
ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 23, 2021

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 Marlow and Dianne Gereluk with respect to the decision of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 5038754 to Stone's Jewellery Ltd.

Cite as: Stay Decision: *Gereluk v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Stone's Jewellery Ltd.* (23 November 2021), Appeal No. 20-002-ID1 (A.E.A.B.), 2021 ABEAB 34.

BEFORE:

Ms. Meg Barker, Acting Board Chair.

SUBMISSIONS BY:

Appellants:

Mr. Marlow and Ms. Dianne Gereluk.

Approval Holder:

Stone's Jewellery Ltd., represented by Ms. Marilyn Germaine, Trace Associates Inc.

Director:

Mr. Andun Jevne, Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

The Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks (AEP) issued an Approval under the *Water Act* to Stone's Jewellery Ltd. (the Approval Holder), allowing Stone's Jewellery to disturb two water bodies for the purpose of constructing a residential development (Morning Vista Estates) located at SW 23-24-03-W5M in Rocky View County.

The Environmental Appeals Board (the Board) received a Notice of Appeal from Mr. Marlow and Ms. Dianne Gereluk (the Appellants), accompanied by a request for a stay. The Board requested, received, and reviewed 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 issuance of the Approval. The Appellants own and live on land adjacent to the land on which the project is to be conducted. Based on the submissions before the Board, the proposed project and expansion of the residential development could potentially affect the surface water flow and drainage from the Appellants' land, impacting the Appellants' land and property.

In considering the stay application, the Board asked the Appellants, Approval Holder, and AEP (collectively, the Parties) to answer the questions for the stay test.

Based on the submissions provided, the Board found the Appellants' land and property could be affected by the issuance of the Approval, indicating serious issues to be heard by the Board, satisfying the first part of the stay test. However, the Appellants did not provide enough evidence to demonstrate they would suffer irreparable harm if the stay was not granted, as harm to the Appellants could be compensated monetarily. The balance of convenience and public interest did not favour one party over the other. All steps of the stay test need to be met for a stay to be granted. Based on the foregoing, the Board declined to grant a stay.

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I. INTRODUCTION

[1] These are the reasons for the decision of the Environmental Appeals Board (the “Board”) regarding the stay application in respect of the appeal of Approval No. 5038754 (the “Approval”) issued under the *Water Act*, R.S.A. 2000, c. W-3, to Stone’s Jewellery Ltd., (the “Approval Holder”) by the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, (the “Director”). The Approval allows the Approval Holder to disturb two water bodies for the purpose of constructing a residential development located at SW 23-24-03-W5M, in Rocky View County.¹

[2] The Board received a Notice of Appeal from Mr. Marlow and Ms. Dianne Gereluk (the “Appellants”). The Appellants requested a stay of the Approval.

[3] The preliminary matter before the Board was whether a stay of the Approval should be granted until the appeal had been heard and determined. As a part of the application for a stay, the Board first determined if the Appellants were directly affected by the issuance of the Approval. The Board can only grant a stay to an applicant who is directly affected by the decision being appealed.

[4] The Board received and reviewed submissions from the Appellants and Approval Holder. The Director did not take a position with respect to the stay.

[5] Based on the submissions, the Board determined the Appellants were directly affected by the Approval. The Appellants own and reside on land adjacent to the land owned by the Approval Holder and the proposed site of the activities allowed under the Approval. In the Board’s view, the activities authorized by the Approval could interfere with the surface water flow and drainage from land owned by the Appellants.

[6] The Board found the first step in the stay test was satisfied since the appeal raised serious issues to be heard, specifically potential impacts to surface and subsurface water flows that could affect the Appellants. In considering the second part of the test, the Board found the Appellants failed to demonstrate they would suffer irreparable harm if the stay was not granted.

¹ For ease of reference, the wetlands impacted under the Approval, identified as Wetland No. 1 and Wetland No. 2 located at SW 23-24-03-W5M, Lots 14, 15, and 34 of Morning Vista Estates, are referred to as the “Affected Wetlands.” See Figure 1, Plan 5038754-P001, attached as “Appendix A” to this Decision.

