ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision: July 22, 2022

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 Robert Tomlinson with respect to the decision of the Director, Regional Approvals, Alberta Environment and Parks, to issue *Environmental Protection and Enhancement Act* Approval No. 248406-01-00 to Evergreen Regional Waste Management Services Commission.

Cite as: Stay Decision: *Tomlinson* v. *Director, Regional Approvals, Alberta Environment and Parks, re: Evergreen Regional Waste Management Services Commission* (22 July 2022), Appeal No. 19-048-ID2 (A.E.A.B.), 2022 ABEAB 31.

WRITTEN SUBMISSIONS BEFORE:

Ms. Meg Barker, Acting Board Chair.*

PARTIES:

Appellant:	Mr. Robert Tomlinson.
Director:	Mr. Michael Lapointe, Regional Approvals Manager, Alberta Environment and Parks, represented by Ms. Shannon Keehn, Alberta Justice and Solicitor General.
Approval Holder:	Evergreen Regional Waste Management Services Commission, represented by Mr. Derek King, Brownlee LLP.

* Meg Barker was the Acting Board Chair at the time this decision was made.

EXECUTIVE SUMMARY

Evergreen Regional Waste Management Services Commission (Evergreen) holds an Approval to operate a Class II Landfill near the Town of St. Paul, Alberta. In 2017, Evergreen applied for a renewal of the Approval. In 2019, Alberta Environment and Parks issued the renewal (the Approval). The decision to issue the Approval was appealed by Mr. Robert Tomlinson (the Appellant) who provided the Environmental Appeals Board (the Board) with a Notice of Appeal.

In June, 2020, the Appellant applied for a stay of the Approval. The Board requested the Appellant answer 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 Evergreen would suffer if the Board granted the stay?
4. Would the overall public interest warrant a stay?

The Appellant provided his answers to the questions and, after reviewing the Appellant's submission, the Board denied the request for a stay of the Approval. The Board stated it would provide its reasons at a later date.

In this decision, the Board provided its reasons for denying the stay request. The Board found the Appellant did not meet the test for a stay for the following reasons:

- The Appellant did not meet the first part of the stay test as he provided insufficient evidence to support his claims of a serious issue to be heard.
- The Appellant did not demonstrate irreparable harm would occur in the absence of a stay. The Appellant submitted irreparable harm was related to Evergreen's ability to sample the landfill's monitoring wells, however, the Appellant's concerns were speculative and he did not provide sufficient evidence to demonstrate the harm was irreparable.
- The Appellant did not provide a direct answer to the third question of the stay test and made general comments on the public interest. The Board found the Appellant did not demonstrate he would suffer greater harm in the time it would take for the Board to hear the appeal than Evergreen

> would if a stay was granted. The Board also found it was in the public interest not to grant a stay of the Approval.

Based on the Appellant's answers to the Board's questions, the Board determined the Appellant did not meet the requirements for a stay. The Board denied the Appellant's request for a stay of the Approval.

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I. INTRODUCTION

[1] This is the Environmental Appeal Board's (the "Board") decision on a request for a stay of the decision of the Director, Regional Approvals, Alberta Environment and Parks (the "Director"), to issue Approval No. 248406-01-00 (the "Approval") to Evergreen Regional Waste Management Services Commission ("Evergreen"), for the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II). The stay was requested by Mr. Robert Tomlinson (the "Appellant"), in support of his Notice of Appeal. The Approval was issued under the *Environmental Protection and Enhancement Act*, R.S.A., 2000, c. E-12 ("EPEA").

[2] The Board has reviewed the written submissions received from the Appellant and has dismissed the Appellant's request for a stay. The Board's reasons are below.

II. BACKGROUND

[3] On December 30, 2008, Alberta Environment and Parks ("AEP") issued Approval No. 248406-00-00 (the "Original Approval") to Evergreen for the construction, operation, and reclamation of the Evergreen Regional Landfill (Class II) (the "Landfill"), located at W-15-56-10-W4M, near the Town of St. Paul (the "Town") in the County of St. Paul, Alberta. On December 1, 2017, Evergreen applied for a renewal of the Original Approval. On November 29, 2019, the Director issued a new Approval for ten years.

[4] On November 30, 2019, the Board received a Notice of Appeal from the Appellant. The Board advised the Director and Evergreen of the Notice of Appeal and requested the documents related to the Approval (the "Director's Record") from the Director, which was provided on January 29, 2020. The Board distributed the Director's Record to the Appellant, the Director, and Evergreen (collectively, the "Parties").

[5] The Board held a mediation on March 13, 2020, however, the Parties did not reach an agreement. The Board requested the Parties' available dates for a hearing to be held in September 2020.

[6] On June 22, 2020, the Appellant requested the Board grant a stay of the Approval. The Board requested the Appellant answer the following questions to determine if a stay request should be granted:

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 Evergreen would suffer if the Board granted the stay?
4. Would the overall public interest warrant a stay?

