

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 28, 2013

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 Gull Lake Water Quality Management Society, Chris Simard, and Rich Thul with respect to *Water Act* Approval No. 00292313-00-00 and *Water Act* Licence Nos. 00293413-00-00 and 00293311-00-00 issued to Delta Land Co. Inc. by the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Stay and Issues Decision: *Gull Lake Water Quality Management Society et al. v. Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Delta Land Co. Inc.* (28 March 2013), Appeal Nos. 12-019-030-ID2 (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Panel Chair;
Dr. Dan Johnson, Board Member; and
Dr. Nick Tywoniuk, Board Member.

SUBMISSIONS BY:

Appellants: Gull Lake Water Quality Management Society,
Mr. Chris Simard, and Mr. Rich Thul.

Approval Holder: Delta Land Co. Inc., represented by Mr. Lance
Dzaman.

Director: Mr. Todd Aasen, Director, Central Region,
Operations Division, Alberta Environment and
Sustainable Resource Development,
represented by Ms. Erika Gerlock, Alberta
Justice and Solicitor General.

Witnesses:

Appellants: Mr. Craig MacLeod, Gull Lake Water Quality
Management Society.

Approval Holder: Mr. Lance Dzaman; Mr. Michael Richards,
Richards Consulting; and Mr. Aaron Majcan,
Dirtworks Inc.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an approval to Delta Land Co. Inc. under the *Water Act* for the construction and maintenance of a marina, beach, and fisheries enhancement works and a second approval for the construction and maintenance of a storm water management system and the modification of two wetlands. The marina includes an inland marina and a channel connecting the inland marina to Gull Lake. AESRD also issued two licences under the *Water Act* to Delta Land Co. Inc. to operate a works and divert water for the purpose of a recreational vehicle resort and irrigation of a golf course. The approvals and licences apply to a site located at Gull Lake in Lacombe County.

Gull Lake Water Quality Management Society, Chris Simard, and Rich Thul appealed the issuance of the approvals and licences and requested a stay. The Board granted the stay on December 20, 2012, pending completion of the submission process. On January 31, 2013, the Board confirmed the stay was to remain in place until the appeals were heard. Delta Lands subsequently applied to the Board to lift the stay.

The Board held an oral preliminary hearing on February 25, 2013, to hear submissions on this application and on the determination of the issues to be dealt with at the hearing on the merits of the appeals. The Board denied the application to lift the stay. It found the test for the granting of a stay continues to be met. There is a serious issue to be heard in these appeals; there is a potential for irreparable harm to Gull Lake if certain aspects of the work are not stayed; and the balance of convenience and the public interest favour leaving the stay in place pending decisions on the appeals.

The Board determined the issues for the upcoming hearing are:

1. What are the environmental impacts of the construction and operation of the marina?
2. Will there be unacceptable increases in sediments or erosion as a result of the construction and operation of the marina?
3. Can the aquifer sustain the volume of water allocated?
4. Will drawing water from Well A negatively impact Gull Lake?
5. What will be the impacts on Gull Lake, if any, on using water from Wells B and C?

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's decisions and reasons for denying an application to lift the stay currently in place in respect of Approval No. 00292313-00-00 (the "Approval") issued to Delta Land Co. Inc. (the "Approval Holder" or "Delta Land"). Alberta Environment and Sustainable Resource Development ("AESRD") issued the Approval to Delta Land under the *Water Act*, R.S.A. 2000, c. W-3, for the construction and maintenance of a marina, beach, and fisheries enhancement works and a second approval for the construction and maintenance of a storm water management system and the modification of two temporary wetlands.¹ The marina includes an inland marina and a channel connecting the inland marina to Gull Lake. AESRD also issued two licences under the *Water Act* to Delta Land to operate a works and divert water for the purpose of a recreational vehicle resort and irrigation of a golf course.² The approvals and licences apply to a site located on Gull Lake in Lacombe County. The Gull Lake Water Quality Management Society (the "Society"), Mr. Chris Simard, and Mr. Rich Thul (collectively, the "Appellants") appealed the issuance of the licences and approvals.