The Appellants' land and property would not suffer irreparable harm, as the Appellants could be compensated monetarily for any harm that might occur.

[7] The balance of convenience and public interest did not favour one party over the other. Based on the foregoing reasons, the Board declined to grant the stay of the Approval.

II. BACKGROUND

[8] On April 23, 2020, the Director issued the Approval to the Approval Holder. The Approval allows for:

“...altering the flow, direction of flow or level of water; and
changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose; (the Activity)
to disturb two (2) water bodies for the purpose(s) of constructing a residential development located at SW-23-024-03-W5M...”² (collectively, the “Activities”).

[9] On April 30, 2020, the Board received a Notice of Appeal from the Appellants. On May 1, 2020, the Board wrote to the Appellants, Approval Holder, and Director (collectively, the “Parties”), acknowledging receipt of the Notice of Appeal, notifying the Approval Holder and Director of the appeal, and requesting the Director provide the records related to the appeal and that were available to the Director when he made his decision (the “Record”). The Board received the Record on May 25, 2021, and copies were provided to the Appellants and Approval Holder.

[10] On May 4, 2020, the Board received a letter from the Appellants requesting a stay of the Approval pending a hearing and final determination of the appeal.

[11] On May 5, 2020, the Board advised the Approval Holder and Director of the Appellants' stay request. The Board asked the Approval Holder to provide comments regarding the status of the work under the Approval and if the Approval Holder would be willing to agree to a temporary stay until full legal arguments could be received, and the Board could make a decision on the stay request. The Board also requested additional information from the Appellants in support of their stay request.

² *Water Act* Approval 5038754, issued April 23, 2020, at Activity, section 1.1.

[12] On May 7, 2020, the Approval Holder wrote the Board and advised that construction was not currently underway and was not expected to start until October 2020. The Approval Holder agreed to a temporary stay until the Board decided whether to issue a stay of the Approval.³

[13] On May 7, 2020, the Appellants responded to the stay questions.

[14] On May 11, 2020, the Board set a process for the Approval Holder and Director to provide response submissions to the Appellants' initial submission and for the Appellants to provide a rebuttal submission.

[15] Between May 11, 2020 and May 19, 2020, the Board received comments from the Parties regarding the stay application.

[16] On May 27, 2020, the Board wrote to the Parties informing them the Board had reviewed the Parties' submissions and concluded the Appellants were directly affected by the Approval, but it declined to grant the stay request.

[17] These are the Board's reasons for these decisions.

III. ISSUES

[18] The Board received comments from the Parties on the following questions regarding the stay application:

1. Are the Gereluks directly affected by Alberta Environment and Park's decision to issue *Water Act* Approval No. 5038754 to Stone's Jewellery?
2. What are the serious concerns raised by the Appellants that should be heard by the Board?
3. Would the Gereluks suffer greater harm if the stay was refused, pending a decision of the Board, than the Approval Holder would suffer if the Board granted a stay?
4. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board on the appeal than the harm that could occur from the granting of a stay?
5. Would the overall public interest warrant a stay?

³ Approval Holder's submission, May 7, 2020.

IV. DIRECTLY AFFECTED

A. Submissions

1. Appellants

[19] The Appellants stated they were directly affected by the Director's decision to issue the Approval. The Appellants said the destruction of the wetlands permitted under the Approval cannot be undone, the underground strata could not be reproduced, and the damage would be irreparable. The Appellants explained the greater area in which the wetlands are located is called "Springbank" because of the numerous springs breaking out of the sides of lesser coulees in the district. The Appellants noted water levels are high throughout the area.

[20] The Appellants stated the subsurface formations underneath the wetlands are important to the natural subsurface water flow. The Appellants explained the Stormwater Management Plan accepted by the County of Rocky View showed overland water was expected to flow from the east, from the Appellants' and their neighbours' properties to the west towards the wetlands. The Appellant said most of the area surrounding the wetlands is hard-packed, high-set asphalt roads, which seals in the area.

