ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Meeting – January 27, 2005
Date of Decision – June 30, 2005

IN THE MATTER OF sections 91, 92, 95, 97, and 98 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by Tartan Energy Inc. with respect to EPO No. 2005/03-NR and EPO No. 2005/04-NR issued under the *Environmental Protection and Enhancement Act* to Tartan Energy Inc., by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Tartan Energy Inc.* v. *Director, Central Region, Regional Services, Alberta Environment* re: *Tartan Energy Inc.* (30 June 2005), Appeal Nos. 04-123 & 124-ID1 (A.E.A.B.).

PRELIMINARY MEETING BEFORE: William A. Tilleman, Q.C., Chair.

APPEARANCES:

Appellant: Mr. Gordon Levang, Board of Directors, Tartan Energy Inc. and Mr. Donald McKechnie, Vice-President Finance, Tartan Energy Inc., represented by Mr. Alan Harvie, Macleod Dixon LLP.

Director: Mr. Albert Poulette, Director, Central Region, Regional Services, Alberta Environment represented by Mr. Jeffrey Moore, Alberta Justice.

Landowners: Mrs. Vivian Visscher, representing herself, Mr. Steve Visscher, Visscher Farms, Mr. Brian Cornelis, and Mr. John Peet; and Mr Robert Halvorson via written submission only.

Other Participant: Orphan Well Association via written submission only.

EXECUTIVE SUMMARY

Alberta Environment issued two Environmental Protection Orders (EPOs) under the *Environmental Protection and Enhancement Act* to Tartan Energy Inc. (Tartan) ordering that Tartan cleanup contamination found on seven oil and gas wells near Legal, Alberta. Tartan appealed the EPOs.

The Board held a Preliminary Meeting to hear oral arguments on the following issues:

1. The party status of Ms. Vivian Visscher, Mr. Brian Cornelis, Mr. John Peet, Mr. Robert Halvorson, and the Orphan Well Association, in these appeals;
2. The Appellant's request for a Stay;
3. The issues to be dealt with at a future hearing of these appeals; and
4. Whether the Hearing of these appeals should be held via written submissions and Agreed Statement of Facts.

The Board determined that Mr. and Ms. Visscher and Visscher Farms Ltd., Mr. Cornelis, Mr. Peet, and Mr. Halvorson, as landowners of the affected lands, are full parties to the appeals. The Board also determined the Orphan Well Association is a full party to the appeal on the basis that it is liable for the off-site remediation associated with three of the wells that are the subject of one of the EPOs.

The Board denied the Stay request with respect to one of the EPOs (EPO 2005/03-NR) as the balance of convenience and the public interest favoured denying the request. The Board granted the Stay request with respect to the other EPO (EPO 2005/04-NR) until June 1, 2005, as the balance of convenience and public interest favoured granting the request. The Board reserves the right to extend the Stay at that time.

The issues that will be heard by the Board at an oral hearing are:

1. Were the Environmental Protection Orders properly issued?
2. Is recission an available remedy in these circumstances to nullify the regulatory authority underlying the Environmental Protection Orders?

TABLE OF CONTENTS

I. BACKGROUND

[1] On March 16, 2005, the Director, Central Region, Regional Services, Alberta Environment (the "Director"), issued two Environmental Protection Orders, EPO-2005/03-NR ("EPO 03") and EPO-2005/04-NR ("EPO 04" and collectively the "EPOs"), under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA" or the "Act") to Tartan Energy Inc. (the "Appellant") with respect to seven well sites near Legal, Alberta.

[2] On March 23, 2005, the Environmental Appeals Board (the "Board") received Notices of Appeal and Stay applications for the EPOs from the Appellant.

[3] On March 23, 2005, the Board wrote to the Appellant and the Director acknowledging receipt of the Notices of Appeal and Stay applications, notifying the Director of the appeal, and asking the Appellant and the Director to provide available dates for a mediation meeting or a hearing. The Board also requested that the Director provide the Board with a copy of the documents (the "Record") relating to these appeals.

[4] According to standard practice, on March 31, 2005, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the Alberta Energy and Utilities Board (the "AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. On April 4, 2005, the NRCB responded in the negative.

[5] On March 31, 2005, the Board received a letter from the Director advising that Mr. John Peet, Mr. Brian Cornelis, and Mr. Steve Visscher and Ms. Vivian Visscher (collectively the "Landowners"), as well the Orphan Well Association (the "OWA"), may have an interest in these appeals. On the same date, the Board wrote to the Landowners to notify them that the Appellant had filed the Notices of Appeal and that, as the owners and or occupants of land that is the subject of the EPOs, they were potentially interested persons in these appeals. The Board requested the Landowners advise the Board in writing if they wished to have the Board hear their views on these matters and participate in the appeals, and if so, to provide their available dates to participate in a mediation meeting, a preliminary meeting, or a hearing. On the same date, the Board wrote to the OWA advising that it was identified by the Director as a potentially interested party to these appeals.

[6] On March 31, 2005, the Board also wrote to the Appellant and asked the Appellant for written comments as to whether the Stays should be granted. [1] The Board also asked the other participants in the appeal to comment on whether the Stays should be granted.

[7] The Board received a letter from the OWA on April 7, 2005, advising they were not in favor of the Stays being issued.

[8] On April 13, 2005, the Board confirmed in writing to the Appellant its understanding that the Director was not prepared to consent to either Stay. On that date, the Board also wrote to the Appellant, Director, and Mr. and Mrs. Visscher advising that a Preliminary Meeting would be held in place of the written submission process to address the Stays.

