

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – March 14, 2012

**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 Peggy and Edward Hiltz with respect to *Water Act* Approval No. 00266612-00-00 issued to Waste Management of Canada Corporation by the Director, Northern Region, Operations Division, Alberta Environment and Water.

Cite as: Stay Decision: *Hiltz v. Director, Northern Region, Operations Division, Alberta Environment and Water*, re: *Waste Management of Canada Corporation* (14 March 2012), Appeal No. 11-043-ID1 (A.E.A.B.).

**BEFORE:**

Mr. Eric McAvity, Q.C., Panel Chair;  
Dr. Alan Kennedy, Board Member; and  
Dr. David Evans, Board Member.

**SUBMISSIONS BY:**

**Appellants:** Ms. Peggy and Edward Hilts.

**Approval Holder:** Waste Management of Canada Corporation,  
represented by Mr. Donald Wilson and Ms.  
Wendy-Anne Berkenbosch, Davis LLP.

**Director:** Mr. Patrick Marriott, Director, Northern  
Region, Operations Division, Alberta  
Environment and Water, represented by Ms.  
Michelle Williamson, Alberta Justice.

## **EXECUTIVE SUMMARY**

Alberta Environment and Water issued an approval under the *Water Act* to Waste Management of Canada Corporation for the placing, constructing, operating, maintaining, removing, disturbing works, in or on any land, water, or water body for the purpose of removing wetlands, constructing wetland compensation works, and managing surface water run-on and run-off for a non-hazardous landfill near Thorhild.

Ms. Peggy and Mr. Edward Hilts appealed the issuance of the approval and requested a stay. Even though the Board granted a temporary stay, a permanent stay was denied after the Board reviewed the submissions. Although the Hilts raised a serious issue regarding the wetlands in the area of the landfill that may be impacted, they did not provide enough information or evidence to demonstrate they would suffer irreparable harm if the stay was not granted or that the wetlands and surface water flows could not be re-established if necessary after a hearing, if one is held. The balance of convenience and public interest did not favour one party over the other.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	BACKGROUND .....	1
III.	SUBMISSIONS .....	3
A.	Appellants .....	3
B.	Approval Holder .....	4
C.	Director .....	7
D.	Rebuttal Submission .....	8
IV.	STAY TEST.....	9
A.	Legal Basis for a Stay .....	9
B.	Analysis .....	12
V.	CONCLUSION.....	15

## **I. INTRODUCTION**

[1] These are the Environmental Appeals Board's reasons for denying the stay application of an approval issued to the Waste Management of Canada Corporation ("WMCC" or the "Approval Holder"). The WMCC received approval to construct a Class II landfill, which is a landfill that accepts non-hazardous waste. Ms. Peggy and Mr. Edward Hiltz (the "Appellants") requested a Stay in relation to the approval issued under the *Water Act*, R.S.A. 2000, c. W-3, which allowed for the removal of wetlands, the construction of compensating wetlands, and managing surface water run-on and run-off from the landfill.

[2] The Appellants argued the Stay was required because of the work allowed under the approval would cause irreparable harm to the wetland complex on the landfill lands which would, in turn, negatively impact the wetlands on their property. A temporary stay had been granted by the Board until submissions were received to determine if the Stay should remain in place until the hearing, if one is held. After reviewing the submissions, the Stay request was denied.

## **II. BACKGROUND**

[3] On September 22, 2011, the Director, Northern Region, Operations Division, Alberta Environment and Water (the "Director"), issued Approval No. 00266612-00-00 (the "Approval") under the *Water Act* to WMCC. The Approval was issued for the placing, constructing, operating, maintaining, removing, disturbing works, in or on any land, water, or water body for the purpose of removing wetlands, constructing wetland compensation works, and managing surface water run-on and run-off for a Class II non-hazardous landfill (the "Landfill") near Thorhild, Alberta.<sup>1</sup>

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<sup>1</sup> The Landfill has two distinct areas. In this decision, the actual land where the Landfill cells will be constructed will be referred to as the "Landfill Area" and the adjoining area that includes a main access road, intersections to provide access, and a crossing of a railway right-of-way, will be referred to as the "Transportation Lands."

[4] On October 5, 2011, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Ms. Peggy and Mr. Edward Hilts appealing the Approval.

[5] On October 11, 2011, the Board wrote to the Appellants, Approval Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and Director of the appeal.

