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 Willem and Mieke Spaans; Andre and Trish Lema; Glen Blaylock; Leo and Valerie Belanger; Robert and Kathryn Lema; and Gary and Doris Labrecque with respect to *Water Act* Amending Approval No. 0023878-00-02 issued to Yellowhead Aggregates and *Environmental Protection and Enhancement Act* Amending Approval No. 15125-01-01, issued to Lafarge Canada Inc. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: Stay Decision: *Spaans et al.* v. *Director, Northern Region, Regional Services, Alberta Environment*, re: *Yellowhead Aggregates and Lafarge Canada Inc.* (11 January 2005), Appeal Nos. 04-024, 04-026-030, and 04-035-040-ID1 (A.E.A.B.).

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

WRITTEN SUBMISSIONS:

Appellants: Mr. Willem and Ms. Mieke Spaans; Mr. Andre and Ms. Trish Lema; Mr. Glen Blaylock; Mr. Leo and Ms. Valerie Belanger; Mr. Robert and Ms. Kathryn Lema; and Mr. Gary and Ms. Doris Labrecque.

Approval Holders: Lafarge Canada Inc., represented by Mr. Brendan J. Vickery, and Yellowhead Aggregates, represented by Ms. Marlea Sleeman.

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

EXECUTIVE SUMMARY

Alberta Environment issued *Water Act* Amending Approval No. 002378-00-02 to Yellowhead Aggregates for the temporary diversion of up to 80 acre-feet (21.7 million Canadian gallons) of water from the aquifer at SW 16-54-26-W4M near St. Albert, Alberta, and *Environmental Protection and Enhancement Act* Amending Approval No. 15125-01-01, issued to Lafarge Canada Inc. for the opening up, operation, and reclamation of a pit on SW 16-54-26-W4M near St. Albert, Alberta.

The Environmental Appeals Board received Notices of Appeal from Mr. Willem and Ms. Mieke Spaans; Mr. Andre and Ms. Trish Lema; Mr. Glen Blaylock; Mr. Leo and Ms. Valerie Belanger; Mr. Robert and Ms. Kathryn Lema; and Mr. Gary and Ms. Doris Labrecque appealing the Amending Approvals and requesting a Stay.

The Board received submissions regarding the Stay request and the directly affected status of the appellants.

The Board determined all of the appellants are directly affected as they live within one kilometre of the project site. However, the Board denied the Stay request as the appellants would not suffer irreparable harm by the companies operating under the terms and conditions of the approvals in the time required to hear the appeals. As the balance of convenience did not favour one party over the other, the status quo remained in effect and the Stay was denied.

TABLE OF CONTENTS

I. BACKGROUND

[1] On June 4, 2004, the Director, Northern Region, Regional Services, Alberta Environment (the "Director") issued Amending Approval No. 15125-01-01 (the "EPEA Amending Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to Lafarge Canada Inc. ("Lafarge") for the opening up, operation, and reclamation of a pit (the "Ballachay Pit") on S 16-54-26-W4M near St. Albert, Alberta.

[2] On June 7, 2004, the Director issued Amending Approval No. 0023878-00-02 under the *Water Act*, R.S.A. 2000, c W-3 (the "*Water Act* Amending Approval"[1]) to Yellowhead Aggregates[2] for the diversion of water at S 16-54-26-W4M near St. Albert, Alberta.

[3] On June 23 and 24, 2004, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Willem and Ms. Mieke Spaans; Mr. Andre and Ms. Trish Lema; Mr. Glen Blaylock; Mr. Leo and Ms. Valerie Belanger; Mr. Robert and Ms. Kathryn Lema; and Mr. Gary and Ms. Doris Labrecque (collectively, the "Appellants") appealing the Amending Approvals and requesting a Stay.

[4] On June 29, 2004, the Board wrote to the Appellants, the Approval Holders, and the Director (collectively the "Parties") acknowledging receipt of the Notices of Appeal and notifying the Approval Holders and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals, and the Parties provide available dates for a mediation meeting or hearing.

[5] On June 29, 2004, the Board wrote to the Appellants, requesting answers to the following questions:

> "1. What are the serious concerns of [the Appellants] that should be heard by the Board?
>
> 2. Would [the Appellants] suffer irreparable harm if the Stay is refused?

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[1] The *Water Act* Amending Approval and the EPEA Amending Approval will be referred to, collectively, as the "Amending Approvals."

[2] In this decision, "Approval Holders" refers to Lafarge Canada Inc. and Yellowhead Aggregates collectively.

3. Would [the Appellants] suffer greater harm if the Stay was refused pending a decision of the Board, than Lafarge Canada Inc. and Yellowhead Aggregates would suffer from the granting of a Stay?

