Approval Holder would not suffer any harm from a delay in the road construction pending more detailed analysis and a hearing. Mr. Warne argued that, if the Approval Holder entered into contracts that would result in delay penalties, it shows the Approval Holder's contempt for due process and environmental concerns and it should have no relevance to the Board's decision. Mr. Warne stated the impact on him could be significant and irreparable, and if the Board finds an alternate route is available that avoids the destruction of the wetland, then the Approval Holder will incur significant expenses in attempting to restore the hydrology, vegetation, and wildlife habitat should construction start before a full analysis is conducted. Mr. Warne submitted a Stay would prevent unnecessary and irreparable harm to himself and would be in the best interests of the Approval Holder.

[42] Mr. Warne argued the overall public interest warrants a Stay. He stated the noise, disturbance, and partial blocking of Wild Rose Close will affect residents and any business or personal use that requires vehicular access beyond the proposed road. Mr. Warne argued the potential destruction of the wetland and wildlife habitat would take many years to restore, creating negative impacts to the public's enjoyment of the natural surroundings in the area, property values, and wildlife. He stated the conservation easement proposed by the Approval

Holder is on public land and would not be accessible to the public. Mr. Warne noted the location of the mitigation site has not been clearly identified and, therefore, it cannot be determined if the site would benefit the local public. Mr. Warne argued the proposed road would only benefit the Approval Holder.

2. Mr. Christopher Wenslaw

[43] Mr. Wenslaw listed his major concerns as:

1. The Director did not question the purpose of the proposed road or investigate alternatives so the routing of the proposed road through the wetland could be avoided.
2. The decision gives away public lands, valued by the community, for the benefit of a private individual.
3. The decision ignores the impact of the proposed road on wildlife.
4. The decision ignores the environmental interests of the community and the public.
5. The Approval Holder did not explain why the driveway for a single family dwelling had to be six metres wide and why the proposed road is necessary.
6. Maintenance, repair, and snow removal costs would be the responsibility of the community even though the proposed road would only be used by the Approval Holder.

[44] Mr. Wenslaw stated he would suffer irreparable harm if the Stay was refused, because the wetland outside of his property would be destroyed on the first day of construction and any future decisions of the Board would be irrelevant. He stated his property is 15 metres from the proposed road.

[45] Mr. Wenslaw argued he would suffer the greater harm if the Stay was denied. He stated that, if the Stay was granted, the Approval Holder would simply have to wait longer with his plans.

[46] Mr. Wenslaw argued the overall public interest warrants a Stay, because construction of the proposed road would irreversibly destroy the publicly owned wetland. He stated any Board decision would be meaningless if the Stay was not granted and construction was started.

3. Approval Holder

[47] The Approval Holder explained the right of way would be 15.5 metres wide by approximately 50 metres long with a six metre wide access road, but the alternative route is substantially longer, requires a bridge to cross Bragg Creek, and results in more land being disturbed. The Approval Holder noted Rocky View County preferred the proposed routing of the road, and the Director preferred the proposed road since it avoids impacts to a larger area of wetland, riparian, and aquatic environments.

[48] The Approval Holder argued the issue of the wildlife corridor has been fully addressed in the Hallstrom Report. He noted Wild Rose Close road runs across the potential wildlife corridor but does not appear to impede wildlife movement. The Approval Holder stated the proposed road will have a low volume of traffic and is not expected to impede large mammal or bird movement, and the culvert will provide a means for amphibians to move. The Approval Holder noted there were no species at risk identified on the site. The Approval Holder stated that based on the wildlife studies conducted, there was no reason to adjust or postpone the construction schedule, but the Hallstrom Report recommended, and a condition was included in the Approval, that no construction was to occur from May 15 to July 31.

[49] The Approval Holder argued Mr. Warne did not provide any evidence to substantiate his claim that the new culvert could potentially plug and cause flooding that will impact his septic field and water well. The Approval Holder stated this claim is a speculative event and it is not reasonable to assume this will happen. The Approval Holder stated culverts have a specific purpose, which is to provide for the movement of water and prevent flooding, and the use of culverts is a standard mitigative procedure throughout Alberta. The Approval Holder stated the culvert included in the proposed road design is a standard size and design for Rocky View County.

[50] The Approval Holder explained a culvert connects the north side wetland to the beaver dams and south side wetland, so the water table is controlled by the height of the beaver dams. The Approval Holder stated that, as long as the area upstream of the proposed road is connected to the area via a culvert, the beaver dams will control the height of the water and the proposed road will not impact the water table in the area or anywhere near Mr. Warne’s property. The Approval Holder explained that only 0.15 percent of the water flow into the wetland south

of the road comes from the wetland north of the road; the remaining 99.85 percent comes from Iron Creek. He noted Rocky View County will be responsible for maintenance of the culvert.