[9] On April 13, 2005, the Board wrote to Mr. Cornelis and Mr. Peet advising that the Board had not yet received a response to its letter of March 31, 2005, and the Board may proceed to make a decision without their input and without further notice to them. On April 14, 2005, the Board received a written submission from Mr. and Mrs. Visscher and Visscher Farms Ltd. (collectively the "Visschers") opposing the Stays and stating the Stays would cause them serious prejudice. On April 15, 2005, Mr. Cornelis and Mr. Peet advised the Board they also opposed the Stays.

[10] On April 14, 2005, the Board received a letter from counsel for Legal Oil and Gas Ltd. ("Legal") and the Estate of Charles Forster advising the Board that Legal and the Estate of Charles Forster had no interest in the Notices of Appeal.[2]

[11] On April 14, 2005, the Board received a letter from the AEUB advising that:

> "...The AEUB is currently considering an application made by Tartan Energy Inc. for a review, pursuant to section 39 of the *Energy Resources Conservation*

---

[1] The Board asked the Appellant to respond to the following questions:

1. What are the serious concerns of Tartan Energy Inc. that should be heard by the Board?
2. Would Tartan Energy Inc. suffer irreparable harm if the Stay is refused?
3. Would Tartan Energy Inc. suffer greater harm if the Stay was refused pending a decision of the Board on the appeals, than Mr. Peet, Mr. Cornelis and Mrs. Visscher (landowners) would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?

[2] The Board had contacted legal counsel for Legal and Mr. Forster because the Appellant argued in its Notices of Appeal that Legal and Mr. Forster are liable for the cleanup required under the EPOs.

Act, of the AUEB's decision made in 1997 granting the transfer of the following well licences from Legal Oil and Gas Ltd. to Tartan Energy Inc.

Licence	**Location**
No. 0006000	07-21-57-25 W4M
No. 0005712	03-21-57-25 W4M
No. 0005071	14-16V-57-25 W4M
No. 0006372	11-16V-57-25 W4M
No. 0003960	10-16V-57-25 W4M...."

The AEUB advised the Board that a decision with respect to the section 39 application was expected within the month.

[12] On April 15, 2005, the Board wrote to the Appellant, Director, Landowners, and the OWA (the "Parties") advising that a Preliminary Meeting would be held in Edmonton, Alberta, on April 27, 2005, and the following issues would be dealt with:

1. The participation of Mr. and Ms. Visscher, Mr. Cornelis, Mr. Peet, and the Orphan Well Association, in these appeals;
2. The Appellant's request for a Stay;
3. The issues to be dealt with at a future hearing of these appeals; and
4. Whether the Hearing of these appeals should be held via written submissions and Agreed Statement of Facts.

The Board requested that the Parties provide written submissions on these issues. The Board also advised the Parties of telephone conversations with Mr. Peet and Mr. Cornelis regarding their participation at the Preliminary Meeting.

[13] The Preliminary Meeting was held on January 27, 2005, and the Board heard from the Appellant, the Director, and Ms. Vivian Visscher on behalf of the Visschers, Mr. Peet, and Mr. Cornelis. The OWA participated by written submission only. Mr. Halvorson did not attend the Preliminary Meeting.[3]

---

[3] On April 21, 2005, the Board received further information from the Director with respect to the land titles. As a result, Mr. Halvorson was added as a Landowner. On the same date, the Board wrote to Mr. Halvorson advising him that he may be interested in the appeals, and he was provided with a copy of the Board's file. On April 22, 2005, Mr. Halvorson confirmed in person to the Board that he would be at the Preliminary Meeting, and he wished to reserve his right to attend and participate in the hearing of these appeals to ensure that his concerns were heard. At that time, Mr. Halvorson advised the Board that he takes no position with respect to the Stays.

II. SUBMISSIONS

A. Appellant

[14] The Appellant is a publicly traded corporation that carries on business in Alberta. The Appellant has discontinued its Canadian production operations[4] and is now focused on developing prospects in California and acquiring projects in Central Asia.[5] The Appellant is currently negotiating long term financing to fund these activities.[6]

[15] The Appellant submitted the Board should recommend to the Minister of Environment that the decisions of the Director be reversed and the EPOs quashed.[7] In the alternative, the Appellant asked to have the timelines for compliance with the EPOs extended.[8] The Appellant also made applications to the Board to Stay the EPOs until the issues raised in its Notices of Appeal were heard.[9]

[16] On the issue of participation by the Landowners in these appeals, the Appellant initially submitted that each Landowner should be permitted to participate in the appeals of the EPOs only with respect to the wells located on their individual land.[10] However, at the Preliminary Meeting the Appellant agreed to all of the Landowners participating fully in the appeals of both EPOs, subject only to the usual limitation of relevance.

[17] Similarly, the Appellant initially submitted that the OWA be permitted to participate only in the appeal of EPO 03 and only with respect to the three wells subject to EPO 03 deemed "orphan" wells for purposes of off-site remediation.[11] However, at the Preliminary Meeting the Appellant agreed to the OWA participating fully in the appeals of both EPOs, subject only to the usual limitation on relevance.

---

4 See: Appellant's submission, dated April 27, 2005, at paragraph 13.

5 See: Appellant's submission, dated April 27, 2005, at Tab 38, Tartan Energy Inc. Q3 Consolidated Financial Statements (unaudited), as at September 30, 2004.

6 See: Appellant's submission, dated April 27, 2005, at Tab 38, Tartan Energy Inc. Q3 Consolidated Financial Statements (unaudited), as at September 30, 2004.