[21] The Appellants said they understand that most of the houses in the immediate area were constructed within the last 10 years, and each house was supplied with potable water from outside the area. The Appellants stated each house uses a septic field system to dispose of water used in the house, which resulted in the area becoming increasingly saturated. The Appellants stated the wetlands have been increasing in size, especially the one facing the Appellants' house.

[22] The Appellants stated their neighbours have experienced water back-up issues, though they have not. The Appellants said several of their neighbours in the Morning Vista area experienced significant water issues and have pumps working full or part-time to extract groundwater that was threatening their houses. The Appellants stated they were concerned destroying the Affected Wetlands would cause the subsurface water situation to worsen.

[23] The Appellants stated that, to their knowledge, the Approval Holder had not conducted a detailed assessment of the subsurface effects of destroying the Affected Wetlands. The Appellants noted the Approval Holder had not provided any details regarding the intended

grading or water diversion planned. The Appellants stated the Affected Wetlands were situated in one of the lowest areas, and they were concerned filling in the Affected Wetlands might cause water to flow back towards their property to the east of the site, contrary to the Stormwater Management Plan.

2. Approval Holder

[24] The Approval Holder did not provide comments on whether or not the Appellants were directly affected.

3. Director

[25] The Director did not provide comments on whether or not the Appellants were directly affected.

B. Analysis

[26] As a part of its consideration of the stay application and before the Board can accept an appeal as being valid, the person filing the Notice of Appeal must show he or she is directly affected by the decision of the Director; in this case, by the issuance of the Approval.

[27] The Board has examined the issue of standing and whether an appellant is “directly affected” in prior decisions. The Board has received guidance on this issue from the Court of Queen’s Bench in *Court*.⁴

[28] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing in the context of appeals to 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. ...

⁴ *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.). Note: The decision currently before the Board was decided before *Normtek Radiation Services Ltd. v. Alberta Environmental Appeals Board*, 2020 ABCA 456 was issued by the Alberta Court of Appeal. *Normtek* provided further guidance on the Board’s directly affected test.

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."⁵

⁵ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 70, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) ("*Bildson*"); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) ("*Mizera*"); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

[29] 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...”⁶

[30] For the purposes of this decision, the Board relies on the principles articulated in the *Court* decision when determining whether or not a person has the standing to bring an appeal. The onus is on the appellant to demonstrate to the Board there is a reasonable possibility they will be directly affected by the decision of the Director. The effect must be plausible and relevant to the jurisdiction of the Board in order for the Board to consider it sufficient to grant standing. The Board will examine how the appellant is affected by the decision being appealed. The closer the appellant and effect are connected (their proximity), the more likely the person is directly affected.⁷ The onus is on the appellant to present a *prima facie* case that he or she is directly affected.⁸

[31] As this is a preliminary matter, the Board does not require, nor will it have, all of the evidence or arguments before it that may be submitted during a hearing on the merits. The test, therefore, cannot be based on whether there is certainty the appellant is directly affected but rather on whether there is a reasonable possibility they will be affected.

[32] The Board has noted in prior decisions that an appeal to the Board is a quasi-judicial process. While the appeal process must adhere to the principles of natural justice and be fair to all of the participants, it is appropriate that, in assessing preliminary matters, the standard be less onerous than that found in a court. Therefore, the Board considers it appropriate an appellant show, on a *prima facie* basis, there is a reasonable possibility they are directly affected

⁶ *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

⁷ *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Rocky View County* (30 November 2011), Appeal No. 10-032-D (A.E.A.B.) at paragraph 60.

⁸ 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.).

by the Director's decision.⁹ While the effect on an appellant does not need to be unique in kind or magnitude,¹⁰ it needs to be more direct than the effect on the public at large.

