ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 11, 2005

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 Mike Northcott with respect to *Water Act* Licence No. 00192603-00-00, *Water Act* Licence No. 00206791-00-00, and *Environmental Protection and Enhancement Act* Amending Approval No. 76893-00-01, issued to Lafarge Canada Inc. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Stay Decision: *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.).

BEFORE: Dr. Frederick C. Fisher, Q.C., Chair.

WRITTEN SUBMISSIONS:

Appellant: Mr. Mike Northcott.

Approval Holder: Lafarge Canada Inc., represented by Mr. Brendan Vickery, Environmental Manager.

Director: Mr. Tom Slater, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued two *Water Act* Licences and an *Environmental Protection and Enhancement Act* Amending Approval to Lafarge Canada Inc. (Lafarge) for a sand and gravel operation (the Wash Plant), near Calihoo, Alberta. The Board received Notices of Appeal from Mr. Mike Northcott appealing the Licences and the Amending Approval.

Mr. Northcott also requested a Stay of the Licences and the Amending Approval.

On reviewing the submissions provided by the parties regarding the Stay application, the Board determined a Stay was not warranted, as there would be no irreparable harm to Mr. Northcott in the time the Board would require to hear the appeal, and the public interest did not support the granting of a Stay.

Therefore, the Board denied the Stay request.

TABLE OF CONTENTS

I. BACKGROUND

[1] On April 30, 2004, the Director, Northern Region, Regional Services, Alberta Environment (the "Director"), issued Licence Nos. 00192603-00-00 and 00206791-00-00 (the "Licences") under the *Water Act*, R.S.A. 2000, c. W-3, and Amending Approval No. 76893-00-01 (the "Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to Lafarge Canada Inc. (the "Approval Holder") in relation to a sand and gravel operation, commonly known as the Onoway Wash Plant (the "Wash Plant"), near Calihoo, Alberta. The Wash Plant has existed since the mid-1950s and was originally authorized by way of a water licence issued in 1957 (the "1957 Licence"), which it still holds today.[1] The Wash Plant is located next to and uses water from Kilini Creek, a tributary of the Sturgeon River, which is in the North Saskatchewan River Basin.

[2] Licence No. 00192603-00-00 ("Licence 192603") authorizes the diversion of up to 80,175 cubic metres of water annually from Pit 92 ("Pit 92"), located in SW 31-53-01-W5M, to Kilini Creek for the purpose of recharging the Wash Plant's settling ponds. Licence No. 00206791-00-00 ("Licence 206791") authorizes the diversion of up to 1,764,000 cubic meters of water annually from Kilini Creek, through works located in W 06-54-01-W5M, for the purpose of aggregate washing, and also authorizes the diversion of water from Pollock Pond, located in SW 7-54-01-W5M, for the purpose of maintaining instream flows in Kilini Creek.

[3] The Approval, an amendment to an existing approval, imposes a number of additional monitoring and reporting conditions on the Wash Plant. The Approval amends existing Approval No. 76893-00-00, which allows for the opening up, operation, and reclamation of a sand and gravel pit on W 7-54-1-W5M, 11-54-2-W5M, W 12-54-2-W5M, SE 12-54-2-W5M, W 1-54-2-W5M, N 2-54-2-W5M, SE 2-54-2-W5M, N 3-54-2-W5M, and SE 10-54-2-

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[1] The 1957 Licence (No. 3318) was issued as an interim licence on May 7, 1957, it was updated and reissued as in interim licence on February 6, 1989, and issued as licence under the *Water Resources Act*, R.S.A. 1980, c. W-5, on March 5, 1990. The 1957 Licence authorizes the diversion of 1,400 acre-feet (1,726,875 cubic metres) annually from Kilini Creek, and permits the "consumptive use" of 280 acre-feet (345,375 cubic metres). It also allows for annual losses of 10 acre-feet (12,335 cubic metres) and requires return flows to Kilini Creek of 1,110 acre-feet (1,369,165 cubic metres). Since approximately 1971, the 1957 Licence has also authorized an on-stream dam and impoundment.

W5M, and the operation of a sand and gravel wash plant and infrastructure located on W 6-54-1-W5M.

[4] On May 28, 2004, the Environmental Appeals Board (the "Board") received three Notices of Appeal from Mr. Mike Northcott (the "Appellant") appealing the Licences and Approval.

[5] The Appellant also requested a Stay of the Licences and Approval.

[6] On June 1, 2004, the Board wrote to the Appellant, the Licence Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notices of Appeal and notifying the Licence Holder and the Director of the appeals and Stay request. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals. The Appellant was asked to provide written comments to the following questions with regards to his Stay request:

> "1. What are the serious concerns of Mr. Northcott that should be heard by the Board?
>
> 2. Would Mr. Northcott suffer irreparable harm if the Stay is refused?
>
> 3. Would Mr. Northcott suffer greater harm if the Stay was refused pending a decision of the Board, than Lafarge Canada Inc. would suffer from the granting of a Stay?
>
> 4. Would the overall public interest warrant a Stay?
>
> 5. Is Mr. Northcott directly affected by Alberta Environment's decision to issue *Water Act* Licence No. 192603-00-00, *Water Act* Licence No 00206794-00-00 and *EPEA* Amending Approval No. 76893-00-01 to Lafarge Canada Inc.? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected."