[2] The issue before the Environmental Appeals Board (the "Board") is whether the stay of the Approval allowing for the construction of the marina, beach, and fisheries enhancement work should be lifted. The stay had initially been applied for by the Appellants and had been granted on the basis the Board considered there was the potential of irreparable harm occurring to the bed, bank, and shore of Gull Lake if work proceeded prior to a hearing on the substantive arguments. The initial basis for the Stay was, in the Board's view, whether the Appellants are successful in whole or in part, the Approval Holder will not be able to undo certain work done under the Approval in any meaningful way.

[3] The Board held an oral preliminary motions hearing to hear arguments on whether the stay should be lifted. The Board also used this preliminary hearing to deal with submissions from the parties as to determine the issues for the subsequent hearing on the merits of the

¹ The appeals of the approval for the construction and maintenance of a storm water management system and the modification of two temporary wetlands were dismissed. See: Board's letter dated January 31, 2013.

² The Licences issued are not part of the Stay. The Stay only applies to construction work allowed under the Approval for the marina.

appeals. Following this oral hearing, the Board remains of the view that the Stay should remain in place until the appeal process is complete.

II. BACKGROUND

[4] On August 3, 2012, the Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued Approval No. 00292313-00-00 under the *Water Act* to the Approval Holder. The Approval allows for the construction and maintenance of a marina, beach, and fisheries enhancement works at Gull Lake in Lacombe County. The Director also issued Licence Nos. 00293413-00-00 and 00293311-00-00 (the "Licences") under the *Water Act* to the Approval Holder allowing the operation of a works and the diversion of up to 38,725.0 and 23,554.0 cubic metres of water annually from well ID 341921 ("Well C") and well 941922 ("Well B"), and well ID 341923 ("Well A"), respectively, at NE 01-41-01-W5M for recreational purposes (a recreational vehicle resort) and for irrigation of a golf course.

[5] Between September 10 and 14, 2012, the Board received Notices of Appeal from the Appellants appealing the Approval and Licences.

[6] On September 18, 2012, the Board wrote to the Appellants, Approval Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and Director of the appeals.

[7] On October 23, 2012, the Board notified the Parties that, after consultation with the Parties, a mediation meeting would be held on December 4, 2012. On November 14, 2012, the Director requested an adjournment of the mediation meeting. The Board granted the request.

[8] On December 14, 2012, the Board notified the Parties that the mediation meeting was re-scheduled to April 16, 2013.

[9] On December 13, 2013, the Board received a request for a Stay from Mr. Thul and the Society. Mr. Thul and the Society were asked to provide a response to the Stay

questions.³ On December 19, 2012, the Board received the response to the Stay questions from Mr. Simard.

[10] On December 20, 2012, the Board granted a temporary Stay pending receiving submissions on the Stay from all of the Parties. Under the temporary Stay, the Approval Holder was prohibited from conducting any work or activities on the bed, bank, and shore and in the waters of Gull Lake, including but not limited to: (1) the building of a boat launch in the lake; (2) the excavation of the channel; (3) the stripping of the shoreline to create a beach; and (4) no materials of any kind were to be placed on the bed, bank, and shore of the lake. The Board requested the Approval Holder and Director respond to the Stay questions.

[11] On January 9 and 10, 2012, the Board received comments from the Director and Approval Holder, respectively. The Appellants did not provide a rebuttal submission.

[12] The Board held a mediation meeting via telephone on January 24 and 25, 2013. No resolution was reached.

[13] The Board notified the Parties on January 31, 2013, that the Stay would remain in place under the same conditions specified on December 20, 2012.

[14] The hearing of the appeals was set for February 25, 2013.

[15] On February 4, 2013, the Board asked the Parties to provide comments regarding the issues the Board identified as being within the Board's jurisdiction and those issues that were not properly before the Board. Comments were received from the Parties on February 6 and 7, 2013.

[16] On February 7, 2013, the Approval Holder requested the Board hear arguments on lifting the Stay.

³ Mr. Thul and the Society were asked to respond 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?
3. Would the Appellants suffer greater harm if the Stay was refused pending a decision of the Board, than Delta Land would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are the Appellants directly affected by the Approvals and Licences? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected.