[33] In *Kostuch v. Alberta (Director Air and Water Approvals Division Environmental Protection)*, this Board determined that “[d]irectly means the person claiming to be “affected” must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.”¹¹

[34] There must be a direct connection between the Director's decision and the effect on the appellant. The closer the nexus, the greater the likelihood of the appellant being found directly affected by the decision.

[35] The Appellants appealed the decision of the Director to issue an Approval for the infilling and permanent alteration of two wetlands. The starting point of the Board's analysis is to determine how the Appellants are affected by this decision.

[36] The Board reviewed the Statement of Concern filed by the Appellants, prior correspondence exchanged between the Appellants and the Approval Holder, and the Parties' comments regarding the stay. The Appellants raised concerns regarding the impacts to the surface water and drainage from their property and impacts related to the loss of the natural features of the Affected Wetlands, including loss of habitat and impacts to wildlife.

[37] The Appellants own and live on land adjacent to the proposed Activities. The Appellants explained their property uses a septic field to dispose of liquid waste and is among the lowest elevation properties in Morning Vista Estates. The Appellants stated their property drains into the proposed development lots in Morning Vista Estates and one of the Affected Wetlands (Wetland No. 1). They argued there was a potential for the surface water flow and drainage from the Appellants' property to be affected by the Activities in ways that could impact their land.

⁹ See *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Rocky View County* (30 November 2011), Appeal No. 10-032-D (A.E.A.B.) at paragraph 61.

¹⁰ 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.).

¹¹ *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)*, (23 August 1995), Appeal No. 94-017-D (A.E.A.B.) at paragraph 34.

[38] The proposed development lots in Morning Vista Estates and the Affected Wetlands, in particular Wetland No. 1, form part of the drainage from the Appellants' land. Surface water and drainage leaves the Appellants' land and enters a natural drainage system as it makes its way into Wetland No. 1. Once the Approval Holder infills the wetland and builds a residence on the site, drainage from the Appellants' land could be impacted, and the development lots may have to be regraded to accommodate the Stormwater Management Plan. If regrading of the development lots does not have the intended effect of re-establishing predevelopment flow, it could result in drainage backing up on the Appellants' land, negatively affecting the land.

[39] Changes made to the drainage system by the Approval Holder could directly affect the land owned by Appellants. Therefore, the Appellants have met the onus of showing, on a *prima facie* basis, they are directly affected by the Director's decision to issue the Approval.

[40] The Board notes the Approval Holder did not dispute the directly affected status of the Appellants, and the Director did not take a position on whether or not the Appellants were directly affected.

C. Decision

[41] The Board finds the Appellants have demonstrated, on a *prima facie* basis, they are directly affected by the Director's decision to issue the Approval. The proposed Activities under the Approval may interfere with the flow of surface water and drainage from their lands, which could impact the land and property owned by the Appellants.

V. STAY

A. Submissions

1. Appellants

[42] The Appellants argued the application and Approval failed to comply with or otherwise satisfactorily or appropriately consider the mandatory or advisory provisions of the law applicable to wetlands. The Appellants stated the Approval failed to appropriately consider the diversion of surface water, even though the Stormwater Management Plan acknowledged the current natural flow of water is from the Appellants' land into the Affected Wetlands. The

Appellants stated water cannot cross the raised asphalt road that surrounds the Affected Wetlands to the west of their property, which are effectively the lowest parts of the area. The Appellants were concerned that, if the water was able to cross the road, the increased water in the Affected Wetlands would not be able to flow into the much smaller artificial pond that lies to the west of the Affected Wetlands.

[43] The Appellants stated the Approval Holder assessed surface water displacement issues based on water flows and topography prior to development in the area. The Appellants noted the Affected Wetlands were dry when the subdivision was approved, but the Affected Wetlands have expanded since the approval of the subdivision, suggesting revised flow patterns and volume levels may need to be established. The Appellants questioned how, according to the Approval Holder, the establishment of predevelopment flow patterns would mitigate the issue of ponding water that caused the increased size in the Affected Wetlands.