[6] On October 13, 2011, the Appellants requested a Stay of the Approval. On October 17, 2011, the Board requested the Appellants answer the standard Stay questions.<sup>2</sup> The Board reviewed the Appellants’ comments to the questions and, on October 19, 2011, asked the Approval Holder and Director to provide response submissions. The response submissions were received on October 28, 2011. The Appellants’ rebuttal submission was received on November 3, 2011.

[7] On November 8, 2011, the Board granted a temporary stay that prohibited any construction or other work that would impact the wetlands on the site that are authorized under the Approval, and the stay would remain in place until the Board directed otherwise. On November 24, 2011, the Board clarified the temporary stay, allowing the Approval Holder to undertake any and all work on the site that was necessary to protect and ensure public and worker safety.

[8] On December 1, 2011, the Board set the schedule to receive submissions on: (1) whether the stay should remain in place; (2) if the Appellants filed a Statement of Concern; and (3) whether the appellants are directly affected. Submissions were received from December 9, 2011, to December 22, 2011.

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<sup>2</sup> The Appellants were asked to provide answers to the following questions:

1. What are the serious concerns raised in the Appellants’ Notice of Appeal 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, than WMCC would suffer if the Stay was granted?
4. Would the overall public interest warrant a Stay?
5. Are the Appellants directly affected by Alberta Environment and Water’s decision to issue the *Water Act* Approval to WMCC?

[9] The Board notified the Participants on January 11, 2012, that the Stay application was denied with reasons to follow. As stated, these are the Board's reasons.

### **III. SUBMISSIONS**

#### **A. Appellants**

[10] The Appellants stated irreparable damage will continue if the Stay is not granted and the site is excavated. The Appellants explained the wetlands on the Transportation Lands and other surrounding wetlands form a complex chain where one wetland affects the others, including those off of the Landfill site. They stated the wetland area spreads out over the Newbrook region and extends to the southeast and west of their property.

[11] The Appellants noted there are no wetland protection plans for their wetlands or others that may be impacted even though there is interdependence between the wetlands. They stated the area has to be viewed as one large complex, and the Director did not consider the impacts on the other wetlands. The Appellants submitted the Stay should remain in place until the issues have been properly and thoroughly analyzed because of the complexity of the wetlands in the region. The Appellants noted the Approval Holder's consultant stated that wetland restorations can be difficult and may not accomplish the objective of wetland restoration.

[12] The Appellants stated that, if the ditches are blocked, water will be prevented from flowing to the other wetlands, causing damage to the wetlands.

[13] The Appellants stated there is a potential that fires could destroy the wetlands, and the fires can travel beneath the peat beds, potentially destroying their livelihood and home. The wetlands become dry in dry seasons, but excavation and re-routing the water will also dry out the wetlands.

[14] The Appellants stated that hydrocarbon soils will be coming to the Landfill, and over time, the liner might crack and disintegrate and contaminate the wetlands.

[15] The Appellants stated their wetlands will be directly and adversely affected by the loss of water to their creek and dugout, their sole source of water, thereby impacting their livelihoods. They require water for their organic market garden. The Appellants stated their

creek is not shown on any documents with the Approval Holder or the Director, and there are aerial photographs that show how water flows have changed and will change due to the Landfill. Because of their dependency on the wetlands, this is a unique situation and a full Stay should be granted until mitigation is achieved. The Appellants argued damage to their wetlands will cause irreparable harm to them and their property.

[16] The Appellants noted the erosion plan required under the Approval was not part of the Director's record, even though construction on the Transportation Lands was almost complete. The Appellants stated erosion can damage the wetlands or redirect or block the flow of water. The Appellants argued that, if there is no approved erosion plan that deals with the wetlands, damage will occur to the project as well as the wetlands.

[17] The Appellants submitted the Stay should remain in place until additional documents, including the WMCC Thorhild Transportation Project Application, have been received and reviewed by the Board.

## **B. Approval Holder**

[18] The Approval Holder explained the developments on the Transportation Lands, includes the construction of a 20 hectare wetland complex and the voluntary restoration of peat lands previously disturbed by a peat harvesting operation.

[19] The Approval Holder stated that a wetland assessment was completed and found that a total of 28 hectares of wetlands was found within the Landfill Area. Two wetlands were classified as bogs and a further 3.84 hectares of wetlands were previously disturbed by agricultural practices. Most of the wetlands are temporary wetlands where water is present for short periods following spring melt or other times during the growing season.