[7] The Appellant provided the information on June 25, 2020. In a letter dated June 29, 2020, the Board denied the stay request, indicating that reasons were to follow. These are the Board's reasons.

III. ISSUES

[8] The issues to be considered by the Board are as follows:

(a) What are the serious concerns of the Appellant that should be heard by the Board?

(b) Would the Appellant suffer irreparable harm if the stay is refused?

(c) Would the Appellant suffer greater harm if the stay was refused pending a decision of the Board than Evergreen would suffer if the Board granted the stay?

(d) Would the overall public interest warrant a stay?

IV. SUBMISSIONS

[9] The Appellant submitted answers to the Board's request for further information regarding the stay application.

(a) What are the serious concerns of the Appellant that should be heard by the Board?

[10] The Appellant submitted the serious concerns are:

- Evergreen is not following the protocol set out in its application;
- the Town is a member of Evergreen and, therefore, the water samples it obtains are biased; and
- a third party that is arm's length from Evergreen must take the required water samples.

[11] The Appellant stated that the *prima facie* evidence listed above is "only a steppingstone as to what the board needs to hear."[1]

(b) Would the Appellant suffer irreparable harm if the stay is refused?

[12] The Appellant stated, "[t]he irreparable harm has been provided to the Board on June 22, 2020."[2] The Board notes that in the Appellant's June 22, 2020 letter requesting a stay, the Appellant stated that Evergreen failed to sample the monitoring wells, resulting in the loss of data.

(c) Would the Appellant suffer greater harm if the stay was refused pending a decision of the Board, than Evergreen would suffer if the Board granted the stay?

1 Appellant's Stay Submission, June 25, 2020.

2 Appellant's Stay Submission, June 25, 2020.

[13] The Appellant submitted: "Evergreen only benefits from inaccurate and bias reporting of groundwater monitoring. Any samples showing groundwater contamination adds to Evergreen's poor financial position."[3]

(d) Would the overall public interest warrant a stay?

[14] The Appellant stated the public relies heavily on public services, but those services lose public confidence when proper protocols are not followed. The Appellant stated: "The public relies heavily on insurance coverage, when protocols not followed insurance becomes void. The public relies on both Evergreen's Application and the Director to ensure compliance."[4]

V. ANALYSIS

[15] The Board's authority to grant a stay is found in section 97 of EPEA, which 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 application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[16] The Board's test for a stay, as stated in previous decisions,[5] is adapted from the Supreme Court of Canada case of *RJR MacDonald.*[6] The steps in the test, as stated in *RJR MacDonald*, are:

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3 Appellant's Stay Submission, June 25, 2020.

4 Appellant's Stay Submission, June 25, 2020.

5 See *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.); *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.); and *Northcott* v. *Director, Northern Region, Regional Services, Alberta Environment* re*: Lafarge Canada Inc*. (11 January 2005), Appeal Nos. 04-009, 04-011, and 04-012-ID1 (A.E.A.B.).

> "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."[7]

[17] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant must demonstrate through the evidence submitted that there is some basis for presenting an argument. Often when a stay application is made, the Board does not have all of the evidence before it, therefore, "…a prolonged examination of the merits is generally neither necessary nor desirable."[8]

[18] The second step in the test requires the Board to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted. 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.

[19] Irreparable harm was defined by the Alberta Court of Appeal in *Ominayak* v. *Norcen Energy Resources* as follows:

> "[b]y 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."[9]

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6 *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: M*anitoba (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.

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

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

9 *Ominayak* v. *Norcen Energy Resources*, 1985 ABCA 12 (CanLll) at paragraph 31, citing The Law of Injunctions, 4th edition, volume 1, at page 34.

[20] 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 speculation.[10] Damage that third parties suffer can also be considered.[11]

[21] The third step in the test is the balance of convenience. Here the Board must determine "...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[12] The Board is required to weigh the burden the stay would impose on the respondent against the benefit the applicant would receive. This weighing is not strictly a cost-benefit analysis but, rather, a consideration of significant factors, such as the cumulative effect of granting a stay,[13] third parties who may suffer damage,[14] or the reputation and goodwill of a party will be affected.[15]

[22] In the third stage of the test, any alleged harm to the public is to be assessed. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."[16] It is important to note that each step of the test must be met, and in most cases, if one of the steps is not met, the stay will not be granted.

[23] The first step of the test requires the Appellant to show there is a serious issue to be heard. The Appellant must be able to demonstrate there is some basis on which an argument can be presented. As noted, the evidence does not need to be complete at this preliminary stage.

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

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

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

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

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 79.

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

[24] The Appellant was concerned that Evergreen was not following the groundwater sampling protocol set out in its Approval application because the Town's Utility Department would be assisting with the sampling and the Town does not have a sampling protocol approved by the Director. The Appellant was also concerned that the samples would be biased because the Town is an Evergreen Commission member.