[7] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[8] On June 23, 2004, the Board received a copy of the Record from the Director, and on July 5, 2004, a copy was forwarded to the Appellant and the Licence Holder.

[9] Between June 28 and July 13, 2004, the Board received submissions from the Parties regarding the Stay request and the directly affected status of the Appellant.

[10] On August 3, 2004, the Board wrote to the Parties informing them the Board had reviewed the written submissions, and the Board decided to deny the Stay request, and it would proceed to a Hearing of these appeals as soon as possible.

[11] The following are the Board's reasons.

II. DIRECTLY AFFECTED

A. Submissions

1. Appellant

[12] The Appellant stated he is and has been directly affected. He submitted the Board's previous decision, *Skinner*,[2] showed "…a hydraulic link is established with a natural infrastructure and when the volume, static head or ground water is varied all users within the surface and ground water regime are impacted, as flows are reversed, cones of depression are created, contamination occurs and reclamation changes flows, porosity and volumes."[3]

[13] The Appellant explained the distance of the direct hydraulic link between his water well and the established water table is approximately one kilometer. He argued, "[a]nything affecting this water table will affect the water table by lessoning the quality and quantity of the surface and groundwater and Mr. Northcott's ability to access potable water."[4]

[14] The Appellant submitted the impacts can affect downstream users, such as Devils Lake/Matchewan Lake, the Sturgeon River, Big Lake, and St. Albert, and the affect may not be identified until the damage is permanent.

[15] The Appellant stated the static head level in his well is lower than the original level at the time the well was drilled, and the loss was first noticed in the late 1990s.

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2 *Skinner* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Aggregates Limited* and *Lafarge Canada Inc.* (13 February 2003), Appeal Nos. 02-086 and 02-087-D (A.E.A.B.).

3 Appellant's submission, dated July 19, 2004.

4 Appellant's submission, dated June 11, 2004.

[16] The Appellant stated he also uses the land for recreational purposes and questioned whether these public recreational areas will be degraded.

[17] The Appellant questioned how the Approval Holder could control access to public lands. He argued he can purchase a fishing licence to fish in fish bearing waters in Alberta, and "…this must allow him access to publicly owned fish bearing waters or waters damned on Kilini creek also identified as public land."[5]

[18] The Appellant stated he has witnessed stress in anyone associated with and who understands the activities on the site, including unreclaimed and questionably monitored surface and groundwater systems, and interference with the bed and banks.[6]

2. Approval Holder

[19] The Approval Holder argued the Appellant is not directly affected. The Approval Holder submitted the Appellant did not provide any direct or specific evidence regarding the impact of its operations over the last three years on the performance of his water well that can establish any reasonable probability of harm on his water supply.

[20] The Approval Holder referred to its expert's report, stating, "…the diversion should have no effect on water wells, aquifers or springs."[7]

[21] In response to the Appellant's comments regarding his recreational use of the public land area, the Approval Holder assumed he was referring to the beds and banks of Kilini Creek, as the remaining land in W6-54-1-W5M is private land owned by the Approval Holder or one of its subsidiaries. The Approval Holder stated it has not granted the Appellant the right of entry or access to the surface rights held by it.

3. Director

[22] The Director stated he accepted the Appellant as being potentially affected by the operations, as he adopted the premise of inclusion instead of exclusion when statements of

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5 Appellant's submission, dated July 19, 2004.

6 See: Appellant's submission, dated June 11, 2004.

7 Approval Holder's submission, dated July 12, 2004.

concern were filed to ensure the best possible decision was made. The Director argued the Appellant's well is in a different and isolated aquifer, and the Appellant would not be directly affected by the operation of the Wash Plant.

B. Legislation

[23] Before the Board can accept a notice of appeal as being valid, the person filing the notice of appeal must show that he is directly affected. Under section 115 of the *Water Act* and section 95(1) of EPEA, a person who is directly affected by the decision of the Director – here the issuance of the Licences and the Approval - has the right to file a notice of appeal with the Board.[8] The Board has examined the term "directly affected" in numerous previous appeals, providing a framework to determine if appellants should be given standing to appear before this Board. The test is the same whether the appeal is filed under the *Water Act* (for an approval, preliminary certificate, or a licence) or EPEA (for an approval or amending approval). Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.[9]

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[8] Section 115(1) of the *Water Act* provides:

> "A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: … (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted (i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108…."

Section 95(1) of EPEA states:

> "A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
>
> (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment , addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted
>
> (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or
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> (ii) by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3).

[9] See: *Fred J. Wessley* v. *Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

[24] The requisite test for determining a person's directly affected status has two elements: the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*,[10] the Board stated "…the word 'directly' requires the Appellant to establish, where possible to do so, a direct personal or private interest (economic, environmental, or otherwise) that will be impacted or proximately caused by the Approval in question."[11]

[25] The principle test for determining directly affected was stated in *Kostuch*:

> "Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. 'Directly' 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.
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> Second, a person will be more readily found to be 'directly affected' if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person's interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic."[12]

[26] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person "…must have a substantial interest in the outcome of the approval that surpasses the common interest of all residents who are affected by the approval."[13] In *Kostuch*,

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[10] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection*) (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.) ("*Kostuch*").

