ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 4, 2013

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 Tony and Louise Harris with respect to *Water Act* Approval No. 00327259-00-00 issued to the Village of Marwayne by the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Stay Decision: *Harris* v. *Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Village of Marwayne* (04 October 2013), Appeal No. 13-008-ID1 (A.E.A.B.).

BEFORE: Ms. A.J. Fox, Panel Chair.

SUBMISSIONS BY:

Appellants:	Mr. Tony and Ms. Louise Harris, represented by Mr. Joseph Nagy, Durocher Simpson Koehli & Erler.
Approval Holder:	Village of Marwayne, represented by Mr. Derek King, Brownlee LLP.
Director:	Mr. Neil Hollands, Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Mr. Gary Crowe, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval to the Village of Marwayne for the construction, operation, and maintenance of a stormwater management system.

Mr. Tony and Ms. Louise Harris (Appellants) appealed the issuance of the Approval and requested a stay.

The Environmental Appeals Board (the Board) requested, received, and reviewed the submissions on whether the Appellants were directly affected and whether a stay should be granted.

The Board found the Appellants were directly affected by the project that was the subject of the Approval.

The Board denied the application for the stay. Although the Appellants demonstrated there was a serious issue to be determined, they did not demonstrate they would suffer irreparable harm in the time it would take the Board to hear the appeal. Furthermore, the irreparable harm claimed by the Appellants could be compensated for monetarily. The granting of the stay would not prevent the irreparable harm the Appellants claimed was already occurring even though the project had not been constructed. The reasonable possibility of irreparable harm being suffered by the Appellants if a stay was not granted is a prerequisite for the Board to grant a stay.

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's decision and reasons regarding two preliminary matters in respect of and appeal of Approval No. 00327259-00-00 (the "Approval") issued to the Village of Marwayne (the "Approval Holder" or the "Village"). Alberta Environment and Sustainable Resource Development ("AESRD") issued the Approval to the Village under the *Water Act,* R.S.A. 2000, c. W-3, for the construction, operation, and maintenance of a stormwater management system. Mr. Tony and Ms. Louise Harris (the "Appellants") appealed the issuance of the Approval.

[2] The issues before the Environmental Appeals Board (the "Board") are whether the Appellants are directly affected and whether to grant the stay of the Approval.

[3] The Board found the Appellants are directly affected by the decision to issue the Approval. However, the Board denied the stay request because the Appellants did not demonstrate they would suffer irreparable harm as a result of the work authorized by the Approval.

II. BACKGROUND

[4] On July 4, 2013, the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued Approval No. 00327259-00-00 under the *Water Act* to the Approval Holder. The Approval allows for the construction, operation, and maintenance of a stormwater management system on an unnamed tributary of Marwayne Creek at SE 26-52-03 W4M in the Village of Marwayne in the County of Vermilion River.

[5] On July 16, 2013, the Board received a Notice of Appeal from the Appellants appealing the Approval and requesting a stay.

[6] On July 17, 2013, 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. The Board asked the Appellants to respond to the Board's questions regarding their stay request.[1]

[7] On July 23, 2013, the Board received the Appellants' response to the stay questions. The Board notified the Participants that the Appellants provided sufficient information for the Board to consider issuing a stay or temporary stay. The Board set the schedule to receive response submissions from the Approval Holder and Director and final comments from the Appellants.

[8] On July 31, 2013, the Board received the submissions from the Approval Holder and Director.

[9] On August 7, 2013, the Board received the section of the Record relating to the Appellants' directly affected status.

[10] On August 9, 2013, the Board received the Appellants' final comments.

[11] The Board notified the Participants on August 16, 2013, that the Appellants were directly affected, but the stay was denied. The following are the Board's reasons.

III. DIRECTLY AFFECTED

A. Submissions

1. Appellants

[12] The Appellants stated their property is being used as a settling pond for all of the chemicals and sediment that flows from the streets and ditches of Marwayne onto their property before the water continues on to Marwayne Creek.

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[1] The Appellants were asked to respond to 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 Village of Marwayne would suffer from the granting of a stay?
4. Would the overall public interest warrant a stay?
5. Are the Appellants directly affected by AESRD's decision to issue the Approval to the Village?