[44] The Appellants stated the Approval failed to appropriately consider subsurface water issues. They said building a residence and regrading the lands would divert both surface and subsurface water that naturally flows from the properties surrounding the Affected Wetlands.

[45] The Appellants said the Approval also failed to consider the diverse, at-risk, and sensitive wildlife in the area and the critical support the Affected Wetlands provide to the wildlife. The Appellants noted the Affected Wetlands could not be reproduced if they were destroyed.

[46] The Appellants submitted they would suffer irreparable harm if the stay was refused. The Appellants argued the Affected Wetlands were irreparable, and the strata underlying the Affected Wetlands could not be reconstructed once destroyed. The Appellants were concerned this could cause subsurface water issues on their property.

[47] The Appellants argued they would suffer greater harm if the stay was not granted than the Approval Holder would suffer if the stay was granted. The Appellants stated the natural flow of water into the Affected Wetlands existed for many years, and if it was destroyed, the Appellants and their neighbours may be subjected to subsurface water issues. The Appellants argued the Approval Holder is a developer, who would be delayed in developing the lots on

which the Affected Wetlands sit, but the delay would be a minor inconvenience when compared to the potential water issues those who live in the neighbourhood could experience going forward.

[48] The Appellants noted the Approval effectively allowed the removal of the Affected Wetlands. The Appellants argued the activities needed to remove the Affected Wetlands were expected to include draining the water, filling the space occupied by the water, altering the surface and subsurface water flows, and harming and otherwise displacing wildlife residing in the Affected Wetlands.

[49] The Appellants argued that once the Affected Wetlands were removed, the wildlife would be gone and the surface and subsurface water issues “will become realized.”¹² The Appellants stated that even if a study was to show the wildlife in the area were not sensitive or at-risk, the nesting grounds of many birds and frogs would be damaged and not easily replaced.

[50] The Appellants argued the Approval Holder did not properly obtain a licence to divert water that flows overland from the Appellants’ property and other neighbouring properties pursuant to section 49 of the *Water Act*.¹³ The Appellants stated overland water would no longer be able to flow into the site, and it was in the public interest to ensure the Approval Holder appropriately diverts water which, according to the Stormwater Management Plan, was intended to flow into the Affected Wetlands.¹⁴

[51] The Appellants argued the Approval failed to comply with the *Water Act* and its related policies and directives, including the Alberta Wetland Policy, the Alberta Wetland

¹² Appellants’ submission, May 11, 2020, at page 3.

¹³ Section 49 of the *Water Act* provides:

“(1) Subject to subsection (2), no person shall
(a) commence or continue a diversion of water for any purpose,
or
(b) operate a works,
pursuant to a licence unless it is otherwise authorized by this Act.”

Note: The Director previously confirmed in correspondence dated May 7, 2020, that a licence was not required. The Director further advised that section 49 requires a licence for the “diversion of water” or “to operate works,” but the definition of “diversion of water” excludes diversions for the sole purpose of drainage. The Director advised the Approval in this matter was all that was required to alter the flow, direction of flow, or level of water and to change the direction of water with respect to the wetlands.

¹⁴ Appellants’ submission, May 11, 2020, at page 4.

Mitigation Directive, and the Alberta Wetland Regulatory Requirements Guide.¹⁵ The Appellants noted the applicable laws and policies prioritize avoidance of wetlands and, if not minimization of disturbance to wetlands, in recognition of the fact that destruction and replacement is only a last resort. The Appellants stated the Approval Holder needed to demonstrate it made a concerted effort to avoid wetland impacts. The Appellants stated that, once destroyed, it is difficult to reproduce the specific function performed by a wetland. The Appellants concluded by noting the law that applies to wetlands was implemented primarily for the public interest.

2. Approval Holder

[52] The Approval Holder did not specifically provide comments on the stay application, noting “[a]ll information related to the concerns raised by [the Appellants] has been provided in previous correspondence with them and AEP.”¹⁶ The following comments were provided in correspondence between the Approval Holder’s consultant, Trace Associates Ltd. (“Trace”) and the Appellants and Director.