4. Would the overall public interest warrant a Stay?

5. Are [the Appellants] directly affected by Alberta Environment's decision to issue the Approvals/Amending Approvals to Lafarge Canada and Yellowhead Aggregates? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected." [Emphasis omitted.]

[6] 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.

[7] On July 21, 2004, the Board received a copy of the Record from the Director, and on July 27, 2004, forwarded a copy to the Appellants and the Approval Holders.

[8] Between July 13, 2004, and August 30, 2004, the Board received the submissions from the Parties regarding the Stay request and the directly affected status of the Appellants.

[9] On September 14, 2004, the Board wrote to the Parties informing them the Board had decided to deny the Stay requests.

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

II. DIRECTLY AFFECTED

A. SUBMISSIONS

1. Appellants

[11] The Appellants stated in appeals previously heard by the Board, "…hydraulic connection was proven to exist to a distance of eight (8) kilometres."[3] They explained they have

[3] Appellants' submissions, dated July 21, 26, and 30.

shallow wells within that distance, and "[a]ny impact by dewatering or improper reclamation will affect the performance of our well and any well of similar depth."[4]

[12] The Appellants stated well water is their only source of water, and alternative sources are expensive and beyond their immediate means. They argued their quality of life could also be affected due to dust, noise, and allergies. They argued it is inappropriate to have gravel development so close to a large group of residents, and property values could be depressed as a result of the expansion of the gravel operations in the area.

[13] Two of the Appellants, Mr. Leo and Ms. Valerie Belanger, expressed additional concerns regarding the health of their children. They stated their children have asthma and were informed by their doctor that stripping of the soils are a trigger for asthma. They questioned what data had been collected regarding air quality in the area and for other gravel operations in Alberta and Canada.[5]

[14] The Appellants, Mr. Willem and Ms. Mieke Spaans, Mr. Robert and Ms. Kathryn Lema, Mr. Leo and Ms. Valerie Belanger (the closest residence), and Mr. Gary and Ms. Doris Labrecque, stated they are directly affected as they live within ½ kilometer of the proposed expanded gravel operation. Mr. Glen Blaylock stated he lives within one kilometer of the proposed expanded gravel operation.

2. Approval Holders

a. Lafarge Canada Inc.

[15] Lafarge argued the Appellants are not directly affected by the issuance of the EPEA Amending Approval. It reiterated the Appellants had not provided any direct or specific evidence that the performance of their wells will be harmed or impacted by its past or current activities.

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4 Appellants' submissions, dated July 21, 26, and 30.

5 See: Mr. Leo and Ms. Valerie Belanger's submission, dated July 26, 2004.

[16] Lafarge referred to the information provided to the Board in the Board's previous decision,[6] and this "…resulted in the conclusion by the Board that the Appellant was not directly affected and the Board dismissed the described appeals."[7]

b. Yellowhead Aggregates

[17] Yellowhead Aggregates stated it has taken the residents' and Appellants' concerns seriously and has addressed these issues adequately and reasonably addressed.[8] It submitted the Appellants' concerns have been adequately and reasonable addressed. It explained it is now possible to mine the Ballachay property with the adjacent property, "…thus preventing the sterilization of a gravel resource and leading to the most efficient, economic and environmentally beneficial method of operation."[9]

3. Director

[18] With respect to the directly affected status of the Appellants, the Director stated he did accept them as being potentially affected by the applications.[10] The Director made no further representations as to whether the Appellants are directly affected.

B. Legislation

[19] 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.[11] The Board has examined the term "directly affected" in numerous previous appeals,

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6 *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.).

7 Lafarge Canada, Inc.'s submission, dated August 20, 2004.

8 See: Yellowhead Aggregates' submission, dated August 12, 2004.

9 Yellowhead Aggregates' submission, dated August 12, 2004.

10 Director's submission, dated August 6, 2004.

11 Section 115(1) of the *Water Act* provides:

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.[12]

[20] 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*,[13] 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."[14]

[21] 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

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> "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:
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> (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
>
> (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).

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

[13] *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*").

[14] *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.).

> 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."[15]

[22] 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."[16] In *Kostuch*, the Board considered its previous decision in *Ross*,[17] 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."[18]

[23] 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

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[15] *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.).

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

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

[18] *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.).

> confident that the interest affected is consistent with the underlying policies of the Act."[19]

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."[20]

[24] 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 approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision."[21]

[25] *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."[22]

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[19] *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.).

[20] *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.).

[21] *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"*).

[22] *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.).

The Board's Rules of Practice also make it clear the onus is on the Appellants to prove they are directly affected.[23] The onus or burden of proof issue, in a slightly different context, was upheld by the Court of Queen's Bench.[24]

[26] In the *Court*[25] 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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> 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:
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> > 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

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[23] Section 29 of the Board's Rules of Practice provide:

"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."