2. Approval Holder

[13] The Approval Holder conceded the Approval directly affects the Appellants, because the project relies on a natural drainage course running through the Appellants' lands. The Approval Holder stated the project is designed to manage and control the amount of water flow in the natural drainage course. The Approval Holder said the stormwater management pond will alleviate concerns regarding volume of water flow and sediment in the water flow. The Approval Holder stated the project will benefit the Appellants.

3. Director

[14] The Director confirmed the Appellants filed a Statement of Concern.

B. Analysis

[15] Before the Board can determine whether a stay should be granted, it must determine whether the Appellants are directly affected. Under section 97(2) of EPEA, only a party to an appeal can request a stay.[2]

[16] The Board has discussed the issue of directly affected in numerous prior decisions. The Board received guidance on the matter of directly affected 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*").

[17] 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

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2 Section 97(2) of EPEA states:
"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."

Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

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:

> 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.

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]

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]

[18] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, 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]

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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.); 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.).

[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.).

[19] 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 for the Board to consider it sufficient to grant standing.

[20] The Approval Holder conceded the Appellants are directly affected and the Director made no further comments other than to confirm a Statement of Concern was filed.

[21] The proposed project will have water flowing from the stormwater management pond over the Appellants' lands. This clearly demonstrates there is a direct affect on the Appellants. Whether the flow is through a natural channel and to what extent the impacts on the Appellants are, is not known at this stage of the process. As stated in *Court*, the Appellants need only demonstrate there is a potential of harm on the balance of probabilities. This has clearly been demonstrated by the Appellants and has not been opposed by the Director or Approval Holder.

[22] Therefore, the Board finds the Appellants are directly affected by the Director's decision to issue the Approval.

IV. STAY APPLICATION

A. Legal Basis for a Stay

[23] 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."

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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.).

[24] The Board's test for a stay, as stated in its previous decisions of *Pryzbylski*[7] and *Stelter*,[8] is adapted from the Supreme Court of Canada case of *RJR MacDonald.*[9] 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."[10]

[25] 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.

[26] 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.[11] Irreparable harm will occur if the applicant will be adversely affected by the activity the stay is meant to prevent, should the applicant ultimately be successful in its appeal. 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*,[12] 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

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7 *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.).

8 *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.).

9 *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.

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

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

12 *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 a denial of justice."[13]

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.[14] The damage that may be suffered by third parties may also be taken into consideration.[15]

[27] 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."[16] 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,[17] third parties who may suffer damage,[18] or if the reputation and goodwill of a party will be affected.[19]

[28] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. Public interest includes the "...concerns of society generally and the particular interests of identifiable groups."[20] The effect on the public may sway the balance for one party over the other.

[29] Each step has to be met. In most circumstances, if any of the steps are not met, then the stay is denied.

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

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

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

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

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

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

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

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

B. Step 1 - Serious Issue to be Tried

1. Appellants' Submission

[30] The Appellants argued the proposed settling pond will not address the water flow issues, because the water will continue to overflow onto the Appellants' land, destroying and polluting their land, and poisoning their livestock.

[31] The Appellants stated that, if the stay is refused, water will continue to run through their property. The Appellants said their septic system has been compromised, their wells have unidentified chemicals in them, the lands will be eroded, and their land will have no value.

2. Approval Holder's Submission

[32] The Approval Holder submitted the Appellants failed to demonstrate the factors required to issue a stay. The Approval Holder argued there is no serious issue to be heard by the Board. The Approval Holder stated the project will decrease the impact of water flow through the Appellants' lands. The Approval Holder explained it investigated the water flows in the area to determine the needs of the residents and created the proposed project, which will alleviate water flow issues on the Appellants' lands.

[33] The Approval Holder stated all of the concerns raised by the Appellants pre-existed the project, and water already flows across the Appellants' lands of which 0.9 percent is contributed by the Village. The Approval Holder stated the project is designed to divert a portion of the total surface water away from the Appellants' lands to another creek, thereby improving the overall position of the Appellants with respect to water flow and water quality on their lands.

[34] The Approval Holder stated that granting a stay would maintain the status quo and would do nothing to resolve the Appellants' concerns respecting water flow and the alleged harm resulting from the flow.

3. Director's Submission

[35] The Director took no position on the stay application. The Director stated the Appellants' issues with water flow are caused by existing drainage conditions on the Appellants' property, and the approved wet pond and other planned drainage work in the area will mitigate the effects of the existing drainage conditions.