[20] In addition, the Approval Holder explained approximately 19.6 hectares of the Transportation Lands were harvested for peat, and no attempts at restoration or reclamation were made, leaving numerous artificial drainage structures or ditches. The Transportation Lands had been extensively drained, the surface peat was devoid of vegetation, and unless drainage was restored, the residual bog along the margins of the extraction area would decline due to the lowering of the watertable. The remaining peat lands on the Transportation Lands were

classified as marginal or transitory, and none were compensable wetlands. According to the Approval Holder, the compensation and restoration it will undertake will result in greater wetland value than what previously existed.

[21] The Approval Holder explained that only wetlands classified as temporary (Class II) or seasonal (Class III) are compensable wetlands. Only 9.75 hectares of Class II or greater wetlands could potentially be disturbed by the Landfill, and using the perimeter fencing boundary, there would be a total of 9.98 hectares of compensable wetlands, including 8.03 hectares of Class II and 1.95 of Class III wetlands.

[22] The Approval Holder argued the ultimate wetlands compensation strategy is not directly relevant to the Stay application, because the Appellants must be able to establish immediate or imminent irreparable harm to the wetlands. However, the Approval Holder explained it will:

1. restore previously disturbed and degraded wetlands on the Landfill Area over the next two to three years;
2. over the next six years, construct a 20 hectare wetlands complex in the Transportation Lands that will include a series of small constructed wetlands that will also incorporate treed and open meadow features; and
3. restore approximately 4.4 hectares of peat lands previously disturbed along with 6.4 hectares of upland restoration, including filling in artificial ditches to restore the natural drainage of the surface water.

[23] The Approval Holder stated it has a siltation and erosion plan as required by the Approval. The initial construction site is approximately 1500 metres from the Appellants' property, and the first cell is not expected to be constructed until late 2012. The closest cell to the Appellants would not be constructed for 15 to 20 years.

[24] The Approval Holder explained the Transportation Lands are lower than the Landfill Area, and surface water drainage is not shared, so work on the Transportation Lands will not affect surface water on the Landfill Area. Work on the Transportation Lands will not materially affect any wetlands on the Appellants' property or affect any drainage upstream that might enter the Appellants' property because there are no surface water connections.

[25] The Approval Holder stated the disturbance of the compensable wetlands on the Landfill Area will not materially affect the remaining wetlands on the south portion of the Landfill. The wetlands are not all interconnected, and water flow between them will generally only occur under exceptional snow melt or storm rainfall events. In a typical year, these wetlands do not contribute to regional hydraulic regimes on adjacent lands, so the Appellants' property to the south will not be materially affected by any disturbance of the compensable wetlands.

[26] The Approval Holder explained that, even though it is preferable to avoid disturbing wetlands, there are cases when that is not possible. In those cases, it is acceptable to disturb naturally occurring wetlands as long as there is an approved plan to address wetland compensation by restoring drained or altered wetlands or constructing wetlands.

[27] The Approval Holder stated that any work on the Transportation Lands will not affect the compensable wetlands on the Landfill Area. The Approval Holder argued that any wetlands on the Appellants' property will not be affected by the disruption of compensable wetlands on the Landfill Area, because the Appellants' property is further removed from the undisturbed wetlands to the south of the compensable wetlands.

[28] The Approval Holder argued there is no evidence of imminent irreparable harm sufficient to justify a permanent Stay.

[29] The Approval Holder stated surface water on the Transportation Lands generally flows away from the Landfill Area and the Appellants' property. The Approval Holder stated that, given the natural wetlands in the area are fed by surface water and there is no surface water connection between the Transportation Lands and the Appellants' property, there will be no affect on any wetlands that may exist on the Appellants' property.

[30] The Approval Holder explained the Landfill project was designed to replicate surface water flow patterns that existed prior to the construction of the Landfill so there would be no adverse affect on the environment.

[31] The Approval Holder explained the surface water collects in depressions in the west and south part of the Landfill, and in the east portion of the property, it drains into an improved swale leading toward Waskatenau Creek. Range Road 210 runs along the west

boundary of the Landfill so much of the drainage basin to the west does not flow onto the Landfill except where two culverts divert surface water to the south of the Landfill but do not convey flow from the active Landfill Area. The ditch adjacent to the road intercepts surface water from upstream lands and prevents the water from reaching the Landfill from the west and limiting surface water flow on the Landfill.