7 See: Appellant's Notices of Appeal, dated March 22, 2005, at paragraph 53.

8 See: Appellant's Notices of Appeal, dated March 22, 2005, at paragraph 54.

9 See: Appellant's Notices of Appeal, dated March 22, 2005, at paragraphs 55 to 60.

10 See: Appellant's submission, dated April 27, 2005, at paragraphs 61 and 62.

11 See: Appellant's submission, dated April 27, 2005, at paragraph 65.

[18] The Appellant submitted the first step of the Stay test, that there is a serious issue to be tried, is met by the Appellant on the grounds of the appeals, including that the Director erred by:

> "(a) failing to consider and respect the effect of the Judgment;[12]
> (b) basing EPO-03 on a finding that Tartan is the licensee of the five wells;
> (c) basing EPO-04 on a finding that Tartan is a working interest participant in and the operator of the two wells; and
> (d) ignoring the Section 39 Application ... [to the AEUB to transfer the well licenses for the wells subject to EPO 03 back to Legal]." [13]

[19] The Appellant also submitted the Director ignored a prior agreement that the Appellant was not liable for off-site contamination when he issued the EPOs, because the EPOs require undertakings from the Appellant with respect to off-site contamination.[14] The Appellant argued the conflicting evidence on these matters dictate the need for a hearing; therefore, the threshold question of a serious question to be tried is met.[15]

[20] On the second step of the test, the Appellant argued that it will suffer irreparable harm if the Stays are not granted, because the persons actually liable for the cleanup of the well sites, who the Appellant submitted were Legal and the Estate of Charles Forster, are of "questionable financial status."[16] Accordingly, the Appellant submitted that it risks not being reimbursed for expenses incurred to cleanup the well sites. The Appellant submitted that its inability to collect on its judgment[17] against Legal and the Estate of Charles Forster and the fact that the OWA is undertaking off-site remediation work that Legal is liable for, is evidence the Appellant will not be able to recover its expenditures.[18]

[21] The Appellant further argued that it will also be unable to recover from the Director or the OWA because of statutory protection for individuals carrying out their duties or exercising their powers in good faith.[19]

---

12 See: *United Compass Resources Ltd.* v. *Legal Oil & Gas Ltd. and Charles W. Forster*, Court of Queen's Bench of Alberta, Action No. 9801-02985.

13 Appellant's submission, dated April 27, 2005, at paragraph 69.

14 See: Appellant's submission, dated April 27, 2005, at paragraph 72.

15 See: Appellant's submission, dated April 27, 2005, at paragraph 73.

16 See: Appellant's submission, dated April 27, 2005, paragraphs 75 to 76.

17 See: *United Compass Resources Ltd.* v. *Legal Oil & Gas Ltd. and Charles W. Forster*, Court of Queen's Bench of Alberta, Action No. 9801-02985.

18 See: Appellant's submission, dated April 27, 2005, at paragraph 76.

19 See: Appellant's submission, dated April 27, 2005, at paragraph 73.

[22] The Appellant submitted that even if it obtains reimbursement, there is a risk of irreparable harm from damage to the Appellant's reputation and goodwill from conducting work which arises from a contract the Court has said does not exist and from allocating cash flow to fund clean-up rather than publicly announced investments into producing assets.[20] The Appellant stated that compliance with the EPOs is also not in the Appellant's budget, and a requirement to spend significant funds to comply with the EPOs will require the Appellant to consider seeking creditor protection.[21]

[23] On the third step of the test, the Appellant argued the balance of convenience favours finding the Appellant would suffer the greater harm for a refusal of the Stays, because the land has been contaminated for a number of years through no fault of the Appellant, but rather as a result of inaction by the regulators.[22] At the Preliminary Meeting the Appellant argued that both the Landowners and the Appellant are victims, the Appellant of fraud by Legal and the Landowners of inaction by the regulators. The Appellant further submitted there is no evidence of imminent human or animal health concerns, and the Stays will only delay the clean-up for a short duration.[23]

[24] The Appellant questioned the motives of the Director in issuing the EPOs prior to the AEUB issuing its decision on the section 39 application to transfer the well licenses for the wells subject to EPO 03 back to Legal.[24]

[25] The Appellant also questioned the motives of the OWA in opposing the Stays because the OWA may eventually become liable for cleanup of the sites subject to the EPOs. The Appellant argued it was unreasonable for the OWA to oppose the Stay of EPO 03 in its entirety on the basis of risk of recontamination of off-site remediation work undertaken by the OWA when remediation work is currently underway for only one well and the OWA planned that work prior to EPO 03 being issued.[25]

---

20 See: Appellant's submission, dated April 27, 2005, at paragraph 79.

21 See: Appellant's submission, dated April 27, 2005, at paragraphs 80 and 81.

22 See: Appellant's submission, dated April 27, 2005, at paragraphs 84 to 86.

23 See: Appellant's submission, dated April 27, 2005, at paragraph 84.

24 See: Appellant's submission, dated April 27, 2005, at paragraph 88.

25 See: Appellant's submission, dated April 27, 2005, at paragraphs 89 to 91.

[26] The Appellant submitted that granting the Stays does not foreclose substantive rights.[26] However, the Appellant submitted denying the Stays would have the practical effect of putting an end to the appeals.[27]

[27] On the public interest component of the test, the Appellant submitted the key question for the Board to determine was how best to achieve the cleanup of the lands. The Appellant argued that, if the Stays are not granted, it may be forced to seek creditor protection, in which case it would take time to determine who is liable for the on-site cleanup, resulting in further delays to the remediation work. According to the Appellant, if the Stays are granted and the Appellant is found to be liable, it will have more time to complete financing negotiations and would, therefore, be in a better position to respond to the EPOs.

