

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – April 8, 2014

**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 Roxanne Walsh with respect to the decision of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, to issue Amending Approval No. 1242-02-02 under the *Environmental Protection and Enhancement Act* and *Water Act* Approval No. 00334295-00-00 to the Town of Turner Valley.

Cite as: Stay Decision: *Walsh v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Town of Turner Valley* (08 April 2014), Appeal Nos. 13-022 and 13-023-ID1 (A.E.A.B.).

**BEFORE:**

Mr. Alex MacWilliam, Panel Chair.

**WRITTEN SUBMISSIONS BY:**

**Appellants:** Ms. Roxanne Walsh.

**Approval Holder:** Town of Turner Valley, represented by Mr. Ron Kruhlak, McLennan Ross LLP.

**Director:** Mr. Brock Rush, Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Alison Altmiks and Ms. Wendy Thiessen, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Amending Approval under the *Environmental Protection and Enhancement Act* and an Approval under the *Water Act* to the Town of Turner Valley (the Town) to construct, operate, and reclaim a waterworks system for the Town and to construct an infiltration gallery below the bank of the Sheep River bank.

Ms. Roxanne Walsh and Ms. Julie Walker appealed the decisions to issue the Amending Approval and Approval and Ms. Walsh requested a stay.

The Board requested, received, and reviewed written submissions from Ms. Walsh, AESRD, and the Town on the questions of whether Ms. Walsh is directly affected and whether to grant the stay.

AESRD and the Town acknowledged Ms. Walsh is directly affected. The Board found Ms. Walsh is directly affected because she is a resident of the Town and relies on the municipal water supply. If any contaminants enter the Town's water supply, Ms. Walsh, as a user of the water, would be affected.

The Board reviewed the submissions on the stay application and applied the stay test as established by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)* and interpreted by the Board in prior decisions.

The Board denied the stay because Ms. Walsh did not meet the requirements of the stay test. Even though there was a serious issue to be heard, the Board found Ms. Walsh would not suffer irreparable harm if the stay was not granted. Her concerns were based on the water from the infiltration system entering the municipal water supply, which would not occur until the system is connected to the municipal waterworks system. The conditions of the Approvals provide that this cannot occur until testing is completed to demonstrate the water meets criteria and the results are provided to AESRD at least two weeks prior to the water being pumped into the municipal waterworks system.

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## I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision regarding preliminary matters in respect of appeals of Amending Approval No. 1242-02-02 (the "Amending Approval") issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), and Approval No. 00334295-00-00 (the "Approval") under the *Water Act*, R.S.A. 2000, c. W-3. The Amending Approval and the Approval (collectively, the "Approvals") were issued to the Town of Turner Valley (the "Approval Holder" or the "Town") by Alberta Environment and Sustainable Resource Development ("AESRD") for the purposes of constructing, operating, and reclaiming a water works system for the Town, and for the construction of an infiltration gallery below the bank of the Sheep River at NW 6-20-2 W5M. Ms. Roxanne Walsh and Ms. Julie Walker (collectively, the "Appellants") appealed the decision to issue the Approvals and Ms. Walsh requested a stay.

[2] In response to the stay request, the Environmental Appeals Board (the "Board") received written submissions on the stay request and on the directly affected status of Ms. Walsh.

[3] The Board had to determine if Ms. Walsh was directly affected before making a decision on the stay, because only a party to an appeal has the right to request a stay. After reviewing the submissions, and given the Town and AESRD acknowledged Ms. Walsh was directly affected, the Board found Ms. Walsh was directly affected by the decision to issue the Approvals. As a resident of the Town, if contaminants enter the municipal water supply, she would be affected.

[4] With respect to the stay, the Board assessed the submissions based on the test as set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR MacDonald*") and applied by the Board in prior decisions. The Board denied the stay request. Although the Board found there was a serious issue to be heard, the Board found Ms. Walsh would not suffer irreparable harm during the construction of the infiltration gallery. It is only when the water from the infiltration system enters the municipal waterworks system would the concerns raised by Ms. Walsh, in her stay request, be relevant.