4. Appellants' Rebuttal

[36] The Appellants stated they know there are chemicals polluting their property, including petroleum products and pesticides, and their drinking water is not potable. The Appellants argued the harm has already occurred, and the holding pond will not address the water flow. The Appellants stated the stormwater management pond proposed by the Approval Holder will not properly manage and control the flow of water, because it will overflow its banks in a heavy rainfall or big snowmelt.

[37] The Appellants explained the surface water flowing across their lands is through a man-made drainage course. The Appellants stated that, historically, Alberta Transportation, the County of Vermilion River, and the Village directed their ditches and culverts through the Appellants' lands.

[38] The Appellants argued the Approval Holder's determination of the volume of water contributed by the Village is in dispute, and the numbers provided by the Approval Holder are speculative, unscientific, and inaccurate. The Appellants stated the Approval Holder did not undertake extensive investigation of the water flows and did not conduct a physical inspection of the Appellants' property during runoff season. The Appellants stated the evidence and studies completed by the Approval Holder do not accurately portray the amount of water being directed through and around the Appellants' property. The Appellants argued the project will only benefit the Approval Holder.

[39] The Appellants stated they disagree with the effectiveness of the stormwater management pond because the Approval Holder did not undertake an extensive investigation of the water flows. The Appellants argued their needs cannot be ignored.

[40] The Appellants acknowledged their concerns pre-existed the project. The Appellants argued the Approval Holder's statement that the project will improve the Appellant's position is speculative and in dispute. The Appellants stated they have video evidence showing the water flow in and around their lands.

[41] The Appellants submitted they have satisfied the first part of the test.

5. Analysis

[42] The first step in the stay test is to determine whether there is an issue that should be heard. The Approval Holder acknowledged the proposed project will require stormwater to flow across the Appellants' lands. However, the Approval Holder and Appellants disagree on the actual impact of the water flows across the Appellants' lands. The Appellants argued there will be a detrimental effect on their lands and their use of the lands if the project is allowed to proceed as planned. The Approval Holder argued the project will actually benefit the Appellants by controlling the amount of water that already flows across their lands. There is no doubt there is an issue regarding the effect of the proposed project on water flows across the Appellants' lands. Therefore, the Board finds there is a serious issue to be determined, and the first part of the stay test has been met.

C. Step 2 - Irreparable Harm

1. Appellants' Submission

[43] The Appellants stated the Approval Holder has been offered alternatives to constructing the storm pond in its present location. The Appellants said there is no urgency to constructing the dry pond, and water can be routed around the Appellants' property.

[44] The Appellants argued the public interest warrants a stay, because if the Appellants are successful, the Approval Holder would have wasted tax dollars building the dry pond.

2. Approval Holder's Submission

[45] The Approval Holder argued the Appellants would not suffer irreparable harm if the stay was not granted. The Approval Holder stated the project will not increase the net water flow through the drainage course running across the Appellants' lands, and since the water flowing through their lands is due to a naturally occurring drainage course, the water will flow through the Appellants' lands regardless of the project. The Approval Holder said the Appellants' concerns regarding their wells and septic system would be there regardless of the project. The Approval Holder stated the Appellants' concerns relate to natural storm runoff and flooding issues arising from the natural drainage course of water in the surrounding area. The Approval Holder said these flooding concerns will be alleviated by managing the flow of water through the Appellants' lands.

[46] The Approval Holder stated that none of the concerns alleged by the Appellants are irreparable since they could be put whole by means of financial compensation, remediation of the lands, or a combination of both. The Approval Holder submitted the Appellants did not demonstrate they would suffer irreparable harm and, therefore, a stay is not appropriate. The Approval Holder submitted the Appellants would suffer no harm and would, in fact, benefit by the project.

[47] The Approval Holder stated that with a stay, the water flow through the Appellants' lands would continue at the same rate it always has, so a stay would not benefit the Appellants with respect to water flow or water management.

3. Director's Submission

[48] The Director did not take a position on the stay application. However, he provided the following comments:

1. The water flow issues are caused by existing drainage conditions on the Appellants' property;
2. The approved stormwater management pond, which is a wet pond, along with other planned drainage work in the area will mitigate the effects of existing drainage condition on the Appellants' property; and

3. The Approval authorizes the stormwater management pond and downtown storm sewers, and a stay could impact construction potentially in progress or pending on the downtown improvements and storm pond.