[28] The Appellant stated the impact of granting the Stays will not affect the whole oil and gas industry or the ability of Alberta Environment to regulate it through the issuance of orders.[28] The Appellant further stated that failing to grant the Stays would send the message that Alberta Environment may effectively ignore fundamental issues, such as the Appellant's section 39 application currently before the AEUB and the implications of the judgment from the Court of Queen's Bench.[29]

[29] On the matter of issues to be dealt with at the hearing of the appeals, the Appellant stated the 28 issues set out in its Notices of Appeal should be dealt with at the hearing.[30] The Appellant submitted it was not aware of any other issues with respect to the appeals.[31]

B. The Director

[30] The Director did not provide any additional comments from that provided by the Appellant regarding the participation of the Landowners and the OWA.[32]

---

26 See: Appellant's submission, dated April 27, 2005, at paragraph 92.

27 See: Appellant's submission, dated April 27, 2005, at paragraph 92.

28 See: Appellant's submission, dated April 27, 2005, at paragraph 94.

29 See: Appellant's submission, dated April 27, 2005, at paragraph 94.

30 See: Appellant's submission, dated April 27, 2005, at paragraphs 101to 102.

31 See: Appellant's submission, dated April 27, 2005, at paragraph 103.

32 See: Director's submission, dated April 21, 2005, at paragraph 1.

[31] The Director submitted the Stays should not be granted for the first requirement in the EPOs that require the Appellant prepare and submit an Investigation Plan for each of the well sites.[33] The Director was not opposed to granting the Stays for the balance of the requirements of the EPOs.

[32] The Director submitted the common law test for a stay application requires:

> "...[A]n appellant to establish:
> 1) there is a prima facie or serious triable issue;
> 2) the applicant will suffer irreparable harm if the stay is not granted; and
> 3) the balance of convenience favours a stay.
> All three arms must be established to qualify for a stay."[34]

[33] The Director argued the first requirement in the EPOS, the preparation of Investigative Plans, is "...not burdensome, time consuming or costly. Consequently, Tartan will not suffer irreparable harm in preparing and submitting these plans."[35]

[34] On the matter of issues to be dealt with at a future hearing of the appeals, the Director submitted the Notices of Appeal raised two issues:

> "1. What effect does rescission of a contract have on regulatory liability?
> 2. Alternatively, should the timelines imposed by the Director be extended?"[36]

[35] The Director further submitted the appeals would be most readily dealt with by way of written submission and, if necessary, the preparation of an agreed statement of facts.[37]

C. The Landowners

[36] The Landowners explained they each own land that is subject to the EPOs.[38]

---

33 See: Director's submission, dated April 21, 2005, at paragraph 1.

34 Director's submission, dated April 21, 2005, at paragraph 2.

35 Director's submission, dated April 21, 2005, at paragraph 2.

36 Director's submission, dated April 21, 2005, at paragraph 3.

37 See: Director's submission, dated April 21, 2005, at paragraph 4.

38 According to the information provided by the Appellant, the Visschers own the land where the following wells are located on: 10-16-57-25W4 (EPO 03); 11-16V-57-25W4 (EPO 03); 14-16V-57-25W4 (EPO 03); and 15-16-57-25W4 (EPO 04); Mr. Cornelis owns the land where the 3-21-57-25W4 well, which is subject to EPO 03, is located, and he also leases and farms land owned by Mr. Peet, including the land on which the 7-21-57-25W4 well, which is subject to EPO 03, is located; and Mr. Halverson owns and leases the land on which the 10-21-57-25W4 well, which is subject to EPO 04, is located.

[37] The Visschers, Mr. Cornelis, and Mr. Peet submitted they are directly affected by the appeals, because it is their land that is contaminated and the subject of the EPOs. Accordingly, the Visschers, Mr. Cornelis, and Mr. Peet requested standing.

[38] These Landowners were opposed to the Stay applications because they believed further delays remediating the sites are unacceptable and will cause serious prejudice to them. These Landowners submitted they are affected every day by the contamination on their lands. They stated there are losses of efficiency in their agricultural operations each year the contaminated areas must be worked around. These Landowners further submitted the contamination adds to the stresses agriculture is currently facing, such as the effects of "BSE" on cattle producers and record high fuel and fertilizer prices and record low crop returns.

[39] These Landowners also submitted there is a "legal cloud" over their lands because it is contaminated and the subject of an EPO. They explained this affects their ability to expand their operations, as financial institutions fear liability and interest rates are higher because of the risks associated with contaminated lands. These Landowners also believed the contamination affects their ability to sell their lands today and tomorrow. They stated this is aggravated by the high visibility of the off-site remediation work at the 10-16 location that is currently being carried out by the OWA.

[40] These Landowners further submitted that in order for the off-site remediation work at the 10-16 location to be effective, the on-site cleanup must also take place in order to prevent re-contamination of the off-site land and cause further harm and prejudice to the landowners.[39] Mrs. Visscher explained their wells for drinking and for their cattle are down gradient to the contaminated site, and she wanted the site cleaned up before the contamination reaches her wells.

[41] These Landowners also argued that the Board should take into account that the contamination of their lands occurred through no fault of their own:

> "It must be remembered that the Visschers did not invite the oil and gas activity onto their land. Alberta law currently gives oil and gas companies right-of-entry powers that allow the companies to enter onto private land and engage in environmentally risky operations despite the landowners' objections. Landowners

---

[39] See: Visschers' submission, dated April 14, 2005, at page 2.

> have no choice. They must accept the activity and, as this case so clearly illustrates, landowners are at the mercy of the company."[40]

[42] The Landowners represented by Mrs. Visscher argued the Stays should not be granted, and they suggested a reasonable solution by having the Appellant put the required money in a trust fund and the OWA continue with the cleanup. They stated if the Appellant wins on the issue of liability, the money will be returned; if the Appellant loses, the remediation is not delayed. They argued the dispute of liability should not delay the cleanup.

[43] Mr. Halvorson did not participate in the Preliminary Meeting, but he advised the Board that he wished to reserve the right to participate in the appeals. He also stated that he was not opposed to the Stay applications.