[5] As Ms. Walsh did not meet the second part of the stay test, the Board did not have to determine if the other parts of the test were met.

## II. BACKGROUND

[6] On February 10, 2014, the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), issued the Approvals to the Approval Holder.

[7] On February 19, 2014, the Board received Notices of Appeal from the Appellants appealing the Approvals. Supplement information regarding the Notices of Appeal were received on February 27, 2014.

[8] On February 24, 2014, the Board wrote to the Appellants, Approval Holder, and the Director (collectively, the “Participants”) acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and Director of the appeals. The Board asked the Director for a copy of the documents upon which the Director made his decision (the “Record”).

[9] On February 28, 2014, Ms. Walsh requested a stay of the Approvals. The Board asked Ms. Walsh to provide any additional information she may have that related to the Board’s questions regarding her stay request.<sup>1</sup>

[10] On February 28, 2014, the Board notified the Participants that, based on the information provided in Ms. Walsh’s stay request, she had made a *prima facie* case for a stay. The Board asked the Director and Approval Holder to provide written responses to the stay request and on the directly affected status of Ms. Walsh.

[11] On March 3, 2014, the Board received additional information from Ms. Walsh regarding her stay request.

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<sup>1</sup> The Participants were asked to respond to the following questions:

1. What are the serious concerns of the Appellant that should be heard by the Board?
2. Would the Appellant suffer irreparable harm if the stay is refused?
3. Would the Appellant suffer greater harm if the Stay was refused pending a decision of the Board than the Town of Turner Valley would suffer from the granting of a stay?
4. Would the overall public interest warrant a stay?
5. Is the Appellant directly affected by AESRD’s decision to issue the Approval and the

[12] On March 7, 2014, the Board received responses from the Director and the Approval Holder. Ms. Walsh provided her final submission on March 21, 2014.

### **III. DIRECTLY AFFECTED**

#### **A. Submissions**

##### 1. Appellants

[13] Ms. Walsh stated that, as a resident of the Town and user of the water, she is directly affected by the issuance of the Approvals. Ms. Walsh noted the Director has acknowledged she is directly affected.

##### 2. Approval Holder

[14] The Approval Holder did not dispute the directly affected status of Ms. Walsh.

##### 3. Director

[15] The Director explained that, as the Town's applications were submitted on a rush basis, there was no public notice of the application, so Ms. Walsh did not have the opportunity to submit a Statement of Concern. The Director stated he had accepted previous Statements of Concern filed by Ms. Walsh on other applications regarding the Town's water treatment and distribution system.

[16] The Director noted the Board found Ms. Walsh directly affected in previous appeals regarding the Town's water supply.<sup>2</sup>

[17] The Director stated the Amending Approval does not authorize a different source of water, and the source of the raw water entering into the waterworks system is the same as what is currently used under the existing Approval.

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Amending Approval to the Town of Turner Valley?

<sup>2</sup> See: *Walsh and Abrams v. Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (2 May 2007) Appeal Nos. 06-071 and 072-ID.

## B. Analysis

[18] Before the Board can determine whether a stay should be granted, it must determine whether Ms. Walsh is directly affected. Under section 97(2) of EPEA, only a party to an appeal can request a stay.<sup>3</sup>

[19] 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*").

[20] 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. ...

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

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<sup>3</sup> 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.”

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.’<sup>4</sup>

Justice McIntyre concluded by stating:

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<sup>4</sup> *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.*

“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....”<sup>5</sup>

[21] 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 onus is on the appellant to present a *prima facie* case that he or she is directly affected.<sup>6</sup>

[22] The Court of Queen’s Bench in *Court*<sup>7</sup> 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.