[32] The Approval Holder explained that even though the surface water in the region generally flows from north to southeast toward Waskatenau Creek and the North Saskatchewan River, at the local site level, the Landfill Area contains numerous closed basins that direct drainage internally within the Landfill. There is minimal surface water flow through the Landfill to the Appellants' property, and any surface water issues have been addressed in the Approval.

[33] The Approval Holder submitted there is no evidence of any immediate irreparable harm to the Appellants from the Landfill. It stated the Appellants did not provide any evidence regarding a creek running through their property and no evidence was provided to show the Approval Holder's activities are or would affect the creek.

[34] The Approval Holder explained it is required to provide engineering design maps and plans that describe run-on and run-off control systems and a surface water monitoring program. Surface water from precipitation or runs onto the Landfill will be conveyed by ditches to engineered retention ponds and will not contact landfill waste or other operations on the site.

[35] The Approval Holder stated the construction and operation of the Landfill and the transportation project will not affect any wetlands on the Appellants' property or affect the Appellants' access to surface water. The Approval Holder submitted the temporary stay should be lifted, and the Approval Holder should be allowed to proceed with permitted activities in accordance with the Approval.

**C. Director**

[36] The Director did not take a position on the Stay application.

**D. Rebuttal Submission**

[37] The Appellants argued the Stay should remain in place until a solution for their wetland and water issues is developed, and if no solution is found, the Stay should apply permanently. The Appellants stated there is no information on what could happen on properties outside the Approval Holder's property when its lands are excavated, and there are no measures in place to protect the wetlands off the Landfill.

[38] The Appellants argued the technical reports and plans prepared for the Approval Holder apply only to the Approval Holder's property and excluded impacts on other properties.

[39] The Appellants argued the Director has a duty to ensure remediation and compensation for wetlands destroyed not only on the Approval Holder's property but also adjoining properties. The Appellants submitted it is a serious matter because it takes years to restore wetlands and wildlife habitat. They stated the Director did not investigate alternatives to avoid the wetlands or question the purpose of the Transportation Lands.

[40] The Appellants stated no analysis of the hydrology was done for the Transportation Lands and no plans were completed to minimize damage. They stated the Approval Holder put in drainage ditches, but no analysis was provided regarding flooding or erosion of the adjoining wetlands. The Appellants stated the area has been damaged by the transportation roads so there may be no water flow to the wetlands or the water will be forced to flow down the ditch towards Highway 63.

[41] The Appellants argued an impact assessment should have been completed for the area to ensure adjoining properties are protected. Interference with the wetland hydrology would impact adjacent properties, the recharge zone, and downstream watercourses that flow into the North Saskatchewan watershed system.

[42] The Appellants argued the Approval Holder cannot damage or impact lands outside the Approval Holder's property, and even though the ditch around the Landfill will enable the Approval Holder to control the internal run-on and run-off, it will block the natural flow to the Appellants' property via the creek and the wetlands. The Appellants stated their stay request is based on the loss of water to the wetlands and creek, directly impacting their livelihood.

[43] The Appellants noted the wetland assessment completed by the Approval Holder did not identify any other properties that may be impacted or assess the damage that might occur. The Appellants argued that, since the Director did not consider the impacts on adjoining properties, the Approval is flawed.

[44] The Appellants argued that, either there are wetlands that need protection or there are no wetlands. Their wetland and creek are in the same interconnected wetland as those found on the Landfill.

[45] The Appellants argued they are seriously and directly impacted and will suffer imminent, irreparable personal damage due to the loss of water on their property, including the wetlands and the creek that flows through the wetlands. The Appellants stated the damage to their wetlands, creek, and livelihood could not be compensated for.

[46] The Appellants explained there is a continuation of the wetlands from the Landfill to their property and wetlands, and the water flows to their property from the northern part of the Landfill. The Appellants argued the Approval Holder acknowledged, in previous discussions, the Appellants' water issue is real and needs to be dealt with.

[47] The Appellants submitted the Stay must remain in place until their issues are dealt with, because any work on the Landfill will impact the wetlands on the Appellants' property and the wetlands further west, south, and east of their property. The wetlands will decrease in value.