[44] The Landowners did not make submissions on the issues to be dealt with at the hearing or on any other issues with respect to the appeals.

D. The OWA

[45] The OWA explained it has been delegated the responsibility for remediating the areas *off-site* of the 10-16-57-25W4, 3-21-57-25W4, and 7-21-57-25W4 wells, all of which are subject of EPO 03. The OWA stated it is currently carrying out remediation efforts off-site of the 10-16-57-25W4 well site.

[46] The OWA submitted that its liability for off-site remediation for wells identified in EPO 03 is sufficient for the OWA to be permitted to participate in the appeal of EPO 03.[41]

[47] The OWA advised the Board it is opposed to a Stay of EPO 03 because of concerns that migration of on-site contamination from the 10-16 location will impact the OWA's work at that location.[42] The OWA explained its inability to quantify this impact to the Board:

> "Based on our observations of the 10-16 off site contaminants at the site boundaries, we feel strongly there will be [an] impact to our offsite remediation efforts from onsite contaminants. However, the OWA is unable to quantify the cost that will be caused by a delay in Tartan's remediation of the 10-16 onsite because Tartan has not provided sufficient data to fully characterize the 10-16 onsite contaminants to AENV. Tartan has also denied the OWA any kind of

---

40 Visschers' submission, dated April 14, 2005, at page 2.

41 See: OWA's submission, dated April 21, 2005, at page 1.

42 See: OWA's submission, dated April 21, 2005, at page 1.

> access to the site for the purpose of conducting subsurface site investigation at depths below 1m, which we proposed to conduct to help us understand the onsite contaminants so we could develop our own offsite remediation action plan."[43]

[48] The OWA further explained that costs to deal with contamination at this site will increase with delays because the special pricing it has negotiated for disposal of the contaminated soil in the landfill will expire in September 2005. This will result in an increase in the cost of landfill disposal from $12 per tonne to $18 per tonne.[44]

[49] On the issues to be dealt with at the hearing of the appeals, the OWA submitted that the possibility the sites may become orphan if the Appellant wins its appeals, should not be a matter considered by the Board. The OWA stated it is not automatic these sites will become orphan, as sites cannot be deemed orphan if there is an active responsible party for the site.[45] The OWA made no further submissions on any other issues related to the appeals.

III. STANDING

A. Legislation

[50] Section 95(6) of EPEA permits the Board to determine who can make representations before it. Section 95(6) states:

> "[T]he Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

Section 1(f)(iii) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993, also states the Board may determine who will be a party to an appeal. This section provides that "...'party' means any other person the Board decides should be a party to the appeal."

[51] The test for determining intervenor status is detailed in the Board's Rules of Practice. Rule 14 states:

> "As a general rule, those persons or groups wishing to intervene must meet the following tests:

---

43 OWA's submission, dated April 21, 2005, at pages 1 and 2.

44 See: OWA's submission, dated April 21, 2005, at page 2.

45 See: OWA's submission, dated April 21, 2005, at page 2.

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties...."

B. Analysis

[52] At the Preliminary Meeting the Appellant and the Director agreed that all of the Landowners and the OWA should be allowed to participate in these appeals. Their participation on all aspects of the EPOs would be subject only to the usual limitation as to relevance.

[53] The Board is of the view that as the owners or occupants of the land on which the well sites subject to the EPOs are located, the Landowners clearly have an interest in the subject matter of the appeals. The Landowners are opposed to the appeals filed by the Appellant, and the Board believes their intervention will not repeat or duplicate evidence provided by the Director or the Appellant.

[54] The OWA is responsible for the remediation of three off-site locations that may be affected by on-site contamination from wells subject to EPO 03. Therefore, the Board believes the OWA also has an interest in the subject matter of the appeals. The OWA is opposed to the appeal of EPO 03 and the Board believes its intervention will not repeat or duplicate evidence provided by the Director or the Appellant.

[55] For these reasons the Board accepts the agreement of the Director and the Appellant and accordingly has determined that the Landowners, being the Visschers, Mr. Cornelis, Mr. Peet, and Mr. and Mrs. Halvorson, and the OWA will be full parties for purposes of these appeals. The Board notes the OWA attended the Preliminary Meeting by written submission only. The Board requests the OWA participate fully in the hearing of the merits, including through the appearance of witnesses and through the filing of written submissions.

IV. STAY APPLICATIONS

A. Legal Basis for a Stay

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

[57] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski,*[46] *Stelter,*[47] and our recent decision in *Nault,*[48] is based on the Supreme Court of Canada case of *RJR MacDonald.*[49] 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."[50]

[58] The first step of the test has a low threshold. Based on the evidence submitted, the applicant requesting the Stay has to have some basis on which to present a substantive argument on the merits of the case. The applicant must show 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

---

46 *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.) ("*Pryzbylski*").

47 *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.) ("*Stelter*").

48 *Nault and Mitchell* v. *Director, Southern Region, Regional Services, Alberta Environment*, Preliminary Motions re: *Town of Canmore* (29 May 2004), Appeal Nos. 04-019 and 04-020-CD (A.E.A.B.) ("*Nault*").

49 *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.