[23] The Approval Holder and Director did not dispute that Ms. Walsh is directly affected. Ms. Walsh, as a resident of the Town, relies on a safe, secure municipal water system. She raised concerns regarding the potential for contaminants to enter into the water drawn into the infiltration gallery given the location of the infiltration gallery and the proximity of a landfill and other current and historic operations in the area. Ms. Walsh is concerned the existing water treatment system may not be capable of removing all the contaminants that enter the infiltration gallery. The Board notes the effectiveness of the water treatment system is not an issue before the Board in these appeals, but it puts Ms. Walsh’s concerns in perspective. At this point of the appeal process, the Board has not made any determination on whether the concerns expressed by Ms. Walsh regarding the infiltration gallery are valid. That will be determined at the substantive hearing, if one is held.

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*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.).

<sup>5</sup> *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

<sup>6</sup> 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.).

<sup>7</sup> *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] If there are contaminants that enter the water system that may not be removed through the water treatment system, then, as a user of the municipal water, Ms. Walsh could be affected. Based on the *Court* decision, the Board need only find there is a potential for Ms. Walsh to be affected by the proposed project. In this case, if contaminants are in the source water, there is a potential Ms. Walsh, as a user of the municipal water supply, could be affected.

[25] Therefore, the Board finds Ms. Walsh is directly affected by the Director's decision to issue the Approvals, and the Board will consider Ms. Walsh's stay request.

#### **IV. STAY APPLICATION**

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

[26] 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.”

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

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<sup>8</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>9</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>10</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.

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>11</sup>

[28] 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.

[29] 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>12</sup> 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*,<sup>13</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>14</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>15</sup> The damage that may be suffered by third parties may also be taken into consideration.<sup>16</sup>

[30] 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>17</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

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<sup>11</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

<sup>12</sup> *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

<sup>13</sup> *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

<sup>14</sup> *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

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

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

<sup>17</sup> *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

considered factors such as the cumulative effect of granting a stay,<sup>18</sup> third parties who may suffer damage,<sup>19</sup> or if the reputation and goodwill of a party will be affected.<sup>20</sup>

[31] 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."<sup>21</sup> The effect on the public may sway the balance for one party over the other.

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

## **B. Step 1 - Serious Issue to be Tried**

### 1. Ms. Walsh's Submission

[33] Ms. Walsh said the construction of the infiltration gallery was to start on February 24, 2014, and according to the application, the infiltration gallery would be completed and operational within six to eight weeks. Ms. Walsh noted the Director's Record would not be available until some time in April.

[34] Ms. Walsh stated there is no indication in the application that further documents would be reviewed, specifically third party documents regarding the industrial landfill across the river from the infiltration gallery or the oil and gas wells and pipelines in the area. Ms. Walsh stated the industrial landfill is considered high risk and is considered as a subsurface pathway for contaminants to enter the Sheep River. Ms. Walsh noted the Approval Holder's consultant, Stantec, prepared a report entitled the "2011 Surface Water Inventory - Turner Valley, Alberta," in which it is stated that there is a hydraulic connection between the river and the gravel aquifer, meaning there is a potential for contamination from the landfill.

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<sup>18</sup> *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

<sup>19</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

<sup>20</sup> *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

<sup>21</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

[35] Ms. Walsh stated this is a serious concern because the parameters currently being tested for in the soil and water may be missing chemicals that could exist in the landfill site as well as the septic fields in Calkins. Ms Walsh noted the following as concerns:

1. process and experimental chemicals that may have been used by industry at the gas plant site or dumped into the industrial landfill;
2. invert drilling mud chemicals;
3. methylmercury resulting from the changes that occurred because of the flood in June 2013;
4. NORM/TENORM related to unknown oil and gas activities in the area and the industrial landfill;
5. corrosion inhibitors, biocides, diesel fuel, PCBs, lubricants, and amines used at the gas plant and may be found in the industrial landfill;
6. pharmaceuticals that may be present in the Calkins subdivision and upstream septic fields, and from upstream ranching and livestock activities;
7. pesticides and herbicides that may have been used at the gas plant site or at residences at Calkins Place for which residuals may be in the area or disposed of in the industrial landfill or used in upstream oil and gas activities or ranching; and
8. chemicals used for fracking.