4. Appellants' Rebuttal

[49] The Appellants stated the water flowing through their lands is not due to a naturally occurring drainage course. The Appellants acknowledged water will flow through their lands regardless of the project, but the Approval Holder has ignored options which will not damage the Appellants' lands but may be more expensive. The Appellants stated the Approval Holder has historically directed the water through the Appellants' lands, and the volume has continually grown over time. The Appellants argued the Approval Holder is using the Appellants' lands as a settling pond for the chemicals and sediments flowing from the streets and ditches in the Village before it continues to Marwayne Creek. The Appellants acknowledged the Approval Holder is constructing the stormwater management pond to prevent further damage to the Appellants' property, but the irreparable harm has already occurred and will continue to get worse.

[50] The Appellants argued that granting the stay will force the Approval Holder to consider alternative measures that will not destroy the Appellants' property, livestock, and livelihood. The Appellants questioned whether the Approval Holder would be willing to offer any compensation to the Appellants.

5. Analysis

[51] The second step is to determine whether the Appellants would suffer irreparable harm if the stay is not granted.

[52] In determining if the Appellants will suffer irreparable harm if the stay is not granted, the Board looks at whether the Appellants could be compensated monetarily for any damages that may occur. The concerns expressed by the Appellants included damages to their lands, effects on their water supply and livestock, and impacts on their livelihood. All of the impacts claimed by the Appellants that could possibly occur can be compensated for monetarily. If the proposed project causes adverse effects during the time the appeal is heard, the value of the

lands and any impacts on their animals can be determined. If the land needs to be remediated, the costs can be calculated. In addition, if the Appellants' potable water is affected, alternate water sources can be provided or a new well dug. The costs of all of these remedies can be determined. Therefore, the Appellants will not suffer irreparable harm and the Board must deny the stay request.

[53] The Board notes the concerns expressed by the Appellants currently exist. Water is flowing across their property through a channel, whether it is a natural channel or a man-made channel. If the Board granted the stay of the project, the existing conditions will not change. Water will still be flowing across the Appellants' lands. The Approval does not authorize the flow across the Appellants' property. The Appellants are asking the Board to issue a stay on a project that, according to the Approval Holder, will reduce the amount of water flowing across the Appellants' lands. The Appellants acknowledged the flow would continue regardless of the status of the project. Therefore, the Board cannot see a benefit to the Appellants in granting a stay.

[54] The Appellants argued a stay to force the Approval Holder to look for alternative measures. This argument does not support the proposition that there would be irreparable harm to the Appellants if the stay was not granted. The Appellants also argued the irreparable harm has already occurred. If the irreparable harm has already occurred, issuing a stay will not reverse the harm.

[55] The Board assures the Parties that it has not made any decision regarding the issuance of the Approval at this stage of the process. It is only after the Board has heard all of the evidence at the substantive hearing that it will determine whether it should recommend the Approval be confirmed, reversed, or varied.

[56] If the Board recommends the Approval be varied and the Minister accepts the Board's recommendations, and if these recommendations include a re-design or reversal of the project, the Approval Holder may be required to undo or modify any work that has been completed to date in order to comply with the varied or reversed Approval. Therefore, it is the Approval Holder who must accept the risk of continuing with the project before the Minister issues her decision.

[57] There will be no irreparable damage to the Appellants while the appeal is heard. Also, any damages the Appellants argued would be the result of the proposed project could be compensated for monetarily. This includes damages, if any, to the land and livestock. Therefore, the Board finds the second step in the stay test has not been met.

[58] Based on applying the stay test developed by the courts to the facts presented to date, the Board denies the application for a stay.

[59] As the Appellants have not met the second step of the stay test and the stay is denied, it is not necessary for the Board to assess the remaining steps of the test for a stay in this case.

V. CONCLUSION

[60] The Board finds the Appellants are directly affected by the issuance of the Approval.

[61] The Board denies the stay request. Although the Board finds there is a serious issue to be heard, the Appellants did not demonstrate they would suffer irreparable harm in the time it will take for the Board to hear the appeal.

Dated on October 4, 2013, at Edmonton, Alberta.

"original signed by"
A.J. Fox
Panel Chair