[51] In response to the Appellants' concern of flooding of Wild Rose Close east of the proposed road, the Approval Holder argued the concern is not reasonable or plausible. He argued flooding due to the proposed road is speculative given the road elevations and topography of the area. The Approval Holder acknowledged Wild Rose Close flooded in the past at the low point of the road. The Approval Holder stated the proposed road will not change the topography of the overall area, and if flooding occurs in the future, it will occur at the same location unless the residents fix the overflow culvert design that controls the water levels in their private lake. The Approval Holder noted the Director indicated that it was not possible for the proposed road to affect flood water in such a way that it would impact Mr. Wenslaw's lands. The Approval Holder stated the proposed road could not cause flooding to the east since there is no real source of water other that drainage from the uplands, and that flow is very low compared to the flow of Iron Creek.

[52] The Approval Holder explained he retained Hallstrom Associates Environmental to complete a Biophysical Impact Assessment according to the terms of reference set out by Rocky View County. He stated the Hallstrom Report was made public, and many of the Appellants read the information and conclusions contained in the report. The Approval Holder argued all of the Appellants' biological and hydrological concerns were addressed by the Hallstrom Report. The Approval Holder noted the Director considered the Hallstrom Report to be comprehensive for a project this size. The Approval Holder noted: (1) the conclusion in the Hallstrom Report was that there was no biological reason why the project should not proceed; (2) Rocky View County concluded the project was ready to proceed; (3) the Department of Fisheries and Oceans confirmed the project can proceed; (4) and the Director approved the project. The Approval Holder explained the Hallstrom Report addressed the concerns originally expressed by Rocky View County.

[53] The Approval Holder stated 0.0175 hectares of wetland will be infilled, and more than half is the public utility lot that has revegetated, but he has agreed to pay compensation for that area as well. The Approval Holder added the wetland that will be infilled is approximately one percent of the wetland north of Wild Rose Close.

[54] The Approval Holder explained the project cannot completely avoid impacts to the wetland, but the alignment was changed to minimize the impacts, and although on-site compensation was not feasible, he reached an agreement to pay Ducks Unlimited Canada for offsite wetland compensation. The Approval Holder explained Ducks Unlimited decided the site for the wetland compensation would be near Water Valley and no options were provided.

[55] The Approval Holder explained the proposed road will not be a private road, and it will be built to municipal standards and regulations. The Approval Holder stated that, in order to address residents' concerns, a smaller right of way will be used, the road will be narrower, and the turnaround will be on his property.

[56] The Approval Holder stated the decision to change the land use and permit development within the environmental reserve was the sole decision of Rocky View County.

[57] The Approval Holder expressed concern that the Board would consider a temporary Stay on the basis the wetland could not be ultimately restored. He explained it is a small project and no dewatering is required. According to his consultant and information from Wildlife Habitat Canada's website, the area would be relatively easy to restore. The Approval Holder argued irreparable harm cannot be considered in this case.

[58] The Approval Holder stated there has been considerable work done to try and complete the work in the fall as recommended in the Hallstrom Report and by the Department of Fisheries and Oceans and by Rocky View County. He explained that even a two week delay could mean that construction would have to be delayed until the spring. The Approval Holder stated that, if the work did not start until spring, he would suffer financial harm, including the cancellation charge for the insurance policy and interest on the cash security deposit for the road construction.

[59] The Approval Holder argued that, based on the submissions and the project status, he would suffer greater harm if the Stay was granted than the Appellants would suffer if the Stay was not granted.

[60] The Approval Holder submitted the public interest does not warrant a Stay.

4. Director

[61] The Director took no position on the Stay applications.

[62] The Director noted the Board should not deal with municipal land use and development issues. The Director noted that, if the Approval Holder proceeds with the project while the appeals are in progress, the Approval Holder bears the risk and costs of having to alter or remove the project should the outcome of the appeals result in recommendations and a decision varying the conditions in the Approval or revoking the Approval. The Director did not attempt to weigh the competing harm to each of the Participants. He stated he was satisfied with the application submitted and the mitigation proposed by the Approval Holder and the Approval was granted. The Director acknowledged the proposed road impacts a portion of the wetland, but there are existing roads in and around the wetland, including Wild Rose Close and driveways of some of the Appellants.

B. Analysis

1. Legislative and Jurisdictional Basis for a Stay

[63] 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]

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[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)."

[64] 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:

> "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]

[65] 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]

[66] 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

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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.

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.).

> 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]

[67] 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]

[68] 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]

[69] 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 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."[24] The effect on the public may sway the balance for one party over the other.[25]

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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.

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

25 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

2. Application

[70] As indicated in *RJR MacDonald*, the first step in determining if a Stay should be granted has a low threshold – there needs to be a serious issue to be tried and the claim is not frivolous or vexatious.