[53] Trace stated it was retained by the Approval Holder to prepare the application for Lots 14, 15, and 34 of Morning Vista Estates (the “Properties”). Trace explained the construction of roads and the surrounding homes adjacent to the Properties resulted in a disruption of water flow leaving the Affected Wetlands, and this led to an increase in the size of the Affected Wetlands. Trace noted that, prior to the influence of the surrounding development, the Affected Wetlands were classified in accordance with the Alberta Wetland Classification¹⁷ as seasonal (Wetland No. 1) and temporary wetlands (Wetland No. 2), rather than semi-permanent and seasonal wetlands. Trace said that, as the Affected Wetlands expanded as a result of disrupted flows, it was possible Rocky View County might have established flow patterns and volume levels which represented conditions prior to the development of Morning Vista Way and the adjacent pipeline paralleling the north side of the road.

¹⁵ Alberta Regulatory Requirements Guide (Alberta Environment and Parks, Water Conservations, 2015, No. 6, Wetland Guide).

¹⁶ Approval Holder’s submission, May 13, 2020.

¹⁷ Alberta Wetland Classification System, Government of Alberta, June 2015.

[54] Trace noted the Morning Vista Estates subdivision was approved by Rocky View County in 2008 with the Properties laid out as shown in the Trace Wetland Assessment Impact Report (“Trace WAIR”).¹⁸ Trace stated the proposed development was in accordance with the subdivision approval and the Rocky View County approved Stormwater Management Plan. Trace explained the development of the Properties with the current zoning was not possible without infilling the Affected Wetlands. Trace said at the time of the approval of the subdivision, the wetlands were dry and not identified, and concerns with the subdivision should be addressed to Rocky View County. Trace stated mitigation measures to reduce impacts to wildlife and natural drainage as a result of developing the Properties was provided for in the Trace WAIR.

[55] Trace stated that water diversion licences were only required for ongoing diversions of water, and when wetlands or other bodies of water are removed or impacted by construction works, a diversion licence was not typically required, even though the construction of works would need to pump off the water, redirect flow, or manage natural drainage. Trace noted the Director had not requested a water diversion licence application be submitted under the *Guidelines for Licensing Water Diversion Projects* (Government of Alberta, 2010) or the *Water Act*.

[56] Trace explained a registered professional biologist conducted a field assessment in 2018, and all the species noted were listed as secure provincially, and none were listed as at-risk federally. Trace noted the Alberta Wetland Assessment and Impact Report Directive (2017a)¹⁹ does not require surveys for species-at-risk or sensitive species during a wetlands assessment, but wildlife species incidentally observed were noted. Trace noted the lack of sensitive species observations did not exclude the potential for those species to use the Affected Wetlands or the Properties. However, the surrounding residential development reduced the likelihood of their presence.²⁰

[57] Trace stated construction was proposed to occur outside of the breeding bird nesting season during which the presence of migratory birds and amphibians was unlikely, and

¹⁸ Wetland Assessment and Impact Report, dated September 17, 2018, prepared by Trace in support of the application for the Approval.

¹⁹ Alberta Wetland Assessment and Impact Report Directive, Government of Alberta, June 1, 2017.

²⁰ Letter from Trace to the Appellants dated August 1, 2019, at page 2.

construction would comply with the *Migratory Birds Convention Act*²¹ and the *Wildlife Act*.²² Trace stated a preconstruction survey would assess for the presence of wildlife species, and appropriate mitigations would be developed if sensitive species were observed. Trace noted the wildlife habitat provided by the Affected Wetlands and the Properties was not unique to the area or critical to key populations of wildlife species.