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

Stay application, "...a prolonged examination of the merits is generally neither necessary nor desirable."[51]

[59] The second step in the test to determine whether a Stay is warranted requires the Board to decide whether the applicant requesting the Stay would suffer irreparable harm if the Stay is not granted.[52] Irreparable harm occurs when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant were to succeed at the hearing. It is the nature of the harm that is relevant, not its magnitude. The harm must not be capable of being quantified; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other. In *Ominayak* v. *Norcen Energy Resources*, 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."[53]

The party claiming that damages would be inadequate compensation must show there is a real risk that harm will occur. It cannot be mere conjecture.[54] The damage that may be suffered by third parties should also be taken into consideration.[55]

[60] 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."[56] The Board is required to weigh the burden that the Stay would have on the persons opposing the Stay against the benefit that the applicant for the Stay would receive. This is not strictly a cost-benefit analysis, but rather a weighing of significant factors. The Court has considered factors such as the cumulative effect of granting a Stay,[57] damage that may be suffered by third parties,[58] or if the reputation and goodwill of a party will be affected.[59]

---

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

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

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

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

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

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

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

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

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

[61] It has also been generally recognized that any alleged harm to the public is also to be assessed as part of the third stage of the test. In *Metropolitan Stores*, it was recognized the public interest is a special factor in constitutional cases.[60] The Board is of the view that this also true of environmental cases. The environmental mandate of this Board requires that the public interest be considered in appeals before the Board, and therefore the public interest will be considered as a separate step in addition to the balance of convenience analysis.[61]

[62] In making a determination on the public interest, the applicant for the Stay and the persons opposing the Stay are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. The public interest includes the "...concerns of society generally and the particular interests of identifiable groups."[62] The effect on the public may sway the balance for one party over the other:

> "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."[63]

B. Analysis

1. Serious Issue

[63] 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 must not be frivolous or vexatious. In its Notices of Appeal, the Appellant raised issues regarding the Director's statutory authority to issue the EPOs and whether rescission of the Appellant's agreement to purchase the wells listed in the EPOs is sufficient to nullify the statutory authority

---

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

61 See: *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 64, where the Court 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."

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

63 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 68.

of the Director. The Board accepts these are serious issues to be tried, and therefore the first part of the test for a Stay has been met.

2. Irreparable Harm

[64] In assessing irreparable harm, the Supreme Court of Canada stated the question is "...whether the refusal to grant relief could so adversely affect the applicant's own 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."[64] 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 it will suffer irreparable harm if the Stay is not granted.

[65] The Appellant submitted that refusing a Stay will cause the Appellant to suffer irreparable harm because the parties liable for the contamination will be unable to reimburse the Appellant for expenses incurred to comply with the EPOs. The Appellant submitted that Legal and the Estate of Charles Forster are actually liable for the contamination of the well sites set out in the EPOs and both are of "questionable financial status."[65] The Appellant's consent judgment against Legal includes the sum of $3,627,437.00 representing indemnification for the costs incurred by the Appellant for remediation of these well sites.[66] The Appellant did not provide the Board with evidence of the steps taken to enforce this judgment or of steps taken to seek compensation from Legal and the Estate of Charles Forster. However, for purposes of the Stay application, the Board is prepared to accept the fact the OWA has undertaken the off-site remediation for the locations in EPO 03 as evidence that the Appellant may not be able to recover its expenditures.

[66] Therefore, for the purposes of this decision, the Board is prepared to accept that the inability of the Appellant to collect damages from a party that may ultimately be held liable for the work done under the EPOs will result in the Appellant suffering irreparable harm if the Stay is not granted.

---

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

65 See: Appellant's submission, dated April 27, 2005, at paragraph 76.

66 See: *United Compass Resources Ltd.* v. *Legal Oil & Gas Ltd. and Charles W. Forster*, Court of Queen's Bench of Alberta, Action No. 9801-02985.

3. Balance of Convenience

[67] 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."[67] The Board is required to weigh the burden that granting the Stay would impose on the parties and the environment against the benefit the Appellant would receive from the Stay being granted. As the cases indicate, this is not a cost-benefit analysis, but rather a weighing of significant factors.

[68] The Parties agree the well sites that are the subject of the EPOs are contaminated. Everyone concedes a long history of efforts by the Landowners and the Director to have these sites cleaned up. The Appellant submits the AEUB and the Director have known that the land has been contaminated for many years, and any adverse effects suffered by the Landowners from the delays are the result of regulators, not the Appellant. The Appellant also argued the Board should take into consideration that the Appellant was a victim of fraud when it entered into the agreement to purchase the wells.

[69] The Board has some difficulty giving significant weight to this argument for EPO 03 based on the Appellant's own submissions. The Appellant stated that *after* becoming fully aware of the environmental concerns with the well sites that are the subject of EPO 03, the Appellant, through its legal counsel, entered into a written agreement with Alberta Environment (then Alberta Environmental Protection). In the written agreement, the Appellant accepted responsibility for the on-site remediation of these well sites *regardless of when the contamination occurred* provided the Appellant obtained the licenses to these wells.[68] At the request of the Appellant, the AEUB subsequently transferred these well licenses to the Appellant.

[70] On the other hand, the Landowners submitted they are affected every day by the contamination on their lands. The Landowners stated because there are losses of efficiency in their agricultural operations that are incurred each year the contaminated areas must be worked around, and the current record high fertilizer and fuel prices aggravate these losses. Further, they argued there is a "legal cloud" over their lands because it is subject to the EPOs. This affects the

---

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

68 See: Appellant's submission, dated April 27, 2005, at Tabs 16 and 17.

Landowners' ability to use their lands for security to finance their agricultural operations and limits their ability to expand their operations. When the Landowners do obtain financing, it is at higher interest rates because of the higher risks associated with contaminated lands.

[71] Ms. Visscher, the spokesperson for the Landowners, explained her children are now old enough to work the land; however, her family cannot expand their farming operation because of the response of financial institutions to the contamination and potential liability associated with their land. Ms. Visscher stated the OWA has started the off-site remediation work for the 10-16 location. She explained this land is adjacent to Highway 2, and the process of removing significant amounts of contaminated soil is drawing further attention to the contamination. Ms. Visscher believed any further delays in the remediation efforts will further prejudice the Landowners, which is unacceptable to her and the Landowners she represents. The Board accepts these concerns are real and immediate.