[24] 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.).

[25] *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.).

> 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."[26]

[27] Justice McIntyre concluded by stating:

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[26] *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.).

> "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…."[27]

[28] 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.[28]

[29] The Court of Queen's Bench in *Court*[29] stated an appellant only needs to show that there is a potential for an affect on their interests. This potential affect must still be within reason and plausible for the Board to consider it sufficient to grant standing.

[30] The effect does not have to be unique in kind or magnitude.[30] 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.[31] 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

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[27] *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.).

[28] *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.).

[29] *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

[30] 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.).

[31] 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.).

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.

[31] 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.[32]

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[32] 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;

(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 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

C. Analysis

[32] What the Board needs to find when assessing whether the Appellants are directly affected is some connection between the possible effect of the project and the individual Appellant.

[33] In this case, the Appellants expressed concern regarding the possibility of their water supplies being affected by the proposed project and the possible effects to their families' health due to dust emissions.

[34] The Appellants all live within one kilometer of the proposed expansion, and they all rely on their groundwater wells for their water supply. If the proposed project does affect the water systems in the area, it is the Appellants who would potentially be affected more than any other Albertan. They live very close to the proposed project, and if their water source is hydrologically connected to the proposed project site, the water source they rely on could be affected.

[35] Also, the Appellants' close proximity to the proposed expansion increases the possibility of them being affected by dust emissions from the operations.

[36] The Yellowhead Aggregates submitted the Appellants are not directly affected since it put in additional monitoring wells. The issue before the Board is whether or not the conditions in the Amending Approvals are adequate to protect those most likely to be affected. To say monitoring is in place, therefore the Appellants are not directly affected, avoids the real issue. The Board will consider whether the conditions and mitigative measures taken will be adequate to protect the Appellants. Essentially, the Board will look at whether the Appellants could be affected by the project should the conditions be inadequate. If the Board finds there is a possible connection between the Appellants and the project, then it will consider the Appellants directly affected. Then, should the matter proceed to a hearing, the substantive issue of whether adequate steps were taken to protect the environment and reduce the potential of an adverse effect to the Appellants will be assessed.

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respect to transboundary water management;

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

[37] 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.

[38] The Appellants have established the proximity needed between the possible environmental affect and the affect it could have on them personally. Therefore, the Board finds the Appellants are directly affected for the purpose of these appeals.

[39] 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. Appellants

[40] The Appellants stated they are deeply concerned with the cumulative impacts of gravel operations on the groundwater in the area. The Appellants stated of the amount of diverted water allocated under the *Water Act* Amending Approval is a ten-fold increase from the previous approval issued under the *Water Resources Act*. They stated the previous amount allowed was 270 m^3/day, and the current *Water Act* Amending Approval allows for a diversion of 3,000 m^3/day. The Appellants stated they are concerned about the effect this will have on the groundwater aquifer from which they draw their drinking water. The Appellants asked the Approval Holders to clarify where the water is to come from and why so much water needs to be diverted. They also questioned what effect the deepening of the extraction site (from 12.8-19.5

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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.).

metres to 14.0-21.0 metres) will have on the groundwater levels in the area and how it will impact their wells and the water flow in the Sturgeon River.

[41] The Appellants stated there is some confusion regarding the conductivity of the post-mined aquifer. According to the Appellants, Yellowhead Aggregates' application states replacing one or more metres of sand at the bottom of the gravel pit will restore conductivity to near prior mining levels, but they have a letter from the Director of Public Services for Sturgeon County stating the difference between the pre-mined and post-mined aquifer is that the conductivity in the post-mined aquifer is less. They noted monitoring in other areas has revealed that one metre of sand has not always been returned to reclaimed gravel operations. They were doubtful the placement of one metre of sand would return adequate conductivity, and if it becomes a condition of reclamation, they questioned whether it would be enforceable.

[42] The Appellants argued the diversion plan appears to fall short of what is required in the Calahoo-Villeneuve Sand and Gravel Extraction Area Structure Plan, and "… 'allowing infiltration' is not the same thing as ensuring that such infiltration occurs."[34] They stated section 11.1.3 of the plan states, "[g]iven that groundwater is a very important resource, *all* sand separated during processing shall be placed on the pit bottom to maintain the hydraulic continuity of the lower sand and gravel aquifer.'"[35] (Emphasis in original.)

[43] In response to Lafarge's statement that no groundwater will be diverted offsite, the Appellants expressed concern that it does limit the use of water onsite. They stated they wanted an assurance that "…all diverted water will be returned to *deep recharge sumps, in direct contact with the formation and aquifer* would be much more reassuring that that given by [Lafarge]."[36] (Emphasis in original.)