[11] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection*) (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

[12] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[13] *Ross* v. *Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) ("*Ross*").

the Board considered its previous decision in *Ross*,[14] saying directly affected "…depends upon the chain of causality between the specific activity approved…and the environmental effect upon the person who seeks to appeal the decision."[15]

[27] Further, in *Kostuch* the Board stated the determination of directly affected is a

> "…multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest, advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act."[16]

The Board further stated that:

> "If the person meets the first test, they must then go to show that the action by the Director will cause a direct effect on that interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified."[17]

[28] A similar view was expressed in *Paron* where the Board held the

> "…Appellants are also concerned that the Approval Holder has been able to obtain an Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar

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[14] *Ross* v. *Director, Environmental Protection* (May 24, 1994), Appeal No. 94-003 (A.E.A.B.).

[15] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

[16] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

[17] *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.).

> approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision."[18]

[29] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show they are directly affected, is on the Appellants. In *Paron*, the Board held that:

> "Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected."[19]

The Board's Rules of Practice also make it clear the onus is on the Appellants to prove they are directly affected.[20] The onus or burden of proof issue, in a slightly different context, was upheld by the Court of Queen's Bench.[21]

[30] In the *Court*[22] decision, Justice McIntyre reversed a standing decision based on the Board's previous cases and provided the following summary on the principles of 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.D. 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. …

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[18] *Paron et al.* v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) ("*Paron"*).

[19] *Paron et al*. v. *Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 24 (A.E.A.B.).

[20] Section 29 of the Board's Rules of Practice provides:

> "Burden of Proof
>
> In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence."

[21] See: *Imperial Oil Ltd*. v. *Alberta (Director, Enforcement & Monitoring, Bow Region, Regional Services, Alberta Environment)* (2003), 2 C.E.L.R. (3d) 236 at paragraphs 87 and 88 (Alta. Q.B.).

[22] *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.) ("*Court*").

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

> What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

> [T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

> While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at

> least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated."[23]

[31] 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…."[24]

[32] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected, and the more ways in which the appellant is affected, the greater the possibility of finding the person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the Appellant to present a *prima facie* case that he is directly affected.[25]

[33] The Court of Queen's Bench in *Court*[26] stated an appellant only needs to show that there is a potential for an affect on their interests. This potential affect must still be reason and plausible for the Board to consider it sufficient to grant standing.

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[23] *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.); *Mizera et. al.* v. *Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection* re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.); and *Vetsch* v. *Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

[24] *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.).

[25] *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.).

[26] *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d)

[34] The affect does not have to be unique in kind or magnitude.[27] However, the affect the Board is looking for needs to be more than an affect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.[28] Under the *Water Act* and EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class.

[35] The Board has always held that a person must show how a personal interest will be affected by the approval, and it is of assistance to the Board if the type of interest which the appellant claims to be affected is supported by the statutes, such as being included in the purpose sections of the acts (EPEA and the *Water Act*). The interests identified in the Acts include the protection of the integrity of the environment, human health, economic growth, sustainable development, and management of water resources.[29]

134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

[27] 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.).

[28] See: *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch* v. *Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[29] Section 2 of EPEA provides:

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
>
> (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
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> (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
>
> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
>
> (e) the need for Government leadership in areas of environmental research, technology and protection standards;
>
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement

C. Analysis

[36] Before the Board can make a determination on the Stay application, it must determine if the Appellant is directly affected by the Director's decision to issue the Licences and Approval.

[37] The Appellant lives within one kilometre of the operations. He has expressed concern regarding the possible effects of the operations on his groundwater. He explained he relies on the groundwater from his well for his organic farming operations.

[38] The Director accepted his Statement of Concern as valid. The Board is not bound by the Director's decision to accept or reject a Statement of Concern as a basis for finding an appellant directly affected, but it is a factor the Board will consider when making its determination.

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and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;

(h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

(i) the responsibility of polluters to pay for the costs of their actions;

(j) the important role of comprehensive and responsive action in administering this Act."

Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;

(b) the need for Alberta's economic growth and prosperity;

(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;

(d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;

(e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;

(f) the important role of comprehensive and responsive action in administering this Act."