[17] In response to the request, on February 8, 2013, the Board notified the Parties that the hearing set for February 25, 2013, would not be a hearing on the merits. The Board was concerned some of the Parties may not have sufficient time to prepare full and proper submissions on all of the issues in time for the hearing. Instead, the Board set a preliminary motions hearing to hear submissions on the issues for the hearing on the merits and to address the Approval Holder's application to lift the Stay.

[18] The Board held a preliminary motions hearing on February 25, 2013, in Edmonton.

[19] The Board notified the Parties on March 5, 2013, that the application to lift the Stay was dismissed with reasons to follow.

[20] These are the Board's reasons for dismissing the application and discussion and identification of the issues for the hearing on the merits.

III. ISSUES FOR THE HEARING ON THE MERITS

A. SUBMISSIONS

1. Board Letter

[21] On February 4, 2013, the Board wrote to the Parties outlining what it believed were relevant issues for the hearing on the merits and which issues were not within the Board's jurisdiction. The Parties were asked to provide comments on the issues listed by the Board.

[22] The issues identified in the Board's letter are reproduced below:

"The Marina Approval

Based on an initial review of the Notices of Appeal, it appears the following are valid issues to be considered with respect to the marina approval:

- (a) the size (footprint) of the marina and its related environmental impact;
- (b) the impact of the marina and its construction on habitat for birds and fish and on sport fishing;
- (c) the potential for erosion, soil compaction, and growth of weeds caused by the marina and its construction;
- (d) the potential impact on water quality in the lake resulting from the reduction in

- the sedge meadows;
- (e) the potential increase of sedimentation and release of 'toxic materials', including from boats, into the lake resulting from the marina;
- (f) the design of the marina, which may result in the need for dredging when water levels are low;
- (g) the potential impact of 'muddy water' and fill material being place[d] in surrounding areas during the construction of the marina; and
- (h) the ability to comply with conditions 3.2, 3.3, 3.6, and 4.0 of the approval.

Well Licences

Based on an initial review of the Notices of Appeal, it appears the following are valid issues to be considered with respect to the water well licences:

- (a) the volume of water allocated in the licences;
- (b) the adequacy of the groundwater assessment regarding the peak daily capacity, the productive capacity, and the sustainability of the water supply;
- (c) the assessment of the amount of water that is needed for the development;
- (d) the connectivity between Well A and the lake, and will drawing water from Well A negatively impact the lake; and
- (e) the impact of return flows to the lake, particularly from Wells B and C, which are said to be high in sodium and sulphate levels.

Issues Not Properly Before the Board.

Based on an initial review of the Notices of Appeal, it appears the following are not valid issues to be considered at the hearing of these appeals:

- (a) abuse of process arguments;
- (b) any issues relating solely to the 'campground' portion of the development, including but not limited to its size, design, density, and use of phased construction;
- (c) any issues relating solely to the 'campground' portion of the development, including but not limited to the removal of trees, impacts of native vegetation, potential for soil erosion, potential impacts on the water quality of the lake, the need for the storm water management system and sewage management system, and any impacts on the use and development of property;
- (d) any impacts on property values resulting from the campground portion of the development or the marina;
- (e) any issues related to communication, including but not limited to communications with Alberta Environment and Sustainable Resource Development, consultation with Delta Lands Co., and communications regarding the change in the project design;
- (f) any municipal planning issues, including the municipal approval and permitting process;

- (g) any impacts from the number and density of boats on the lake, including any safety issues regarding boats on the lake, but not including the impacts of discharges or other direct impacts on the environment from the boats;
- (h) the compliance with the Gull Lake Integrated Development Plan ('IDP'), although information in the IDP can be used as evidence to support a valid issue;
- (i) the visual appearance of the "campground" portion development or the marina;
- (j) the choice and qualifications of the consultants; and
- (k) the fitness of wells B and C for human consumption and irrigation." [Footnotes omitted.]

2. Appellants

[23] The Society agreed with the Board's list of proposed issues for the appeals of the Approval and the Licences.

[24] The Society agreed issues (d), (f), (g), (h), and (i) in the list of Issues Not Properly Before the Board (the "Exclusion List") should be excluded.

[25] The Society submitted issues (a) and (e) on the Exclusion List should be heard at the hearing. The Society said it was concerned about what it described as an abuse of process in the original authorizations of the Approval and Licences. The Society stated the Approval Holder withheld information when the information was requested, and the Director did not return calls and requests. The Society argued concerned citizens have a right to receive complete information relating to the application.