#### **IV. STAY TEST**

##### **A. Legal Basis for a Stay**

[48] The Board is empowered to grant a Stay pursuant to section 97 of 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.”<sup>3</sup>

[49] The Board’s test for a Stay, as stated in its previous decisions of *Pryzbylski*<sup>4</sup> and *Stelter*,<sup>5</sup> is adapted from the Supreme Court of Canada case of *RJR MacDonald*.<sup>6</sup> 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.”<sup>7</sup>

[50] 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.”<sup>8</sup>

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<sup>3</sup> 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).”

<sup>4</sup> *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.).

<sup>5</sup> *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.).

<sup>6</sup> *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 and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

<sup>7</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

<sup>8</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 50.

[51] The second step in the test requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.<sup>9</sup> 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*,<sup>10</sup> 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 of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.”<sup>11</sup>

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.<sup>12</sup> The damage that may be suffered by third parties may also be taken into consideration.<sup>13</sup>

[52] 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.”<sup>14</sup> The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the applicant 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,<sup>15</sup> third parties who may suffer damage,<sup>16</sup> or if the reputation and goodwill of a party will be affected.<sup>17</sup>

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<sup>9</sup> *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

<sup>10</sup> *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

<sup>11</sup> *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

<sup>12</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>13</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>14</sup> *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

<sup>15</sup> *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

<sup>16</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>17</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

[53] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test.

[54] The environmental mandate of this Board requires the public interest be considered in appeals before the Board. Therefore, the Board has assessed the public interest as a separate step in the test. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "...concerns of society generally and the particular interests of identifiable groups."<sup>18</sup> The effect on the public may sway the balance for one party over the other.

## **B. Analysis**

[55] In its submission, the Approval Holder argued the Appellants failed to provide sufficient details or evidence to demonstrate there is a serious issue to be determined. At this stage of the appeal process the Board does not have all of the technical and legal arguments before it. The Board must base its analysis on the information provided by the Participants and what is available in the Director's record. It is clear from the Appellants' Statement of Concern and Notice of Appeal that they have concerns regarding the impacts the activities on the Landfill will have on the wetlands on the Appellants' property. The Board considers this a serious issue that needs to be heard, should a hearing be held, and the first part of the Stay test has been met.

[56] The second step is to determine whether the Appellants would suffer irreparable harm if the Stay is not granted. The Appellants argued the Approval Holder failed to demonstrate there would be no impacts on adjoining wetlands resulting from the Approval. The Appellants, not the Approval Holder, have the onus of showing there is a likelihood of an irreparable impact on them or the environment from the Approval Holder's permitted actions under the Approval.

[57] In determining if the Appellants will suffer irreparable harm, the Board looks at whether the Appellants could be compensated monetarily for any damages that may occur. The concerns expressed by the Appellants relate to potential effects on the wetlands on their property as a result of the removal and interference of the wetlands and surface water flows on the

Landfill Area and Transportation Lands. If the Approval Holder's operations cause an impact to the Appellants during the time the appeal is heard, the Approval Holder can compensate the Appellants in different ways. For example, the Approval Holder might purchase the affected lands, or if the Appellants' water supplies are affected and it can be shown it is the result of the Approval Holder's activities, the Approval Holder can provide alternative water supplies, whether it requires trucking in water or drilling new wells. These are examples of how the Appellants can be compensated if they are affected.

[58] The Appellants argued their livelihood would be impacted if the wetlands or surface water flows are impacted. Again, any losses that can be attributed to the Approval Holder can be compensated for through monetary means.

[59] The Board appreciates the Appellants' connection to their property and the intrinsic value they place on their lands. However, for the purposes of determining whether the Stay should remain in place, the Board is of the view that any damages that occur to the Appellants personally can be compensated for monetarily.

[60] The Board also considered whether the alleged damages to the environment would be irreparable if the Board recommends, and the Minister orders, the Approval be cancelled or varied. One of the major concerns expressed by the Appellants was the destruction of wetlands on the Landfill that could impact their wetlands and the difficulty in restoring disturbed wetlands. The Board acknowledges there are challenges with restoring wetlands, including peat lands, to pre-disturbance levels. It may take many years to return the lands to pre-disturbance levels but, to the Board's knowledge, it has been done in other areas. Although difficult, it is not impossible and, therefore, cannot be considered irreparable.