[39] As the Board discussed in *Ouimet*,[30] the Board is not bound by the decision of the Director with respect to whether to accept a Statement of Concern or whether a person is directly affected. In *Ouimet,* the Board stated:

> "The Board notes that the Director accepted Ms. Ouimet's Statement of Concern on the basis that in his view she was directly affected. As will be discussed shortly, the Board does not share the Director's view that Ms. Ouimet is directly affected – the Director's decision does not bind the Board. In making this determination, the Board is *not* of the view that the Director's decision to accept Ms. Ouimet's Statement of Concern, at that stage of the process, was incorrect. We believe the Director's more inclusive approach to directly affected, for the purposes of his decision, is entirely appropriate. In fact, it is to be encouraged and is in keeping with section 2(d) of the *Water Act*.
>
> The Board notes that the decision-making function of the Director and the appellate function of the Board are different and that in keeping with this, it is appropriate for the Director to apply a more inclusive test with respect to directly affected than is applied by the Board. The purpose of the directly affected test with respect to the Statement of Concern process, and the Director's decision, is to promote good decision-making taking into account a broad range of interests. The process that the Director is engaged in is non-adversarial information collection – he is collecting information regarding the views and concerns of a broad range of parties to assist him in making a decision. This purpose is properly reflected in the 'Policy on Acceptance of Statements of Concern (1997).' This policy, established by then Assistant Deputy Minister Al Schulz, states: '… considerable judgment will have to be exercised in determining what constitutes a valid Statement of Concern and where there is any doubt the concern should be considered a Statement of Concern.'
>
> The purpose of the directly affected test *vis-a-vis* the Board is somewhat different. While still promoting good decision-making, the Board's decision respecting directly affected determines whether the person (or in this case, a person and an organization) has a right to appeal. The Board is more strictly focused on the burden of proof and involves a more adversarial process. As a result, the Board's determination respecting an appellant's standing, must, by its very nature be more specific. We must also follow several Court of Queen's Bench precedents on standing that review the decisions of the Board, not the Director."31 (Emphasis in the original.)

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30 *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment,* re*: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D ("*Ouimet*").

31 *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment,* re*: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D at paragraphs 23 to 25. See: *Graham* v. *Alberta (Director*, *Chemicals Assessment and Management, Environmental Protection)* (1997), 22 C.E.L.R. (N.S.) 141 (Alta.Q.B.) and (1997), 23 C.E.L.R. (N.S.) 165 (Alta.C.A.); and *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.).

[40] The Board believes it was appropriate for the Director to accept the Statement of Concern for the purpose of making his decisions in this case. The Director was aware of the Appellant's continued interest in the protection of the water resources in the area and with regards to the Approval Holder's operations. As discussed in *Ouimet,*[32] the Board is of the view the Director's decision-making process should be more inclusive than the Board's process of determining legal rights of appeal. The Board considers it invaluable to have the Director receive as much input as possible at the Statement of Concern level. It is better to err on the side of inclusion, and the concerns expressed in the Statements of Concern should be considered whenever possible, as the Director did in this case. A Statement of Concern provides the Director with additional information upon which he can make a better decision.

[41] The purpose of filing a Statement of Concern is twofold. First, it provides the Director with the filer's input into the decision that the Director must make. Second, the filing of a Statement of Concern preserves the filers right to appeal. Both of these rights are contingent on a Statement of Concern being filed and being filed on time.

[42] The *Court* decision requires the Board to allow an appellant to be heard when there is a potential the Director's decision will have an affect on the appellant. An actual effect does not have to proven, as the Board will often not have the full scientific data available at the time it is making its decision regarding the directly affected status of an appellant.

[43] In this case, the Appellant has raised the issue of water quality and quantity in his groundwater well being affected by the issuance of the Licences and Approval. The Appellant lives near the project site, so if there is a negative impact on the water resources in the area, there is the potential the Appellant could be affected. The Appellant relies on the groundwater from his well and any affect on his water supply would affect his livelihood and way of life.

[44] The Appellant has established the proximity needed between the possible environmental affect and the affect it would have on him personally. Therefore, the Board finds the Appellant is directly affected for the purpose of these appeals.

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[32] *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D.

[45] This does not, however, mean the Board will find there is an actual affect. The Board will make that determination after it has heard all of the evidence from the Parties on the substantive issues under appeal.33

III. STAY REQUEST

A. Submissions

1. Appellant

[46] The Appellant stated the issues and their cumulative impacts on the natural infrastructure system must never be considered frivolous and without merit. He argued there is a strong need to consider the surface and groundwater regime in the area.

[47] The Appellant submitted that anything that affects public lands affects the public, especially those directly affected by impacts forced on these lands, as public lands are assessable by the public.

[48] The Appellant argued that since Licence 206791 has no use shown and the consumptive use is zero cubic metres, the licence is redundant, as the 1957 Licence would be sufficient for its operation. The Appellant questioned why a containment area on Kilini Creek is needed "…if there is no requirement for water other than the questionable 74,000 cubic/m, estimated evaporative loss."[34]

[49] The Appellant submitted the gross diversion could be limited to a maximum of 74,000 cubic/m, as indicated by the maximum water lost. He stated a closed cycle wash water system would eliminate any requirement for a containment area, "…which is contrary to AENV Administrative Guide to Protect Surface Water bodies, under the *Water Act*…."[35]

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[33] As stated in Court: "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…." *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.).

[34] Appellant's submission, dated June 11, 2004.

[35] Appellant's submission, dated June 11, 2004.