[44] The Appellants stated there have been several complaints filed with the Sturgeon County about deteriorating water quantity and quality. They expressed concern that there has been inadequate monitoring of current water tables and no adequate baseline measurements have been identified. They stated the monitoring wells have been installed for less than one year, which is an inadequate length of time to establish baseline measurements. The Appellants

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34 Mr. Robert and Ms. Kathryn Lema's submission, dated August 30, 2004.

35 Mr. Robert and Ms. Kathryn Lema's submission, dated August 30, 2004.

requested a Stay until adequate baseline had been acquired and a watershed management bylaw, including an aquifer protection zone, had been developed for the area. They stated that without adequate baseline data, any degradation of their water supply could be dismissed as part of a natural cycle.

[45] The Appellants expressed concern regarding the cumulative impact of gravel operations on the surface water in the area. They stated water flow in the Sturgeon River is considerably greater in the winter when extraction is suspended than what it is in the summer when extraction occurs at an intense rate.

[46] The Appellants submitted there is connectivity between the Ballachay Pit and the Sturgeon River as Yellowhead Aggregates' application stated that, after a two-year period, the ground water elevation in the Friesen Pit reflected the water level in the Sturgeon River.

[47] The Appellants expressed concern about the cumulative impact of gravel operations on the natural environment in the area and on their property values. They explained the high quality soils and high quality groundwater, as well as the proximity to the Sturgeon River, were the significant factors in deciding to locate in the area. They argued the "…destruction of this natural environment through expanded strip mining will impact our quality of life as well as the value of our property."[37] They stated they have requested a change in the area structure plan to establish an 800-meter buffer between the Sturgeon River and the gravel operations. They considered this distance to be adequate separation between most local residents and the gravel operations in the area, resulting in a more compatible land use.

[48] The Appellants stated the pit operation had been sitting dormant during much of the last 20 years. They explained the site was overrun with weeds and poorly secured, and even though Lafarge has assured them the property would be properly maintained, the site is still weed infested.

[49] The Appellants argued irreparable harm could result immediately when aquifer and groundwater levels, volume, and flow are reduced and well levels in the area are affected.

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36 Mr. Robert and Ms. Kathryn Lema's submission, dated August 30, 2004.

37 Appellants' submissions, dated July 21, 26, and 30.

They stated well water is their only source of water, and alternative sources are expensive and beyond their immediate means.

[50] The Appellants argued irreparable damage would also result from the lack of proper reclamation, which would negatively impact the natural environment in the vicinity and their quality of life and adversely affect the value of their homes and properties.

[51] The Appellants argued the size of harm is proportionate to the resources each has. They stated their water supply comes from their wells, and a reduction or loss of water supply would significantly impact their quality of life. They stated their homes are their major asset and any deterioration in property values would significantly impact their net worth. They argued they have many neighbours in the same position and when multiplied together, the result is significant. They argued Yellowhead Aggregates is a multi-national corporation with significant assets, and a Stay would not cause irreparable damage to its bottom-line.

[52] The Appellants argued the public interest warrants a Stay, as it would allow proper planning and monitoring be put in place. They stated the City of St. Albert and the Onoway River Valley Conservation Association had submitted statements of concern, asking for a moratorium on future development along the Sturgeon River Watershed, pending development of a Water Management Plan. They argued this indicates a broader societal concern for the impact of this development.

2. Approval Holders

a. Lafarge Canada Inc.

[53] Lafarge stated that, based on the Appellants' submissions, there is no serious concern that should be heard by the Board.

[54] Lafarge explained it is the previous and interim landowner and Yellowhead Aggregates is the sole pit operator. Lafarge explained the EPEA Amending Approval allows the existing pit operation in SW 16-54-26-W4M to be expanded and to incorporate new pit operations within SE 16-54-26-W4M.

[55] Lafarge understood Yellowhead Aggregates was committed to the Groundwater Monitoring Program as amended by the Sturgeon County's Community Sand and Gravel Liaison Committee, and Yellowhead Aggregates also was committed to installing two new monitoring wells that would be monitored and sampled by an independent consultant for Sturgeon County. Lafarge stated Yellowhead Aggregates is "…committed to specific response and resolution procedures if any interference or interruption is observed on water wells on adjacent lands."[38] Lafarge explained Yellowhead Aggregates's commitments are conditioned and enforceable under the Development Permit issued by Sturgeon County as well as under the *Water Act* statutes.

[56] Lafarge explained the pit operation on SW 16-54-26-W4M has been in existence for more than 20 years, and it was previously approved by Alberta Environment under the existing legislation at that time. Lafarge stated it acquired the property in 2001.