[36] Ms. Walsh stated that F-fractions may not be sufficient to identify lower detection limit chemicals that are anthropogenic in origin, so "...all tests should be performed at 1/3 to 1/10<sup>th</sup> lower than detection limits for all anthropogenic chemicals/particles to ensure accuracy."<sup>22</sup>

[37] Ms. Walsh stated the fish and habitat assessment was done without the proper fish study licence in place. Ms. Walsh requested the stay because a proper fish study was not completed.

[38] Ms. Walsh stated the application for the Approvals: (1) did not address the kind of construction expertise the supervisor has; (2) did not include the Emergency Response Plan or the Spill Response Plan; and (3) did not provide the protocol that will be used to clean, fuel, and service the equipment.

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<sup>22</sup> Ms. Walsh's submission, dated February 28, 2014.

[39] Ms. Walsh noted the application for the *Water Act* Approval states the infiltration gallery will be covered with native gravels, but the application for the Amending Approval states the infiltration gallery will be covered with imported gravel, native gravel, a filter fabric and HDPE liner, and a clay liner.

[40] Ms. Walsh stated all of these issues should be reviewed before construction starts under the Approvals.

## 2. Approval Holder's Submission

[41] The Approval Holder explained the June 2013 flood caused extensive damage to the existing waterworks system in the Town and in the Town of Black Diamond ("Black Diamond"). Two of the Town's three water supply wells, located on the bank of the Sheep River, were damaged beyond repair (wells No. 5 and 8). In Black Diamond, the water treatment plant and two of its three wells were irreparably damaged in the flood. The Approval Holder said that, as a result, a state of local emergency was declared, a temporary connection was established to supply Black Diamond with water from Turner Valley, and water restrictions and a fire ban were imposed.

[42] The Approval Holder noted the state of emergency was lifted on January 29, 2014, but water restrictions remain in place and will continue until an adequate water supply is secured to meet the demands of the Town and Black Diamond. The Approval Holder explained it applied to the provincial Disaster Recovery Program for funding and explored options for replacing its water supply. The Approval Holder stated that, in consultation with its qualified consultants and AESRD, it concluded the most viable option for a water supply was the construction of an infiltration gallery at NW 6-20-2-W5M, in the immediate vicinity of the former Wells No. 5 and 8, and the diversion of the same groundwater that was diverted under the 2008 EPEA Approval. Wells No. 5 and 8 were sampled and analyzed regularly over the past five years and were found to be safe and reliable.

[43] The Approval Holder submitted Ms. Walsh did not meet the Board's test for a stay.

[44] The Approval Holder noted Ms. Walsh raised a number of additional issues after she submitted her stay application, and some were not raised in her Notice of Appeal. The Approval Holder referred to Ms. Walsh's allegation that a proper fish study was not completed. The Approval Holder submitted it is not proper to consider issues that were not raised in the Notice of Appeal when considering a stay application. The Approval Holder stated the Board should only consider the issues related to the Approvals and not allow Ms. Walsh to use the stay application to re-visit issues previously considered under the original EPEA approval.

[45] The Approval Holder submitted Ms. Walsh did not demonstrate an evidentiary basis for the issues she raised in support of her request for a stay.

[46] The Approval Holder explained it is working closely with and relying on the expertise of consultants familiar with concerns specific to the Turner Valley area to ensure adequate sampling and monitoring is done in preparation for construction. The Approval Holder stated that sampling for NORMs, PCBs, and other parameters will be conducted in due course in accordance with the terms of the Approval. The Approval Holder said a long term aquifer monitoring program is being developed to ensure foreseeable risks are managed in the future.

[47] The Approval Holder stated it retained a company that employs several qualified aquatic environmental specialists to conduct the fish and fish habitat assessment in accordance with the Code of Practice under the *Water Act*. The Approval Holder said the company did not seek a Fish Research Licence so the company used the Fish and Wildlife Management Information System for the information, and this was supplemented with recreational angling information. The Approval Holder stated the company assessed the project and consulted directly with the Federal Department of Fisheries and Oceans to ensure the proper assessment procedures were followed.