[61] The second concern expressed was the potential interference of surface water flows to the Appellants' property. The Approval Holder argued surface water flows would not be impacted by its activities. The Board is looking at what irreparable harm can occur in the time it takes to hear the matters at a substantive hearing. It is not clear how much construction is anticipated to occur during this time. If surface water flows are impacted and the Minister subsequently orders the Approval varied or reversed, it will then be the responsibility of the

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<sup>18</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

Approval Holder to re-establish pre-existing water flows. This may involve recontouring of the lands, but it is not considered irreparable harm.

[62] Therefore, there can be no irreparable damage to the wetlands while the appeal is heard because, if required, the wetlands can be reclaimed and surface water flows re-established, and the Appellants would be in the same position they are in currently.

[63] Based on the information available before the Board at this time, the Appellants have not met the onus of demonstrating they, or the environment, will be irreparably harmed by the issuance of the Approval during the time the appeal is heard and a decision issued by the Minister.

[64] The third step in the Stay test is to assess who will suffer the greater harm, the Appellants if the Stay is not granted or the Approval Holder if the Stay is granted. If the Stay was granted, the Approval Holder could be delayed in starting the construction of the Landfill. Although this may be an inconvenience, it is not the type of harm that would support denying the Stay. The Approval Holder did not provide any information on construction deadlines or windows that it would have to meet, and the Director's record did not include any detailed construction timelines. Based on the information provided, the Board cannot conclude the Approval Holder would suffer harm if the Stay was granted.

[65] If the Stay was not granted, the Appellants argued the wetlands on their property would be destroyed. In determining who will suffer the greater harm, the Board considers the timeframe in which the appeal would be resolved. Essentially, would the Appellants suffer a greater harm during the time their appeal is considered and the Minister's decision released? The hearing, should one be held, will determine if there will be actual harm to the environment and if the Approval adequately reflects what must be done to minimize impacts.

[66] The Approval Holder stated construction on the Landfill Area nearest to the Appellants' property would not start for another 15 to 20 years. Therefore, the construction of the cells on the Landfill Area will not impact the Appellants during the time the appeal is heard.

[67] The Approval Holder has started construction on the Transportation Lands, including filling in ditches that were part of a peat extraction business that occupied the site prior to the Approval Holder obtaining the land. The Appellants argued this construction will affect

their wetlands because of the interconnectivity of the wetlands in the area. As stated above, although it can be complicated, wetlands can be reclaimed. If it can be shown the Approval Holder's activities impacted the Appellants' water supplies, the Appellants can seek to have the Approval Holder provide alternate water supplies. The Board understands the stress the Appellants are under dealing with the issues associated with the Landfill, but it does not factor into the assessment of whether the Stay should remain in place.

[68] Therefore, the Appellants will not suffer a greater harm if the Stay was denied than the Approval Holder would suffer if the Stay was granted.

[69] The fourth step in the Stay test is whether the public interest favours the granting of the Stay. In this case, there is a public interest in both granting a Stay and, likewise, in allowing the continued construction of the Landfill. There have been numerous appeals filed in relation to the Landfill, so it is obvious there is a strong public interest in the matter. However, as stated above, the wetlands and surface water flow regimes can be re-established if necessary if they are disturbed while the appeals are heard and at the end of the hearing, the Minister orders the Approval be varied or reversed.

[70] This project also has a public purpose. The Approval Holder believes there is a public need to construct the Landfill, but there was no indication if timelines for construction were a factor or if there is an urgency to complete the Landfill within a specified time period.

## **V. CONCLUSION**

[71] There is insufficient evidence to support the continuation of the Stay. Although the Appellants raised a serious issue regarding the wetlands in the area of the Landfill that may be impacted, they did not provide sufficient evidence to demonstrate they would suffer irreparable harm if the Stay was not granted or that the wetlands and surface water flows could not be re-established if necessary after a hearing, if one is held. The balance of convenience and public interest did not favour one party over the other.

[72] The Approval Holder is reminded that, should the Board recommend to the Minister that the Approval be varied or cancelled, and the Minister agrees, the Approval Holder will be responsible for returning the site to pre-disturbance conditions or making the necessary

changes to comply with any amendments. Also, whether or not any work has been done by the Approval Holder will not be a factor in the Board's decision-making regarding any recommendations.

Dated on March 14, 2012, at Edmonton, Alberta.

*“original signed by”*

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Eric McAvity, Q.C.  
Panel Chair

*“original signed by”*

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Alan Kennedy  
Board Member

*“original signed by”*

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Dave Evans  
Board Member