[50] The Appellant referred to a previous decision of the Board[36] and argued the "…hydraulic connection was proven to a distance of eight (8) kilometres and Mr. Northcott's relatively shallow well is well within the distance. Any impact by dewatering or improper reclamation will effect (*sic*) the performance of Mr. Northcott's well and any well of similar depth."[37]

[51] The Appellant argued the Approval Holder has never believed there was a serious concern regarding its industrial use, aggregate washing operation, and mining of metallic and industrial minerals, therefore the Board must hear the appeals. He stated the appeals were undertaken to question existing and previously constructed works that may have been "…done in non-compliance, without proper authorization, with no base-line information, no public consultation and no expert consultation reports."[38]

[52] The Appellant argued the Licences and Approval were issued without reviewing the past changes and the environmental impacts to the area, and until a full study of past impacts has been completed, no further licensing should be allowed. He submitted the history must include what the area was like prior to the operation and should identify aquifer protection zones, surface and groundwater protection zones, protected wetlands, and protected buffer zones.

[53] The Appellant argued the Approval Holder was not diligent prior to its acquisition of the business, and now it is using it as an excuse to continue with a previously established non-compliance. The Appellant questioned how the Approval Holder could review impacts and mitigations associated with the operations without establishing a historical baseline. He stated no formal plan has been presented to indicate how the inactive operations are to be restored to a state similar to or better than the original.

[54] The Appellant stated the lowering of the water table can affect systems 8 to 10 kilometres away, and the impact must be established over the long range. He questioned how a seven-month test could establish the effects that take much longer to identify.

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[36] See: *Skinner* v. *Director, Northern Region, Regional Services, Alberta Environment* re: *Inland Aggregates Limited* and *Lafarge Canada Inc.* (13 February 2003), Appeal Nos. 02-086 and 02-087-D (A.E.A.B.).

[37] Appellant's submission, dated June 11, 2004.

[38] Appellant's submission, dated July 19, 2004.

[55] The Appellant argued the Stay must be granted and the Licences and Approval rescinded before the watershed loses its capacity to support itself and those dependent on it.

[56] The Appellant argued his close proximity to the operations can be proven, and the Licence Holder's continued operations with no regard to water suppression and water use will cause irreparable harm to him and his family.

[57] The Appellant submitted there would be irreparable harm, with both immediate and long term effects. He stated well levels in the affected area would respond accordingly when the groundwater level, volumes, and flow are reduced.

[58] The Appellant stated there would be long term effects of continuously lowering groundwater levels and continuously maintaining lower than normal surface and groundwater levels, flows, and volumes. He stated a longer type of irreparable damage would result from the lack of or improper reclamation. The Appellant argued the requirement to reclaim to the minimum productivity of the original capacity has not been accomplished due to the lack of required resources and the unwillingness to apply appropriate resources.

[59] The Appellant argued all those within the surface and groundwater hydrology of the area would be affected, as well as those downstream of this main tributary to the Sturgeon River. The Appellant listed a number of communities and organizations, and stated they would be impacted as well as other communities located and dependent on maintaining the Sturgeon River surface and groundwater regime.[39]

[60] The Appellant stated the Sturgeon River drainage system was identified as a low priority, and the history of non-compliance has been "…due to the lack of monitoring and due diligence combined with the narrow scope of assessing applications for these activities, especially the cumulative affects with associated activities and strip mining below the water table."[40]

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[39] The communities and organizations listed by the Appellant were: Devils Lake; Sturgeon River; Big Lake; Calahoo; City of St. Albert; North Saskatchewan Watershed Alliance; Onoway River Valley Conservation Association; Big Lake Environmental Support System; Big Lake/Sturgeon River Coalition; Alberta Health & Wellness; Alberta Sustainable Development; Department of Fisheries and Oceans; County of Lac St. Anne; County of Sturgeon; Environment Canada; and the Canadian Environmental Assessment Agency.

[40] Appellant's submission, dated June 11, 2004.

[61] The Appellant argued Licence 191661 identified the maximum use of water of 60 acre-feet as evaporative losses. He stated if water was pumped out of the last stage settling pond directly into the inlet used for washing, then the only amount required for make up is well within the 1957 Licence volumes. Therefore, according to the Appellant, no water would have to be diverted from Kilini Creek and the Approval Holder would not suffer from the Stay.

[62] The Appellant stated the loss to him would be greater than the loss to the Approval Holder when comparing the amount invested to net worth. He submitted the "…loss of business and impact to shareholders is speculation and insignificant to the cost of repairing the natural infrastructure…."[41] He submitted there are other source wells within transport distance that could be used that do not impact surface and groundwater systems.

[63] The Appellant stated these operations do not belong in close proximity to residents. He submitted the operation has been poorly monitored as proven by the long-term non-compliance identified. He stated the non-compliance started in the mid-1990s and continued for three years after the Approval Holder acquired the operations.

[64] In response to the Board's question if the overall public interest warrants a Stay, the Appellant stated his efforts and dedication to Alberta's natural infrastructure are being very well received by the overall public.

[65] The Appellant submitted a Stay is "…of the utmost importance to the overall public interest."[42]

[66] He argued anything that impacts the Sturgeon River drainage basin affects all interested parties, including the Onoway River Valley Conservation Association and the Big Lake Sturgeon River Coalition.

2. Approval Holder

[67] The Approval Holder stated it does not believe there is a serious concern that should be heard by the Board.

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41 Appellant's submission, dated July 19, 2004.