[71] Based on Mr. Warne's and Mr. Wenslaw'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. Mr. Warne and Mr. Wenslaw raised the issue of the potential for flooding on their properties, possibly affecting their water wells and septic fields. This is a valid issue and is related to the construction of the proposed road. Therefore, the first part of the Stay test has been satisfied.

[72] 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."[26]

[73] To determine if the harm is irreparable, the Board must look at whether Mr. Warne and Mr. Wenslaw could not be compensated for any damages that may result from the refusal to grant a Stay. The onus is on the Appellants to demonstrate they will suffer irreparable harm if the Stay is not granted.

[74] Mr. Warne and Mr. Wenslaw argued their properties could be flooded as a result of the construction of the proposed road. Even if their septic fields or water wells were damaged as a result of flooding, the value to repair or replace any damaged property can be calculated. Theoretically, the loss of enjoyment of the property, including watching wildlife, even though it may be difficult to calculate, can be determined.

> 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."

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

[75] Mr. Warne and Mr. Wenslaw were also concerned about access to their property if flooding occurred. The Board anticipates the highest risk for flooding would occur during spring runoff, and the hearing of the appeals would be completed prior to spring since the hearing was set for December 2010. Therefore, Mr. Warne and Mr. Wenslaw would not suffer any irreparable harm during the time it would take for the Board to conduct the hearing.

[76] The Stay would be in place until the time of the hearing, and the Board would then decide whether the Stay should remain in force or be lifted until the Minister makes his decision. Once the Minister releases his decision, there can be three results: the Approval is not varied and the Approval Holder can continue with his project as allowed under the current Approval; the Approval can be varied, and the project is allowed to continue in some fashion; or the Approval is rejected and the Approval Holder must stop the project immediately.

[77] In this particular circumstance, the Board must look at whether there will be irreparable harm to the environment if the Stay is not granted. The proposed road crosses a wetland, and requires infilling of a portion of the wetland. If the Board recommends, and the Minister accepts, the Approval not be granted or modifications be made to the project, the Approval Holder would be required to essentially reverse the work that had been completed. Although the Approval Holder argued a disturbance of this size with minimal site disturbance can be reclaimed, the Board is hesitant to allow the work to proceed before the hearing is held. If the road has to be removed due to negative environmental impacts, then the removal of the road could exacerbate the impacts. In these circumstances, what the Board considers most relevant is what would the environmental effect be if the activity proceeded but then, based on the arguments heard at the hearing, the Board recommends and the Minister accepts that the Director's decision should be reversed.

[78] When dealing with issues that may affect the bed, bank, and shores of a water body, it is often difficult, if not impossible to reverse the activity without causing further effects to the environment. If part of the mandate of this Board is to protect the environment, it does not seem reasonable to allow something to proceed, and then make a decision knowing that, if the Board determined the activity should not have been approved, reversing what has been completed would cause further damage to the environment.

[79] The Board has looked at similar situations in previous decisions where enforcement orders were issued to landowners for placing sand and gravel on their property adjacent to a lake. [27] Although the Board agreed with the director that an approval was required to do the work, it also found more harm would result from the removal of the gravel than leaving it in place.

[80] In previous decisions, the Board has acknowledged the additional adverse effect of having to remove an activity once completed. In the case of *Martin*,[28] the Board discussed the effect of requiring the removal of an illegal deposition of sand. After evaluating the effect of the activity, plus the potential effect the project could have on the environment, and comparing it to the effect of removing the activity, the Board stated:

> "In light of the fact that Mr. Martin placed a small amount of sand on the site, an amount that would be difficult to accurately determine, the nutrient loading damage would already be done, and that removal of this amount of sand could create as much or more environmental damage through siltation than leaving it in place, it is environmentally unreasonable to require Mr. Martin to remove it."[29]

[81] In a similar case, *Gilmore*,[30] the Board discussed the reasonableness of an enforcement order that required removal of sand. In *Gilmore*, the Board stated:

> "An enforcement order to stop an activity which was already done is appropriate, as is an enforcement order to undertake remedial action that is logical, reasonable, and environmentally sound. However, an enforcement order that includes a direction to undertake remedial action when it is not logical or reasonable to do so is not appropriate."[31]

[82] In these previous cases, the issue was not whether the addition of the gravel was causing a detrimental effect, but it was the non-compliance with the legislated requirements that was at issue. In the appeals currently before the Board, the issue that has to be determined is whether the construction of the proposed road will have a detrimental effect on the environment.

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[27] See: *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.).

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

[29] *Martin* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal No. 00-065-R (A.E.A.B.) at paragraph 34.

[30] *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.).

[31] *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.) at paragraph 48.