[57] Lafarge stated it has opened up, operated, and reclaimed a number of sand and gravel pits in the area over the last 30 years, and to its knowledge, "…there has been no reports brought to Lafarge's attention concerning the interference or interruption of a groundwater well or wells on the adjacent properties within one kilometer of the Lafarge pit operations in existence or reclaimed on the described Lafarge properties."[39]

[58] Lafarge stated all pit operations would be contained within the land parcel bordered by the road allowances and the Canadian National Railway right of way. It explained no pit excavations will occur within the floodplain areas of the Sturgeon River and the side slopes of the Sturgeon River Valley will not be disturbed.

[59] Lafarge stated the Amending Approvals confirms the dewatering procedures for the pit excavation will follow an accepted and prescribed manner, and the groundwater is diverted to a sump that allows infiltration into the subsurface, recharging local groundwater. It explained no groundwater would be diverted offsite.

[60] Lafarge further explained the Amending Approvals confirm the required reclamation procedures for reclaiming pit excavations will follow an accepted and prescribed

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38 Lafarge Canada Inc.'s submission, dated August 20, 2004.

39 Lafarge Canada Inc.'s submission, dated August 20, 2004.

manner, and the elimination sand will be placed at a minimum thickness of one metre at the bottom of the pit before overburden material is replaced.

[61] Lafarge submitted the "…Appellants have not provided any specific evidence on how any of their water well's performance has been or would be impacted or how the decision by Alberta Environment's Director to issue EPEA Amending Approval 15125-01-01 would also impact the performance of their wells."[40]

[62] Lafarge stated it believed the pit could operate in compliance with the conditions in the Amending Approvals "…without causing, within reasonable probability, any harm or impact to the Appellants' water wells."[41]

[63] Lafarge stated many of the issues raised focused on the conditions in the *Water Act* Amending Approval.

[64] Lafarge argued the Appellants would not suffer irreparable harm if the Stay is refused, as the amount of water allocated for diversion at any time has not increased under the *Water Act* Amending Approval. Lafarge stated the Appellants did not provide "…any direct or specific evidence with respect to impacting the performance of their water wells that can establish any reasonable probability of harm or impact to the water supply on their respective properties." It submitted the standard of proof required to obtain a Stay goes beyond mere speculation, and the Appellants must show on a balance of probabilities there is a potential for irreparable harm.

[65] Lafarge argued any harm it would suffer would far outweigh any potential harm suffered by the Appellants. It argued that, based on its operational history and experience as well as its consultant's investigation, "…the pit and its infrastructure can operate in compliance with the approval conditions issued by Alberta Environment without causing, within reasonable probability, any harm or impact to the Appellants' water wells."[42]

[66] Lafarge argued it would suffer the greater harm, as it has made a substantial capital investment in acquiring the pit, with a reasonable expectation of being able to continue

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40 Lafarge Canada, Inc.'s submission, dated August 20, 2004.

41 Lafarge Canada, Inc.'s submission, dated August 20, 2004.

42 Lafarge Canada, Inc.'s submission, dated August 20, 2004.

the pit operations or divest the pit and property 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 impact its shareholders and its employees, as well as the cost of aggregates produced and consumed in the greater Edmonton market area. Lafarge explained it is an interim landowner and is divesting the property to Yellowhead Aggregates, and the Stay would compound its ability to divest the property in a timely manner.

[67] Lafarge expressed concern that a Stay could increase the "…potential for negative perceptions by the general public of Lafarge businesses, activities and operations…."[43]

[68] Lafarge submitted there is a very small probability of harm to the Appellants, but it would suffer unnecessarily. It argued the Stay would cause significant harm to its businesses and operations.

[69] Lafarge did not believe the overall public interest warrants a Stay.

[70] Lafarge submitted its long-term history of operating experience in the area, including its compliance with the existing EPEA approval operating conditions, "…along with current technical and scientific assessments, has not produced any specific or direct evidence suggesting any reasonable probability of harm or impact to local groundwater supplies from the existing pit operations on the Lafarge properties…."[44]

[71] Lafarge explained that in 2000 and 2001, it participated in and supported an extensive public review and consultation process directed by Sturgeon County that resulted in the Calahoo-Villeneuve Sand and Gravel Area Structure Plan (2001). Lafarge stated its representatives participated in open houses and was in direct consultation with local communities. It stated it remains an active member of the Community Sand and Gravel Liaison Committee, and through its public consultation and community outreach processes, it provides substantial information to the local community and interested public about its operations.

b. Yellowhead Aggregates

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43 Lafarge Canada, Inc.'s submission, dated August 20, 2004.