[72] The Board also accepts the Landowners' submission that they did not invite the oil and gas activity onto their land and played no part in the contamination of their land. Rather, they were required to accept that oil and gas companies have the right to enter onto privately owned land and engage in activities, which may result in contamination, despite the objections of the landowner. These are significant factors the Board believes must be taken into account in considering the balance of convenience between the Landowners and the Appellant with respect to a request for a Stay.

4. The Public Interest

[73] 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."[69]

[74] The Appellant submitted the oil and gas industry and the public would benefit from the Stay, because the Director should not be permitted to ignore the fact that a fundamental

---

69 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 68.

issue, in the form of the Appellant's section 39 application, is before the AEUB, nor should the Director be permitted to ignore the implications of a decision of the Court when issuing a cleanup order. The Appellant submitted these benefits would flow to the public without negatively affecting the Director's ability to regulate the oil and gas industry.

[75] At the Preliminary Meeting, the Appellant stated the real question in determining the public interest was how the lands would eventually be cleaned up. The Appellant submitted that in its current financial circumstances, the burden of complying with the EPOs may cause the Appellant to seek creditor protection as it requires additional time to ensure that it has the necessary financial resources to carry out the EPOs should it be found liable. The Appellant noted that it had voluntarily spent money on these sites in the past to abandon the wells and carry out studies, and the Board should consider this when making its decision.

[76] The Supreme Court in *RJR MacDonald* also directs the Board to look at the authority that is charged with the duty of promoting or protecting the public interest for proof that the action has been taken in the interest of the public. The Supreme Court held that for a public authority such as the Director, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant such as the Appellant. The public interest test will nearly always be satisfied simply upon proof that the public authority is charged with the duty of promoting or protecting the public interest – in this case the environment - and upon some indication the legislation, regulation, or activity was undertaken pursuant to that responsibility. Therefore, the issuance of the EPOs by the Director is sufficient to demonstrate to the Board the EPOs are in the public interest.

[77] Initially, the Director opposed the granting of the Stay with respect to the preparation of "Investigative Plans," as set out in the first requirement of both EPOs. However, at the Preliminary Meeting, the Director agreed there were different issues, including environmental protection issues, with respect to each of the EPOs.

[78] The Appellant has completed considerable work on remediation studies and plans for the wells identified in EPO 03.[70] The Director submitted that the Appellant's burden of complying with EPO 03 is a matter of "filling in the gaps" in these plans. In addition, the

---

[70] See: Tartan, written submission, dated April 27, 2005, at Tabs 29 to 31, Hood Environmental Report of May 2002, Hood Environmental Report of February 2004 for 10-16 Well, and Hood Environmental Report of February 2004 for 7-21 Well.

Director advised the Board the OWA is in the midst of dealing with a sizeable portion of the contamination off-site of the 10-16 location, for which on-site remediation is included in EPO 3. The Director submitted it is in the best interest of the environment to have this site dealt with in its entirety.

[79] This is consistent with the written submission of the OWA. The OWA objected to the granting of a Stay of EPO 03 because migration of on-site contamination from the 10-16 location may impact the off-site remediation efforts currently being undertaken by the OWA.[71] The OWA stated it was unable to quantify the cost of the delay because the Appellant has not provided sufficient data to the Director to fully characterize the contamination at the 10-16 site, and the Appellant has denied the OWA access to the site for the purpose of conducting the necessary investigations.[72] However, the OWA advised the Board that the costs of dealing with contamination migration from the 10-16 location onto the off-site area will increase with any delay, because the special pricing it has negotiated for the disposal of the contaminated soil in the landfill will expire in September 2005. This will result in an increase in the cost of the landfill disposal from $12 per tonne to $18 per tonne.[73] A 50 percent increase in the cost of removal is clearly significant.

[80] The current circumstances of the 10-16 location demonstrates the practical problem of distinguishing between "on-site" and "off-site" contamination and remediation. The Board accepts that, not only are there economic disadvantages to the Landowners and the OWA from granting a Stay of EPO 03, but most importantly, a coordinated cleanup approach is necessary to solve the overall environmental problem for the individual Landowners and their lands. Such an approach is in the interests of the public generally. The Board believes the work already done by the Appellant for the well sites in EPO 03 is such that the financial burden of complying with EPO 03 until there is a hearing on the merits of the issues is not overly onerous for the Appellant. This is particularly so given the commitment of the Parties and the Board at the Preliminary Hearing to hold a hearing on the merits as quickly as possible, subject to ensuring a fair hearing. For these reasons, the Board finds the balance of convenience and public interest in the matter of the Stay for EPO 03 requires the Stay be denied.

---

71 See: OWA's submission, dated April 21, 2005, at paragraph 3.

72 See: OWA's submission, dated April 21, 2005, at paragraph 3.

73 See: OWA's submission, dated April 21, 2005, at paragraph 3.

[81] In contrast to EPO 03, the Director does not have detailed information for the two wells that are the subject of EPO 04, and the OWA is not currently involved in any remediation of these locations. While the Director believes the investigative work required by EPO 04 is important to delineate the extent of the contamination on these two well sites and to determine if the contamination is migrating off-site, the Director agreed that a *short* Stay of EPO 04 is not likely to result in significant harm to the environment.

[82] Giving consideration to the Director's views on a Stay of EPO 04, the fact that no off-site remediation is currently planned for the locations that are the subject of the on-site remediation required by EPO 04, and recognizing the significant amount of work the Appellant would be required to undertake to delineate the extent of the contamination of these two well sites and the financial burden this may place on the Appellant, the Board finds the balance of convenience and public interest supports the Appellant's application for a Stay of EPO 04.