42 Appellant's submission, dated July 19, 2004.

[68] The Approval Holder explained the Licences were issued for existing and previously constructed works situated on Kilini Creek. It stated the Licences were issued after the Director completed an extensive review of the application information that was supported by several expert consultant reports, and he determined the related works would meet or exceed the requirements of the *Water Act* and its regulations.[43]

[69] The Approval Holder stated the Approval requires more extensive groundwater and surface water monitoring with more detailed analytical requirements for water quality. It explained the Approval was based on preliminary monitoring programs it implemented in 2003.

[70] The Approval Holder explained the Wash Plant has been in existence since 1957, and a water licence was issued under the *Water Resources Act*, R.S.A. 1980, c. W-5. The Approval Holder stated it acquired the property and related assets in 2001, and although it had performed some due diligence prior to purchasing the operations, it was not privy to specific operational details or records. It explained it reviewed all operational aspects, impacts, and mitigations associated with the plant operations throughout 2002 and found deficiencies concerning diversions under the existing 1957 Licence. It stated it contacted Alberta Environment prior to the start of the 2003 season, and the Director issued temporary diversion licences with stringent operating and reporting conditions. The Approval Holder stated it initiated a number of environmental studies to help offset identified historic information gaps.

[71] The Approval Holder argued the Appellant did not provide any specific evidence on how his well's performance has or would be impacted by the issuance of the Licences. It quoted a paragraph from one of the expert consultant's report, in which it stated:

> "…the diversion from the impoundment does not induce groundwater to flow from the natural groundwater flow system into the impoundment. Therefore, it was concluded that the diversion should have no effect on water wells, aquifers or springs…. The diversion had no identifiable effects on the water levels in the shallow and bedrock wells located near the point of diversion."[44]

[72] The Approval Holder stated it had no knowledge of any interference or interruption of the water well supplying the Appellant's property over the last three years since the Approval Holder had assumed management and operation of the Wash Plant.

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[43] Approval Holder's submission, dated July 12, 2004.

[73] The Approval Holder argued the Wash Plant can operate in compliance with the Licences "…without causing, within reasonable probability, any harm or impact to Mr. Northcott's well."[45]

[74] The Approval Holder did not believe the Appellant would suffer irreparable harm if the Stay was refused. It stated the Appellant did not provide any direct or specific evidence with respect to impacts on the performance of his water well that can establish any reasonable probability of harm or impact to his water supply attributable to the Wash Plant. The Approval Holder submitted the standard of proof required to obtain a Stay goes beyond mere speculation.

[75] The Approval Holder submitted any harm it would suffer would far outweigh any potential harm suffered by the Appellant. It argued it would suffer the greater harm as it has made a substantial capital investment in acquiring and improving the operation with a reasonable expectation of being able to continue the operation based on its due diligence findings. It stated it expects a reasonable return on its investments, and any business losses do not just have financial implications for the corporation. It stated any impact would also affect its shareholders and its employees, as well as the cost of aggregates produced and consumed in the greater Edmonton market area.

[76] The Approval Holder argued a Stay would affect the ready mix concrete industry in Edmonton as it would have to find, on short notice, a proven and viable aggregate source as a replacement.

[77] The Approval Holder expressed concern that a Stay could increase the "…potential for negative perceptions by the general public of Lafarge businesses, activities and operations…."[46]

[78] The Approval Holder submitted there is a very small probability of harm to the Appellant, but the Approval Holder would suffer unnecessarily. It argued the Stay would cause significant harm to the business and impact consumers of washed aggregate products.

[79] The Approval Holder argued the public interest would not warrant a Stay.

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44 Approval Holder's submission, dated July 12, 2004.

45 Approval Holder's submission, dated July 12, 2004.

46 Approval Holder's submission, dated July 12, 2004.

[80] The Approval Holder explained it reviewed the 132 Statements of Concern filed with the Director with respect to the Licences, and all Statement of Concern filers were invited to a public meeting to discuss the information provided in the Statements of Concern. It stated it held three other open houses and invited all of the Statement of Concern filers and local area residents. The Approval Holder stated it formed a public advisory group to continue ongoing dialogue with local residents and other interested parties about water quality and quantity, monitoring programs, and regulatory reporting issues.

[81] The Approval Holder submitted that "…through its public consultation and community outreach processes, Lafarge has provided substantial information about the Lafarge wash plant, the existing licence, the application information and findings from expert consulting reports have already made significant strides in addressing the public interest."[47] The Approval Holder stated one of the key messages throughout the consultation process was the importance of protecting groundwater and surface water resources.

3. Director

[82] The Director stated he does not take a position on whether the Stay should be granted, but it would appear the Appellant had not met his onus on establishing the grounds for a Stay.

[83] The Director stated the Board accepted the appeals and requested comments on the Appellant's submission, and therefore it is clear the Board feels there is a serious issue.

[84] The Director explained he reviewed the operation of the facility and concluded it was operating in a manner that was not authorized under the legislation. He stated he brought the matter to the Approval Holder's attention and determined the appropriate regulatory action was to bring the Approval Holder into compliance with the legislation.