44 Lafarge Canada, Inc.'s submission, dated August 20, 2004.

[72] Yellowhead Aggregates requested the application for a Stay be dismissed.

[73] Yellowhead Aggregates explained it would not be dewatering on the Ballachay property until 2005, and therefore, there will be one year of groundwater monitoring data available. It stated there are nine test/observation wells within the Area Structure Plan boundaries, and it installed two additional groundwater monitoring wells near the Ballachay Pit that will provide localized and specific data for future use.

[74] Yellowhead Aggregates explained the well it installed west of the nearest residence will monitor water levels during times of dewatering, and the second well, located west of the Sturgeon River, "…will provide water levels which may be noted with seasonal and storm fluctuations in the Sturgeon River water levels."[45]

[75] Yellowhead Aggregates stated the observation wells adjacent to the Ballachay property "…are to act as an assurance for residents regarding water levels in the aquifer."

[76] Yellowhead Aggregates explained it conducted water testing for ten residents within an 800 metre radius of the Ballachay property and three water wells outside the 800 metre radius. It stated well yield tests, static water elevations, and laboratory analysis of routine potability parameters were conducted on these wells. It stated it would continue to submit investigation results to the landowner and Alberta Environment, and it would monitor static water levels annually for the wells within 800 metres of the pit operations.

[77] Yellowhead Aggregates stated it hired an independent consulting firm to evaluate the relationship between dewatering within the Ballachay Pit and the surrounding residents' water wells and the Sturgeon River. According to Yellowhead Aggregates, the study determined "…dewatering would have a minimal effect and impact on the nearest neighbour water level and well water yield" and "…'there are no anticipated adverse effects on neighbouring water wells and/or the Sturgeon River anticipated by the operation of the Ballachay Pit by Yellowhead Aggregates'."[46] Yellowhead Aggregates explained the report was available for viewing by residents at the Sturgeon County office and at the open house hosted by Yellowhead Aggregates. It further explained the hydrogeologist who headed the study attended the open house to answer

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45 Yellowhead Aggregates' submission, dated August 12, 2004.

46 Yellowhead Aggregates' submission, dated August 12, 2004.

any questions the residents may have had with respect to the study conducted, the water wells installed, and the residential water sampling conducted.

[78] Yellowhead Aggregates stated it considered 16 wells for monitoring, five of them completed in the sand and gravel unit while seven are completed in the bedrock. It stated it will only be mining in the sand and gravel layer; therefore those Appellants whose wells are completed in the bedrock layer will not be adversely affected.

[79] With respect to the Appellants' concerns over the conductivity of the aquifer, Yellowhead Aggregates explained that, in order to maintain conductivity, it is required to place a minimum of one metre of sandy overburden in the mined out pit before replacing clayey overburden , subsoil, or topsoil.

[80] Yellowhead Aggregates explained it has provided Sturgeon County with a bond of $50,000.00 for assurance in the event of an unacceptable drawdown of an adjacent well, and it must provide Alberta Environment with a security deposit. It stated if an unacceptable drawdown does occur, it must cease all pumping operations, determine the cause of the drawdown, and provide an alternate water supply to the affected parties. Yellowhead Aggregates submitted its mitigation plan also provides assurance of its due diligence.

[81] Yellowhead Aggregates explained it has not applied for a gravel washing permit.

[82] Yellowhead Aggregates stated the scale and duration of the Ballachay operations under this application do not justify the development of long term mitigative measures such as a watershed management plan. Yellowhead Aggregates submitted the issues regarding mitigative measures "…may be better analyzed by municipal or policy making authorities."[47]

[83] Yellowhead Aggregates clarified it is the operator and approval holder under the *Water Act* and Lafarge Canada is the approval holder under EPEA.

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[47] Yellowhead Aggregates' submission, dated August 12, 2004.

3. Director

[84] The Director stated the issues raised by the Appellants relate almost exclusively to the *Water Act* Amending Approval.

[85] The Director explained the EPEA Amending Approval allows for the expansion of the gravel mining operation from the SW 16-54-26-W4M to the SE 16-54-26-W4M, and the *Water Act* Amending Approval allows for the dewatering of the pit. The Director stated the quantity of water that can be diverted has not increased, and therefore, there will be no effect on the Appellants as a result of the Amending Approvals that did not exist under the original approval.

[86] The Director submitted the additional representations made by the Appellants relate to the subject matter of the appeals and are factual matters that should properly be addressed during the hearing.

[87] The Director submitted the Appellants would not suffer any greater harm under the Amending Approvals than what would arise under the existing approvals. He stated the Approval Holders, however, would be prevented from undertaking continuous reclamation as described in the mining plan if the Stay was granted, and it may have to handle the material twice in order to complete the original plan. Therefore, according to the Director, the Approval Holders would suffer the greater harm as a result of the Stay.