5. Additional Comments

[83] At the Preliminary Meeting, the Appellant expressed concern that a loss on the Stay application is a loss on the merits. With respect, the current Stay decision is not a determination of the merits of the issues raised in the Notices of Appeal. The only issue the Board is dealing with in this decision is the Appellant's application for a Stay. In considering an application for a Stay, the Board is directed by the Supreme Court of Canada not to undertake a prolonged examination of the merits of the appeal and the Board has not done so. The substantive merits are still to be heard by the Board, and it makes no judgment on these matters until the issues are heard.

C. Summary

[84] The Appellant has shown there are serious issues to be decided and, therefore, have succeeded on the first element of the test for a Stay. For the purposes of the application for the Stay, the Board is also prepared to accept that the Appellant may suffer irreparable harm if the Stay is not granted. However, the deciding factor for the Board is its determination on the balance of convenience between the Parties and the public interest.

[85] In the case of EPO 03, the Board has determined that given all of the circumstances, including the studies undertaken by the Appellant and the remediation work now being undertaken by the OWA, a coordinated approach to the remediation of on-site and off-site contamination is in the best interests of the environment, the Landowners, and the public. Therefore, the application for a Stay of EPO 03 is denied.

[86] Considerably more work is required to delineate the remediation requirements for the sites in EPO 04, and while it is imperative this work be done and the sites remediated as soon as possible, a short Stay is not likely, in the Board's judgment, to harm the environment. Given the financial burden that complying with EPO 04 may place on the Appellant, the Board has determined the balance of convenience and public interest favours the Board granting a Stay for EPO 04. The Board therefore grants a Stay of EPO 04 until June 1, 2005, and reserves the right to extend the Stay as necessary.

V. ISSUES TO BE DEALT WITH AT HEARING OF APPEALS

A. Legislation

[87] Section 95 of EPEA authorizes the Board to set the issues for a hearing. Section 95 provides:

> "(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters, included in a notices of appeal properly before it will be included in the hearing of the appeal...
> (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representation may be made on that matter at the hearing."

B. Analysis

[88] At the Preliminary Meeting the Parties agreed the issues at the hearing of the appeals should be:

1. Were the Environmental Protection Orders properly issued?
2. Is recission an available remedy in these circumstances to nullify the regulatory authority underlying the Environmental Protection Orders?

[89] The Board accepts these as the proper issues to be heard at the hearing of these appeals. Pursuant to section 95(4) of EPEA, the Board reminds the Parties that representations on other matters may not be made at the hearing of these appeals.

[90] The Board agrees with the Director and the Appellant that an agreed statement of facts and written submissions will be filed in preparation for the hearing of these issues. The Board encourages all of the Parties to work together to develop an agreed statement of facts, and the Board will provide a schedule for the filing of the agreed statement of facts and written submissions.

VI. BOARD'S JURISDICTION AND THE AEUB

[91] Under section 95(5)(b)(i) of EPEA, the Board does not have jurisdiction to hear an appeal, if, in its opinion, the person had an opportunity to participate in a hearing or review and all of the matters in the Notice of Appeal have been adequately dealt with by the AEUB.[74] On April 18, 2005, the Board wrote to the Parties indicating that there did not appear to be issues in relation to section 95(5)(b)(i) of EPEA arising from the AEUB letter of April 14, 2005. This letter advised the Board that the AEUB was considering an application made by the Appellant for a review, pursuant to section 39 of the *Energy Resources Conservation Act,* of its 1997 decision to grant the transfer of the licenses for the five wells subject to EPO 03 from Legal Oil and Gas Ltd. to Tartan Energy Inc. The Board asked the Parties to address this matter at the Preliminary Meeting.

[92] At the Preliminary Meeting, the Parties submitted that they were not aware of any matter that would affect the Board's jurisdiction to address the appeals because of the involvement of the AEUB. As a result, the Board concludes that, at this time, there is no concern to impede the Board's jurisdiction pursuant to section 95(5)(b)(i) of EPEA.

---

[74] Section 95(5)(b)(i) states:

"The Board...

(b) shall dismiss a notice of appeal if in the Board's opinion

(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act,* under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with...."

VII. CONCLUSION

[93] The Board determined the Landowners, being the Visschers, Mr. Cornelis, Mr. Peet, and Mr. Halvorson, as well as the OWA are full parties to these appeals, subject only to the usual limitation on relevance.

[94] Pursuant to section 97 of EPEA, the Appellant's application for a Stay with respect to EPO 03 is denied. The Appellant's application for a Stay with respect to EPO 04 is granted until June 1, 2005, and the Board reserves the right to extend the Stay as necessary. The Board will take every effort to ensure the appeals are heard as expeditiously as possible and, as indicated at the Preliminary Meeting, the Board has determined these appeals will be heard on May 30 and 31, 2005.[75]

[95] The issues that will be heard by the Board are:

1. Were the Environmental Protection Orders properly issued?
2. Is recission an available remedy in these circumstances to nullify the regulatory authority underlying the Environmental Protection Orders?

The Board orders that representations on other matters will not be permitted at the hearing.

[96] The Board concludes section 95(5)(b)(i) of EPEA does not apply in these appeals.

[97] An agreed statement of facts and written submissions will be prepared by the Parties to aid in the hearing of these appeals. The Board will provide the Parties with a schedule for these filings.

Dated on June 30, 2005, at Edmonton, Alberta.

Dr. William A. Tilleman, Q.C.
Chair

[75] The Board notes that it scheduled a hearing of these appeals for May 30 and 31, 2005, and at the request of the Parties, the hearing was adjourned and a mediation meeting was held at which the majority of the issues in these appeals were resolved.