[85] The Director stated the Licences "…authorize the continuation of the operation of the Onoway wash plant that has been undertaken for [a] substantial period of time."[48] According to the Director, he reviewed the Appellant's concerns and determined the Appellant was not

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47 Approval Holder's submission, dated July 12, 2004.

48 Director's submission, dated July 8, 2004.

suffering any harm as a result of the operation. The Director argued the Licenses authorize the continuation of the current operation, and "…it is clear that Mr. Northcott does not presently suffer any harm at all as a result of Lafarge's operations."[49]

[86] The Director explained the purpose of the Approval was "…to require additional monitoring to be undertaken by Lafarge."[50] He stated this was based on the Statements of Concern, and "…no adverse affect arises as a result of the EPEA approval as it is simply to undertake monitoring and reporting activities at the Onoway wash plant. Mr. Northcott would not suffer any harm whatsoever [as] a result of Lafarge complying with the EPEA approval…."[51]

[87] The Director stated reclamation is not a requirement set out in the decisions under appeal.

[88] The Director stated the Appellant would not suffer harm, let alone irreparable harm, if the Stay is refused. The Director submitted the Approval Holder would suffer the greater harm as a result of the Stay, as a Stay of the Licenses would require the Approval Holder to stop its operations and thereby suffer monetary damages.

[89] The Director submitted a Stay would not serve the public interest, as it would effectively leave the Approval Holder to operate in violation of the *Water Act* or it would affect its operations. He stated the Licences were issued to bring the Approval Holder into compliance.

B. Legal Basis for a Stay

[90] The Board is empowered to grant a Stay pursuant to section 97 of the Act. 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."[52]

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49 Director's submission, dated July 8, 2004.

50 Director's submission, dated July 8, 2004.

51 Director's submission, dated July 8, 2004.

52 Section 97 of the Act, also provides:

"(3) Where an application for a stay relates to the issuing of an enforcement order or an

[91] The Board's test for a Stay, as stated in its previous decisions of *Przybylski*[53] and *Stelter*,[54] is based on the Supreme Court of Canada case of *RJR MacDonald.*[55] 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."[56]

[92] The first step of the test has a very low threshold. Based on the evidence submitted, the applicant has to have some basis on which to present an argument. The applicant must show that there is a serious issue to be tried. As not all of the evidence will be before the Board at the time the decision is made regarding a Stay application, "…a prolonged examination of the merits is generally neither necessary nor desirable."[57]

[93] The second step in the test to determine whether a Stay is warranted requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.[58] Irreparable harm will occur when the applicant would be adversely

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environmental protection order or to a water management order or enforcement order under the *Water Act* and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out,

(a) order the Director under this Act or the Director under the *Water Act* to take whatever action the Director considers to be necessary to carry out those terms and conditions and to determine the costs of doing so, and

(b) order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the *Water Act* in the form and amount the Board considers necessary to cover the costs referred to in clause (a)."

53 *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.).

54 *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.).

55 *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 ("*American Cyanamid"*). Although the steps were originally used for interlocutory injunctions, the Courts have stated that 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 ("*Metropolitan Stores"*) and *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 41.

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

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

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

affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, *not its magnitude*. The harm must not be quantifiable, 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*,[59] 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 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 denial of justice."[60]

The party claiming that damages would be inadequate compensation must show that there is a real risk that harm will occur. It cannot be mere conjecture.[61] The damage that may be suffered by third parties may also be taken into consideration.[62]

[94] 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."[63] The decision-maker is required to weigh the burden that the remedy would impose on the defendant against the benefit the plaintiff would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The courts have considered factors such as the cumulative effect of granting a Stay,[64] third parties that may suffer damage,[65] or if the reputation and goodwill of a party will be affected.[66]

[95] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. In *Metropolitan Stores*, it was recognized that the public interest is a special factor in constitutional cases.[67]

[96] The environmental mandate of this Board requires the public interest be considered in appeals before the Board.[68] The Board has, therefore, stated the public interest is a

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

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

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

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

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

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

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

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

separate step in the test when applying for a Stay. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "…concerns of society generally and the particular interests of identifiable groups."[69] The effect on the public may sway the balance for one party over the other.[70]

C. Analysis of Stay Request

1. Serious Issue

[97] As indicated in *RJR MacDonald,* the first step in determining if a Stay should be granted has a low threshold – there needs to be a serious issue to be tried and the claim is not frivolous or vexatious.

[98] Based on the Appellant's submission, the Board accepts there is a serious issue to be tried, and the first part of the test for a Stay has been met. The Appellant raised concerns regarding the potential effect on groundwater and surface water as a result of the licenced project. These are valid issues and are related to the Licences and Approval issued. Therefore, the Appellant has met the first step of the test.

2. Irreparable Harm

[99] In assessing irreparable harm, the Supreme Court of Canada states that it must be determined "…whether the refusal to grant relief could so adversely affect the applicant's own

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67 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 90.

68 The Court in *RJR MacDonald,* at paragraph 64, stated:

"The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants."

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

70 The Court in *RJR MacDonald,* at paragraph 68, stated:

"In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."[71]

[100] To determine if the harm is irreparable, the Board must look at whether the Appellant could not be compensated for any damages that may result from the refusal to grant a Stay. The onus is on the Appellant to demonstrate he will suffer irreparable harm if the Stay is not granted.