[48] The Approval Holder stated the concerns raised by Ms. Walsh appear to be largely conjecture. The Approval Holder said Ms. Walsh did not provide evidence that indicated the sampling parameters are inadequate. The Approval Holder noted the parameters were selected having regard to the history of the area and the risks associated with ongoing local uses.

3. Director's Submission

[49] The Director said he took no position on the stay application.

[50] The Director stated the Board should balance the competing interests of Ms. Walsh and the Approval Holder.

[51] The Director stated the Board should not deal with the following matters:

1. withdrawn applications;
2. applications on hold or review; and
3. issues not directly related to the infiltration gallery.

[52] The Director stated the issues in the appeals should be limited to the Approvals issued that authorized the construction of the infiltration gallery, and the appeals should not be used to open up EPEA Approval No. 1242-02-00 in its entirety. The Director stated the issues should not extend to the water treatment plant, which has a separate application and Statement of Concern filed by Ms. Walsh.

[53] The Director explained that, prior to the issuance of the Approvals, the Approval Holder had authorization for a water works system that included water wells within W1/2 6-20-2-W5M producing groundwater under the direct influence of surface water. The Director stated the source of the new water under the Amending Approval is the same as under the initial approval, but the mechanism for capturing the source water has changed to include an infiltration gallery. The Director said the existing monitoring and reporting requirements remain in place with additional monitoring and reporting requirements.

4. Ms. Walsh's Rebuttal Submission

[54] Ms. Walsh stated she is concerned about the quality of the water that is provided to the residents of the Town, and every effort should be made to ensure they are not exposed to possible unknown contaminants in their drinking and bathing water that could be identified, tested for, and filtered out. Ms. Walsh questioned whether the infiltration gallery is at the best location.

[55] Ms. Walsh said that all matters related to the water infrastructure should be considered, including pumping, transporting, filtering, and distribution, plus a consideration of nearby oil and gas infrastructure and waste pits.

## 5. Analysis

[56] The first step in the stay test is to determine whether there is a serious issue that should be heard. Ms. Walsh raised concerns regarding the safety of the municipal water supply given the Approval Holder's intention to construct an infiltration gallery across the river from a landfill. Ms. Walsh is concerned contaminants from the landfill, as well as oil and gas facilities and other potential sources of contaminants, will enter the river and the infiltration gallery. This would then allow contaminants to enter the municipal water source, which she uses on a daily basis.

[57] Given the construction of the infiltration gallery in close proximity to the landfill and the history of past oil and gas operations in the Turner Valley area, the concerns of Ms. Walsh regarding contamination of the water entering the infiltration gallery are serious issues. At this stage of the appeal process the Board has not made any determination of whether the concerns are valid as this would be determined at the substantive hearing.

[58] These are serious issues that are relevant to the Approvals and are within the Board's jurisdiction to consider. In addition, Ms. Walsh raised issues regarding the adequacy of the testing and monitoring for contaminants. These issues are also relevant to the Approvals and within the Board's jurisdiction.

[59] As Ms. Walsh has raised relevant concerns, 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. Ms. Walsh's Submission

[60] Ms. Walsh argued she would suffer irreparable harm if chemicals are not being tested for before entering the drinking water. She stated some of the chemicals can

bioaccumulate, the effects may not show up immediately, and they may not be easily traced back to the source. Ms. Walsh stated the chemicals could impact her health and wellbeing.

2. Approval Holder's Submission

[61] The Approval Holder denied Ms. Walsh would suffer irreparable harm if the stay was refused.

[62] The Approval Holder stated the construction of the project will not affect Ms. Walsh's water supply. The Approval Holder explained that no water will be directed from the project to the Town's waterworks system unless and until the Director and the Approval Holder are satisfied the water is of acceptable quality and meets the Canadian Drinking Water Quality Guidelines for any health-based Maximum Acceptable Concentration, and Alberta Tier 1 Guidelines for any health-based parameters.

[63] The Approval Holder argued Ms. Walsh's application for a stay is premature, because she would not suffer any irreparable harm until the water is directed to the reservoir or water treatment plant.