[88] The Director did not believe the public interest warrants a Stay.

B. Legislation

[89] The Board is empowered to grant a Stay pursuant to section 97 of EPEA. This section provides, in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."[48]

[48] Section 97 of the Act also provides:

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

[90] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*[49] and *Stelter*,[50] is based on the Supreme Court of Canada case of *RJR MacDonald.*[51] 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."[52]

[91] 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."[53]

[92] 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.[54] 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)."

[49] *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.).

[50] *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.).

[51] *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.

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

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

[54] *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*,[55] 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."[56]

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.[57] The damage that may be suffered by third parties may also be taken into consideration.[58]

[93] 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."[59] 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,[60] third parties that may suffer damage,[61] or if the reputation and goodwill of a party will be affected.[62]

[94] 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 the public interest is a special factor in constitutional cases.[63]

[95] The environmental mandate of this Board requires the public interest be considered in appeals before the Board, and therefore the public interest will be considered in the

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

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

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

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

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

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

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 79.

balance of convenience.[64] The Board has, therefore, stated that the public interest is a 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."[65] The effect on the public may sway the balance for one party over the other.[66]

C. Analysis of Stay Request

1. Serious Issue

[96] 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.

[97] The Appellants raised concerns regarding the potential effect on groundwater and the quality of the air as a result of the proposed project. These are valid issues and are related to the Amending Approvals issued. Therefore, the Board accepts there is a serious issue to be tried, and the Appellants have met the first part of the test for a Stay.

2. Irreparable Harm

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

64 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."

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

66 The Court in *RJR MacDonald,* at paragraph 68, 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."

[98] In assessing irreparable harm, the Board looks at the effect of the project on both the Appellants and the environment. The Board generally does not grant a Stay unless there is some indication an ecosystem will be irreparably harmed, and attempts at repairing or reversing the work would cause more harm than good to the environment.

[99] One of the major issues in these appeals is the potential effect the dewatering of Ballachay Pit will have on the Appellants' groundwater wells. Impacts to a water system do not occur overnight; in most instances, the effect occurs over time. Therefore, during the time the Board will take to hear these appeals, it is unlikely the Appellants' water sources will be irreparably harmed. In addition, the water withdrawal allowed under the Amending Approval is for a finite period of time, reducing the potential for long term environmental effects.

[100] In this case, Yellowhead Aggregates stated it does not intend to be dewatering the Ballachay property until 2005. It is the Board's intent to have the matter decided as soon as possible, and in all likelihood, prior to Yellowhead Aggregates proceeding with the dewatering. If the dewatering is not taking place, the groundwater and surface water regimes should not be affected, and the Appellants' wells would not be negatively affected.

[101] Therefore, the Appellants will not suffer irreparable harm during the time the appeals are dealt with through the Board's process.

[102] One issue that was raised by the Appellants was the possible effect the project could have on the dust levels in the area and the health of the Appellants' families. The Board notes the concerns of the Belangers and the possible affect the operation may have on their children's health. The Board takes these concerns seriously.

[103] The Board acknowledges that health impacts can be difficult, if not impossible, to evaluate monetarily. However, the Board must also look at the extent of any possible harm the Appellants may suffer if the Stay is not granted.

[104] The time between now and the final decision being made will be relatively short. Any harm the Appellants would suffer within that time frame would be minimal. There was no indication of the amount of time, if any, they spend outdoors in the winter months. In assessing the Stay application, the effect on the Appellants has to be viewed in the narrower timeframe of the appeal period, not the life of the project. The Board anticipates the Appellants and their

families spend less time outdoors during the winter, thereby reducing the potential exposure to dust particulates. With limited exposure during the winter months, the Board does not believe the Appellants will suffer any irreparable harm if the Stay is not granted.

[105] In addition, the Appellants did demonstrate the connection between the proposed project and the actual health affects. Without that connection more clearly defined, the Board cannot grant a Stay on speculative effects.

[106] The Approval Holders must also abide by the conditions placed on them by the local municipality, including providing a $50,000.00 assurance bond to Sturgeon County in the event of an unacceptable drawdown of an adjacent well. These requirements provide additional protection to the Appellants.

[107] Therefore, the Appellants did not meet the requirements of the second element of the Stay test.

3. Greater Harm

[108] The damages the Approval Holders would suffer are easily calculated and can be compensated monetarily. Any costs it may incur if the project is not allowed to proceed, after the final decision from the Minister, is not a matter the Board considers in determining if a Stay should be granted.

[109] It is clear from the information provided by the Approval Holders that any harm associated with the granting of a Stay are inconvenience and economical in nature.