[58] Trace stated the overland drainage for the site and surrounding area was addressed in the approved Stormwater Management Plan, which had been prepared as part of the subdivision approval. Trace explained that, according to the Stormwater Management Plan, overland water that currently accumulated in the Affected Wetlands would be directed into stormwater pond D-1 via road ditches and existing natural channels and swales. Trace stated that post-development, ponds D-1 and D-2 would accommodate all surface drainage within the catchment boundary, with no wetlands on the Properties. Trace said the Director had the discretion to require additional studies regarding surface and groundwater hydrology to determine if infilling the Affected Wetlands would impact the water table. Trace said the re-establishment of predevelopment flow was likely and would significantly mitigate the issue of ponding water that created the increased size of the wetlands.²³

[59] Trace stated that, based on recent communications with AEP, it appeared subsurface water conditions underlying Morning Vista Estates were typical within Rocky View County. Trace explained that ensuring there is sufficient stormwater and groundwater infrastructure in place for subdivisions in Rocky View County is the responsibility of Rocky View County.²⁴

[60] Trace noted the following correspondence between itself and Jubilee Engineering Consultants Limited (Jubilee):²⁵

“The infilling of the wetlands would eliminate the amount of the infiltration from the standing water in the wetland into the ground. The wetland would be filled with good dirt and graded to direct surface runoff to the ditch and

²¹ *Migratory Birds Convention Act*, S.C. 1994, c. 22.

²² *Wildlife Act*, R.S.A. 2000, c. W-10.

²³ Letter from Trace to the Appellants dated August 1, 2019, at page 3.

²⁴ Trace Letter to the Appellants, October 29, 2019, at page 2.

²⁵ Jubilee Engineering Consultants Limited designed the stormwater management system for the current Morning Vista Estates.

eventually to ponds D1 & D2. As such the infilling of the wetlands as a net effect of reducing the impact on the groundwater table.

... Morning Vista, the adjacent Morgan's Rise subdivisions and the surrounding areas have [a] high groundwater table and underground streams which are requiring the sump pumps to run longer. This area is not serviced by [an] underground storm piping system and as such all areas have surface drainage to the ditches. It is imperative that individual lots are properly graded to drain towards the ditches. Creating low areas on the lots should be avoided. Also the area around the houses should be graded away from the houses."²⁶

3. Director

[61] The Director took no position with respect to the Appellants' stay application.

4. Appellants' Rebuttal

[62] The Appellants stated the issues underlying their stay request were not addressed by the original information and correspondence from the Approval Holder and Trace. The Appellants stated they were concerned about the irrevocable nature of the destruction of the Affected Wetlands. The Appellants reiterated their reasons why the stay should be granted and noted, in particular, the following reasons:

- the seriousness of the question at issue;
- the irrevocable nature of the damage that would be done by destroying the Affected Wetlands;
- the significant difficulty in quantifying damages to the Appellants, especially since the Approval Holder had not been clear as to how it intended to (a) fill in and otherwise "remove" the Affected Wetlands, or (b) in doing so, alter surface and subsurface water flows;
- the difficulty in quantifying damages, given the irreparable harm that would result from the fact future compensation, might not be possible because the Activities would create conditions (e.g. water backflow) that could not be returned to pre-destruction conditions, requiring the Appellants and their property to be constantly under threat if water extraction methods or surface/subsurface diversion methods failed; and
- the public interest issues involved, including the broader impact upon their neighbours and the failure of the Approval Holder to comply with applicable laws.

²⁶ Trace's Letter to the Appellants, March 30, 2020, at page 1.

[63] The Appellants stated they continue to be concerned about the irrevocable nature of the destruction of the Affected Wetlands and requested their stay request be granted.

B. Analysis

[64] The Board has the authority to grant a stay under 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.”

[65] The Board’s test for a stay, as stated in previous decisions,²⁷ is adapted from the Supreme Court of Canada case of *RJR MacDonald*.²⁸ 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.”²⁹

[66] 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 there is some basis on which to present an argument. As not all of the evidence may be before the Board at the time

²⁷ 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.).

²⁸ *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.

²⁹ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

the decision is made regarding the stay application, "...a prolonged examination of the merits is generally neither necessary nor desirable."³⁰

[67] 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. 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.