[64] The Approval Holder stated there must be some evidence Ms. Walsh's health and safety are, in fact, in danger. The Approval Holder said Ms. Walsh's health concerns are mere conjecture, and she did not provide any evidence the alleged contamination will bioaccumulate as a result of drinking or bathing in water supplied by the project.

[65] The Approval Holder acknowledged it bears the risk if the Approvals are amended or reversed. The Approval Holder stated Ms. Walsh can secure alternate water supplies pending the Minister's decision and, therefore, if any harm occurs, it is not irreparable.

3. Director's Submission

[66] The Director did not believe Ms. Walsh would suffer irreparable harm if the stay was refused. The Director explained the Approval Holder must:

1. test the source water during construction and provide the results to the Director prior to the water entering the waterworks system; and
2. change and update its Source Water Program, Well and Infiltration Gallery Monitoring Program, and Remedial Action Plan for Specific Possible Contaminations prior to using the water from the infiltration gallery in the waterworks system.

[67] The Director stated that, should the Approval Holder choose to proceed with the project with the appeals 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 altering the terms and conditions of the Approvals or revoking the Approvals.

4. Ms. Walsh's Rebuttal Submission

[68] Ms. Walsh noted the Approval Holder's consultant elevated the risk of possible contamination of the water at the infiltration gallery to high because the landfill was directly adjacent to the bank of the Sheep River and due to pipelines located under the river that would result in a direct pathway into the river.

[69] Ms. Walsh stated that, in the 2014 application, the Approval Holder indicated there are nine pipelines downstream of the site, but in the 2011 Stantec reports, it indicated there are 32 pipelines within the infiltration gallery area and it is not known if the pipelines have impacted the soil and groundwater in the vicinity of the protection area boundary.

5. Analysis

[70] The second step in the test is to determine whether Ms. Walsh would suffer irreparable harm if the stay is not granted.

[71] In this case, Ms. Walsh is concerned about potential contaminants entering the Town's municipal water supply given the proposed infiltration gallery is located across the river from the landfill and in the vicinity of oil and gas and other activities occurring in the Turner Valley area.

[72] The Approvals allow for the construction of the infiltration gallery. The concerns expressed by Ms. Walsh are the effects any contaminants may have on her health if the contaminants enter the municipal water supply. Ms. Walsh did not state the construction of the infiltration gallery would cause her irreparable harm.

[73] The actual construction of the infiltration gallery will not cause irreparable harm to Ms. Walsh. It is only when the water from the infiltration gallery enters the municipal waterworks system that there could be a possibility that Ms. Walsh could be irreparably harmed, if her concerns are valid. The Approval Holder and Director explained water from the infiltration system will not enter the municipal waterworks system until testing of the water shows it complies with all federal and provincial water quality criteria.

[74] Since the water collected through the infiltration gallery is not entering the municipal waterworks system at this time, the Board finds Ms. Walsh will not be irreparably harmed by the construction of the infiltration gallery. Therefore, the second step of the stay test has not been met, and the Board denies the stay request.

[75] The Board notes that testing must be completed on the water in the infiltration gallery and the results must be provided to the Director two weeks prior to the water entering the waterworks system. The Board requests the Approval Holder provide the test results to the Board at the same time the results are provided to the Director. The Board will provide a copy to Ms. Walsh, and at that time, if she wishes, Ms. Walsh may re-apply for a stay if she believes it is warranted.

[76] All steps of the stay test must be met before a stay will be granted. Since the Board has found Ms. Walsh will not be irreparably harmed if a stay is not granted, the second step of the stay test has not been met and the Board does not have to consider the remaining steps of the stay test, specifically the balance of convenience and the public interest.

**V. CONCLUSION**

[77] The Board finds Ms. Walsh is directly affected by the issuance of the Approvals.

[78] The Board denies the stay request. Although there are serious issues to be heard, the Board found Ms. Walsh would not be irreparably harmed by the actual construction of the infiltration gallery.

Dated on April 8, 2014, at Edmonton, Alberta.

A handwritten signature in black ink, appearing to read 'Alex MacWilliam', written over a horizontal line.

Alex MacWilliam  
Panel Chair