[110] However, this alone is not sufficient to find that a Stay should be granted. The Appellants still have the onus to demonstrate the balance of convenience warrants the granting of a Stay.

[111] If the Board recommends the project not proceed, or proceed with modifications, it will be the Approval Holder who will bear the costs of proceeding with the project now. It is the risk the Approval Holder has opted to accept, and it is not the Board's position to advise a company on these decisions.

[112] The Appellants live in any area where there are a significant number of gravel operations. The proposed project will bring these disturbances closer to their property and residences.

[113] As stated before, Yellowhead Aggregates explained they would not be dewatering the Ballachay Pit until later in 2005. The Stay would only be in place until the Minister makes his decision. Therefore, a Stay of the *Water Act* Amending Approval is not necessary for the Board will have, in all likelihood, completed the appeal process before the dewatering occurs.

[114] To demonstrate the Appellants will suffer the greater harm if the Stay is not granted, the Board needs something more concrete than stating there is the potential for contamination. A stay cannot be granted on mere speculation. Although the Board does not expect the Parties to provide all of their evidence regarding the issues at the time it is making its determination regarding the Stay, the Board needs enough information to go beyond general statements of concern.

[115] The Supreme Court stated in *American Cyanamid* that, when all things being equal, the status quo should be preserved. As the Appellants have failed to prove, at this point of the proceedings, that they 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.

[116] The concern that must also be weighed, as discussed below, is the potential concerns for public health, which is probably the Board's biggest concern.

4. Public Interest

[117] 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."

[118] 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…" and in this case the public authority, the Director representing Alberta Environment, does not take any position as to whether a Stay should be granted.

[119] The residents in the area are an identifiable group that may be affected by the project. However, as stated previously, any affect that may result from the project during the remaining appeal process will be limited, because at the end of the appeal process, either the project will be continuing as is or with further terms and conditions, or the operation will be forced to stop. The time before the recommendations are made and the Minister releases his decision will be minimal.

[120] The Federal Court of Canada in *North of Smokey Fishermen's Association* v. *Canada (Attorney General)*, [2003] F.C.J. No. 40, stated, "an action taken by the Crown is prima facie deemed to be in the public interest." The Court continued:

> "When a public authority is prevented from exercising its statutory powers, it can be said that the public interest, of which the authority is the guardian, suffers irreparable harm….
>
> In view of the role and responsibility of the Minister in authorizing a certain fishery and the inherent public interest in the Minister's decision, the public policy component of the Minister's decision is paramount and must prevail over the more private, and at this point, somewhat speculative concerns of the applicant."[67]

[121] The Director issued the Amending Approvals to allow the proposed project to proceed. He reviewed the applications and all of the supporting documents and determined there would be no significant affect on the environment and the public.

[122] In this case, the Board does not believe the public interest warrants the granting of a Stay. Although the Appellants raised legitimate and important issues, the Board must also

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[67] *North of Smokey Fishermen's Association* v. *Canada (Attorney General)*, [2003] F.C.J. No. 40 at paragraphs 24 to 26.

consider the area in which they live. The Appellants have other gravel operations in the vicinity, and as the proposed project will not be fully operational for a number of months, the Board does not anticipate any significant effects that would affect the general public during the time the appeals are heard. In addition, the Director is well aware of the environmental impacts a gravel facility could have on the area. If the public has valid concerns regarding the operation of the facility, they can submit their concerns to Alberta Environment, and they will investigate valid complaints.

[123] The Board will take all necessary steps to ensure the appeal is concluded as soon as possible for the Appellants' interest as well as for the Approval Holders.

5. Summary

[124] The Appellant has shown there is a serious issue to be decided and has, therefore, succeeded on the first element of the test. However, the Appellants failed to convince the Board they would suffer irreparable harm, or that on the balance of convenience they would suffer greater harm if the Stay was not granted than the Approval Holders would suffer if the Stay was granted. The Appellants did not provide sufficient evidence to convince the Board that their health will be affected during the time the appeals are heard and determined. Most importantly, the Board is not convinced that granting the Stay would be in the public interest. As a result, the Appellants' application for a Stay must fail.

[125] The Board intends to proceed with the appeal process as quickly and as fairly as possible.

IV. DECISIONS

[126] The Board finds all of the Appellants directly affected for the purpose of these appeals.

[127] However, the Board denies the Stay request of the Appellants, as they failed to demonstrate they would suffer irreparable harm during the time these appeals are heard. Although the Appellants showed there was an important issue to be heard, they did not demonstrate the public interest warrants the granting of the Stay.

[128] The Board intends to proceed with the appeal process as quickly as possible.

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

"*original signed by*"

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