[68] The Alberta Court of Appeal defined irreparable harm 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.”³¹

[69] 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.³² Damage that may be suffered by third parties can also be considered.³³

[70] The third step in the test is the balance of convenience, which is determined by asking, "...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."³⁴ The decision-maker 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. The courts have considered factors such as the cumulative effect of granting

³⁰ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 50.

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

³² *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

³³ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

³⁴ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

a stay,³⁵ third parties who may suffer damage,³⁶ or if the reputation and goodwill of a party will be affected.³⁷

[71] The courts have recognized that any alleged harm to the public is to be assessed at the third stage of the test. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."³⁸ 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.

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

[73] The Appellants raised concerns regarding potential damage to their property and concerns about surface water flooding their land and property if it cannot drain properly in accordance with the Stormwater Management Plan. The evidence currently before the Board indicates there is potential for the Appellants' lands to be impacted by the proposed Activities. While there are conflicting arguments about whether the drainage would be improved by the proposed Activities or if harm would be caused, or the degree of the impact, if any, it is sufficient that the Appellants have shown there is an issue that needs to be heard. The Appellants have met the first part of the stay test.

[74] 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 Appellants argued they would suffer greater harm if the stay was not granted than the Approval Holder would suffer if the stay was granted since the Affected Wetlands and the strata beneath the wetlands are irreparable. The Appellants stated the removal of the Affected Wetlands could damage their land and property. They believed the natural drainage from their land would be impacted as water on their property would be unable to drain properly.

[75] The type of harm the Appellants raised, specifically damage to their land and property, can be quantified and compensated for monetarily and is not, therefore, irreparable in

³⁵ *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

³⁶ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

³⁷ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

³⁸ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

nature. Since the harm the Appellants anticipate will occur cannot be considered irreparable harm as defined in the stay test, the Appellants did not satisfy the second step in the stay test.

[76] In considering the balance of convenience, the Board must determine which of the parties will suffer the greater harm from the granting or refusal of 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.

[77] The Appellants stated their neighbours already experienced water back-up issues and had pumps running to address the water issues threatening their homes. The Appellants were concerned the removal of the Affected Wetlands could exacerbate the water issues.³⁹ The Board notes many of the concerns expressed by the Appellants regarding water backing up and drainage issues already exist. Based on the information before the Board, it is uncertain whether water issues will become better or worse when the Activities start.

[78] If a stay was granted, the Approval Holder would not be able to start construction on the site until the Board lifted the stay or the Minister makes a decision. The Board notes the Approval Holder did not provide any submissions on the specific stay questions, including where the balance of convenience rests. However, the Approval Holder advised it would not commence construction until October 2020, and it did not state there was an urgency to start construction.

[79] Based on the information before it, the Board finds the balance of convenience and public interest did not favour one party over the other.

[80] Although the Appellants raised serious issues that need to be heard, they did not demonstrate they 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 either the Appellants or the Approval Holder. 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 Appellants did not meet the second step, the Board denies the stay application.

[81] It is important to note that if the Approval Holder decides to start construction prior to the Minister making a decision, the Approval Holder is risking that any work done may

³⁹ Appellants' Letter to Trace, September 3, 2019, at page 3.

have to be reversed, depending on the Minister's decision. Under section 100(1) of EPEA, the Minister may confirm, reverse, or vary the Approval.⁴⁰ If the Minister reverses or varies the Approval, the Approval Holder would be obligated to take whatever steps necessary to ensure it complies with the Minister's decision.

VI. CONCLUSION

[82] The Board finds the Appellants are directly affected by the decision of the Director to issue the Approval.

[83] The Board declines to grant a stay. Even though the Appellants raised serious issues to be heard, they did not demonstrate they would suffer irreparable harm.

Dated on November 23, 2021, at Edmonton, Alberta.

-original signed-

Meg Barker
Acting Board Chair

⁴⁰ Section 100(1) of EPEA provides:
“On receiving the report of the Board, the Minister may, by order,
(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,
(b) make any direction that the Minister considers appropriate as to the forfeiture or return of any security provided under section 97(3)(b), and
(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.”