[25] The Appellant provided an excerpt of a document with the Town's letterhead, dated June 22, 2020, which appears to be a request for a decision of the Town to allow the Town's Utility Department to assist Evergreen with its annual monitoring well sampling. The document states Evergreen cannot take the samples on their own site, according to the regulations.

[26] The Appellant appears to have the impression the Town would need to have its own groundwater sampling protocol approved by the Director in order to conduct the monitoring well sampling. The Appellant is mistaken. In reading the document provided by the Appellant, the Board notes the request is simply for the assistance of an operator from the Town's Utility Department to take water samples which would then be given to Evergreen and submitted for analysis. The Board notes the document describes the amount of time and a general description of the work that is being requested of the employee. The description of the work is general and does not include the detailed steps outlined in Evergreen's Groundwater Sampling Protocol, an excerpt of which the Appellant also attached to his June 22, 2020, email to the Board, but in the Board's view, nothing turns on this. One document provided by the Appellant is a request for a decision of the Town to allow one of their employees to assist Evergreen in conducting its groundwater monitoring. The other document provided by the Appellant is an excerpt from the Application for Renewal of the Approval, outlining the groundwater sampling protocol.

[27] The Board notes the Appellant appears to be under the impression these two documents are somehow contradictory or suggest some sort of noncompliance on the part of Evergreen. The Board is of the view, however, that Evergreen's request for assistance from the Town demonstrates Evergreen is endeavouring to comply with the requirements by having an operator from the Town take the samples, rather than a representative of Evergreen. In the Board's view, the two documents provided by the Appellant are instead complementary in effect. The Board finds the Appellant has not provided evidence on which to base his allegation that groundwater sampling will contravene the protocols contained in the Approval.

[28] The Appellant further claims the results of the water samples collected by the Town's operator will be biased because the Town is a member of the Evergreen Commission. In the Board's view, this is an unfounded conclusion. The Board notes the excerpt from Evergreen's Groundwater Sampling Protocol states that chain of custody forms must be completed and the samples will be shipped to a laboratory for analysis. In the Board's view, this suggests the samples will be carefully tracked, shipped to and analyzed by an independent laboratory to provide analytical results. The Board finds no evidence to support the Appellant's allegation that the results of water samples taken by an employee of the Town will be biased.

[29] The Board finds insufficient evidence was presented on which to base the Appellant's allegations that groundwater sampling will not comply with the groundwater sampling protocol and that the water sampling will be biased.

[30] In light of the above, the Board therefore finds the Appellant has not demonstrated there is a serious issue to be heard. The Appellant has not met the first part of the stay test.

[31] In considering the second part of the stay test, the harm has to be irreparable in nature. It is not the magnitude of the harm that is important, but the inability to quantify it. The Appellant submitted that the irreparable harm was related to Evergreen not sampling its monitoring wells in accordance with the timelines in the Approval, and that there are extended

periods without groundwater sampling. Mr. Tomlinson appears to be of the opinion that uncollected sampling data during these periods is lost data and that it constitutes irreparable harm.

[32] The Appellant's concern is speculative, and the Appellant has not provided sufficient evidence to demonstrate that this harm is likely or that it is irreparable. The Board finds the Appellant has not met the second part of the stay test.

[33] When the Board considers the third part of the stay test, the balance of convenience, the Board must determine which of the parties will suffer the greater harm from granting or refusing a stay. The Board views the harm in the time frame it will take for the Board to hear the appeal and the Minister makes a decision. The Board makes its determination based on the information before it.

[34] The Appellant did not provide a direct answer to the third question of the stay test but rather made insinuations regarding Evergreen's financial situation. On the matter of public interest, the Appellant's comments were mostly general. The Board notes that if it granted a stay of the Approval, Evergreen would not be able to continue its operations, and the community would be deprived of a significant waste management facility. Without specific evidence from the Appellant, the Board finds that Evergreen would suffer the greater harm as it would have to cease operations in the event of a stay. The Board also finds it would not be in the public interest to grant a stay of the Approval while the appeal process continues.

[35] The Appellant has not demonstrated there is a serious matter to be heard. The Appellant did not demonstrate that he would suffer irreparable harm in the time it will take the Board to hear the appeal. The balance of convenience and public interest did not favour the Appellant. The stay test requires, in most instances, the applicant to meet each step of the test. If any step is not met, the stay application will usually fail. As the Appellant did not meet each of the steps, the Board denies the stay application.

VI. DECISION

[36] The Board has determined the Appellant did not meet the criteria for the Board to grant a stay, therefore, the Board denies the Appellant's request for a stay of the Approval;

Dated on July 22, 2022, at Edmonton, Alberta.

"*original signed by*"
Meg Barker
Acting Board Chair