[101] The Appellant argued he would suffer irreparable harm if the Stay is not granted as his well is within eight kilometres of the site and there is a hydraulic connection proven to that distance. He stated any drawdown of the aquifer would affect his well.

[102] The operations allowed under the Licences have been ongoing for a number of years. There will be no change in the operations during the time the Board determines the substantive issues under appeal. As the Appellant did not demonstrate how his well has been affected by the operations during the past years of operation, the Board does not believe he would suffer irreparable harm, providing the conditions of the Licences are adhered to as required. The effects on groundwater usually occur slowly, and the Appellant should not be affected during the time it takes to hear the appeals. If the Appellant notices an effect, he can notify Alberta Environment, and they will investigate any valid complaints.

[103] Irreparable harm also refers to whether there are alternatives available if the Appellant does suffer damages. In this case, other sources of water are available, even though they may be costly or inconvenient, but there are alternatives that can be used should harm occur in the time it takes for the Minister to release his decision.

[104] The EPEA Approval requires additional monitoring and reporting. The Appellant will not suffer any harm in having the Approval Holder operate under these additional requirements. In fact, additional information could be beneficial to the Appellant in arguing his case at the Hearing, and it would assist in ensuring the conditions in the Licences are obtainable and are adhered to by the Approval Holder. The information that is collected can also assist the Board when it prepares its report and recommendations for the Minister.

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[71] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 58.

[105] The Appellant did not provide persuasive arguments to illustrate how the harm he would receive, if any, would be irreparable. Therefore, the Appellant has not succeeded on the second element of the Stay test.

3. Greater Harm

[106] The Approval Holder operates a business that requires the use of water for its operations. The Approval Holder argued it would suffer financially if the Stay was granted, and this would then be passed down to its shareholders and consumers. Economic losses are quantifiable. Therefore, if there was an economic impact on the Approval Holder, it could, arguably, be compensated.

[107] However, the Appellant failed to demonstrate he would suffer a greater harm as the operations have been in place for a number of years, and the additional time required to hear the appeals would not result in any additional effect. Effects on groundwater resources would not be seen in such a short period of time. As long as the Approval Holder continues to operate as it has in the past, with the additional monitoring as required under the Approval, there will be no additional impacts on the Appellant's water source in the short time it will take to process his appeals.

[108] In this case, neither Party will suffer the *greater harm*; therefore, it is not a determinative factor in deciding the Stay request.

[109] However, the Supreme Court stated in *American Cyanamid* that, when all things being equal, the status quo should be preserved. As the Appellant has failed to prove, at this point of the proceedings, that he will actually be harmed if the Stay is refused, the Board accepts the position of maintaining the status quo, and therefore, the application for a Stay is declined.

4. The Public Interest

[110] On the question of the public interest, the Supreme Court in *RJR MacDonald* stated:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be

> pursuing their own interests rather than those of the public at large…. Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

[111] Further, in determining the public interest, the Supreme Court directs us to look to the "…authority that is charged with the duty of promoting or protecting the public interest…"

[112] As stated before, the facility has been operating for a number of years. The Licences and Approval do not change how the site is operating, except to add additional monitoring requirements. Under the Licences and Approval, as issued, the Approval Holder's consumptive use of water will not increase from that allowed under the existing licence.

[113] The protection of potable water is an important issue for all Albertans, but a generalized concern is insufficient to base the granting of a Stay. Although 132 Statements of Concern were filed with the Director regarding the Approval Holder's applications, only the Appellant filed a Notice of Appeal. It appears many of the concerns originally brought forward by the Statement of Concern filers have been addressed by the Approval Holder.

[114] Therefore, the Board does not believe the public interest warrants the issuing of a Stay in these circumstances.

5. Summary

[115] Although the Appellant showed there is a serious issue that needs to be heard, he did not demonstrate he would suffer irreparable harm, as the facility has been in operation for a number of years and its operations are not changed by the Licences. The Licences do not increase the amount of water that can be used consumptively, and the Approval provides additional mechanisms to protect the water sources in the area.

[116] There are insufficient grounds to warrant the granting of the Stay. The Licences and Approval were given to an existing operation, and the Appellant did not provide evidence he

has suffered harm from the existing operations. As neither Party will suffer a greater harm, the status quo will be remain. There was no indication the public interest warrants the granting of a Stay.

[117] This does not, in any way, determine the issues under appeal. The Board can still find, after it has heard all of the evidence on the substantive issues at the Hearing, the Licences and Approval should not have been granted at all or in the form they presently exist.

IV. CONCLUSION

[118] The Board finds the Appellant is directly affected and there is a serious issue to be heard. However, the Appellant did not demonstrate he would suffer irreparable harm, and the public interest does not warrant the granting of a Stay.

[119] Therefore, the Board denies the Stay application, and the Hearing will be scheduled to hear the arguments on the substantive matters of the appeals.

Dated on January 11, 2005, at Edmonton, Alberta.

"*original signed by*"

Dr. Frederick C. Fisher, Q.C.
Chair