In making a decision, whether it is regarding a Stay or any other matter within its jurisdiction, the Board assesses which option would have the minimum effect on the environment. In this particular situation, the Approval Holder wants to build a road in a wetland which would require infilling a portion of the wetland. One of the issues the Board must determine when it holds the substantial hearing is whether the construction of the road will have a detrimental effect on the environment. If the Board finds the road should not be constructed, and the Stay is not granted, it is highly likely there would be further environmental effects to the environment if the Approval Holder was required to remove the road. This certainly would not minimize the effects on the environment; instead, the effect would be intensified.

[83] For this reason alone, the Board considers it prudent to grant the Stay request.

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

[85] The Board recognizes the time limits placed on the Approval Holder to get the work completed. However, it is clear from the information provided by the Approval Holder that any harm associated with the granting of a Stay are inconvenience and economical in nature. Although the Appellant preferred to have the work completed in the fall, there would still be time for him to complete the work in 2011.

[86] If the Board recommends the project not proceed, or proceed with modifications, it would be the Approval Holder who will bear the costs of proceeding with the project now and then having to remove or modify the project. It is the risk the Approval Holder has opted to accept, but it is still the environment that could suffer greater harm if the proposed road had to be removed.

[87] What the Board does not want to occur in this circumstance is to have a situation that cannot be reversed without causing further environmental damage. The Board does not know the extent of the harm, if any, that may be caused by constructing the proposed road. However, if it is determined there is a detrimental effect and the Approval is reversed or varied, it would be difficult to reverse the impact. As this type of damage cannot be realistically quantified, the Board finds it is reasonable to have the Stay remain in effect until the hearing is held.

[88] The balance of convenience favours the Stay remaining in place until the hearing is held. At that time, the Board will reassess its decision and determine if the Stay should remain in place pending the Minister's decision.

[89] Another concern that must also be weighed, as discussed below, is the public interest element.

[90] 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."

[91] Further, in determining the public interest, the Supreme Court directs us to look to the "…authority that is charged with the duty of promoting or protecting the public interest…"

[92] As stated in *RJR MacDonald*:

> "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….[T]he applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought."[32]

[93] The Appellants are residents in the area of the project. If the proposed road negatively impacts the environment in the area, specifically the wetland, this could have an affect on the use of the area by the public, including local residents and Albertans at large.

[94] As the construction of the proposed road has the potential to have an effect on the environment, which is the issue to be determined at the substantial hearing, in this case, the public interest supports the Stay remaining in effect until the hearing is held.

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[32] *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 68.

[95] In granting the Stay, the Board will take all necessary steps to ensure the appeal is concluded as soon as possible.

3. Summary

[96] The Board has determined there is a serious issue to be addressed, there is a reasonable probability of irreparable harm, and the balance of convenience and public interest support the Stay. Therefore, the Board confirms the Stay. The Stay will remain in place until the appeals of Mr. Warne and Mr. Wenslaw have been addressed or until the Board orders otherwise.

[97] In reviewing the evidence that is currently before the Board, the Board is concerned that there is insufficient information relating to the hydrology of the wetland. In particular, there is insufficient information regarding the flows within the wetland, the potential levels of water that will occur in the wetland if the proposed road is built, and how these water levels may interact with the Mr. Warne's and Mr. Wenslaw's domestic water wells and septic systems. The Board encourages the participants to provide additional evidence on this issue if this matter proceeds to a hearing.

[98] The Board's process must be fair to all parties to an appeal, not only to the Appellants, but also the Approval Holder and the Director. Mr. Warne and Mr. Wenslaw requested a Stay, which would, at a minimum, inconvenience the Approval Holder. Mr. Warne and Mr. Wenslaw must also realize the importance of having the issue dealt with as quickly as possible, for if the Minister agrees with the Director after hearing all of the evidence, the Approval Holder should be allowed to proceed with the project. If the Minister agrees with Mr. Warne and Mr. Wenslaw at the end of the hearing, the Stay was in place to protect the status quo of the site. To this end, the Board will hold the hearing, if required, as quickly and as fairly as possible.

V. DECISION

[99] Based on all of the evidence presented to the Board in the Director's abridged record, the written submissions of the participants, and the submissions of the participants at the Preliminary Motions Hearing, the Board dismisses the appeals of Dr. Towers, Mr. Weekley, and

Dr. and Ms. Overell as the Board finds they are not directly affected by the Approval. The Board finds Mr. Warne and Mr. Wenslaw directly affected.

[100] The Stay is to remain in place until the appeals of Mr. Warne and Mr. Wenslaw are concluded or until the Board orders otherwise.

Dated on May 20, 2011, at Edmonton, Alberta.

"*original signed by*"

Delmar W. Perras
Chair

"*original signed by*"

Alan J. Kennedy
Board Member

"*original signed by*"

Eric O. McAvity, Q.C.
Board Member