[26] The Society submitted issues (b), (c), (j), and (k) on the Exclusion List should be considered by the Board. The Society argued the issues of density, lot sizes, and total number of lots are directly related to environmental impacts, particularly as they relate to boating density and impacts, vegetation removal, wildlife impacts, aquifer impacts, and sewage disposal. The Society stated subdivided permanent recreational vehicle lots are different than a campground with different hard surfacing and lot coverage ratios and the possibility of year round residents.

[27] The Society stated the Director relied on reports from consultants who did not have the required expertise.

[28] The Society argued the suitability of Wells B and C for human consumption and irrigation must be heard. The Society stated the poor quality of the water from these wells will require the Approval Holder to rely only on Well A, which is hydraulically connected to the lake.

The Society stated the Approval Holder has not shown there is enough water for the size of the development.

[29] The Society submitted the following evidence would also be relevant:

1. actual water peak day and average day requirement to serve the development to establish how much water the development requires and the impacts on aquifers;
2. if the water will be used for irrigation and if there will be year round domestic use;
3. an outline plan on sewage disposal given the potential impact on the lake with sensitive water quality; and
4. evidence on the critical habitat for fish and waterfowl in the location of the development and studies done on the environmental aspects of the development.

[30] Mr. Simard agreed all the issues listed for the Approval and Licences are properly before the Board.

[31] Mr. Simard agreed issues (d), (f), (h), and (i) listed under the Exclusion List are not issues that can be heard at the hearing.

[32] Mr. Simard disagreed that issues (a), (b), (c), (e), (g), (j), and (k) are not properly before the Board.

[33] Beyond the issues identified by the Board in its February 4, 2013 letter, including the issues the Board identified in the Exclusion List, the Appellants did not request any additional issues be considered.

3. Approval Holder

[34] The Approval Holder accepted the issues for the Approval as described by the Board.

[35] The Approval Holder agreed with the issues for the Licences except it asked that issue (e) be deleted. The Approval Holder submitted that this issue refers to raw groundwater quality, but all groundwater used under the Licences will be treated to meet or exceed all

requirements set by AESRD. The Approval Holder stated its applications for a water treatment plant have been submitted to the Director for approval.⁴

[36] The Approval Holder agreed with the Board's determination of the issues not validly before the Board.

4. Director

[37] The Director took no position with respect to issues (b), (c), (d), (f), (g), and (h) of the issues listed for the Approval.

[38] With respect to issue (a) of the Approval issues listed by the Board, the Director stated the size of the marina's physical footprint and its potential environmental impacts can be properly considered at the hearing. However, the Director submitted that this issue should not be expanded to include submissions on the number of boat slips as a measure of the marina size because this evidence would relate to density of the development and increased boat traffic on the lake, which are not proper issues for the hearing.

[39] The Director submitted that issue (e) should not be an issue for the hearing. The Director stated the issue of the release of toxic substances, such as petroleum products used by boats, into the lake cannot be addressed under the Approval, as the regulation of marinas and boats, including associated environmental issues, are under federal jurisdiction. The Director stated releases into the environment generally can be addressed provincially under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-13 ("EPEA"). The Director suggested issue (e) be restricted to be only in relation to the amount of sedimentation that could enter the lake resulting from the marina.

[40] With respect to the issues listed regarding the Licences, the Director did not object to issues (a), (b), (d), or (e).

[41] The Director submitted issue (c) should not be considered at the hearing. The Director explained the Licences provide for an allocation of water based on a detailed assessment of the hydrogeological information and estimate of water needs supplied by the Approval Holder

⁴ At the hearing, the Director's counsel indicated the water treatment plant would likely be authorized by way of a Registration, which is not appealable.

in support of its application. The Director noted the Approval Holder cannot divert water above the allocated amount even if its water demands increase. If the Approval Holder underestimated its water demand, the Approval Holder would have to apply for another water licence, demonstrate its legitimate need for additional water, and undergo another full technical review by the Director prior to diverting any additional groundwater. Therefore, according to the Director, the amount of water required for the development into the future is not relevant to the current Licences.

[42] The Director noted he was in the process of correcting a clerical error made on the Licences. He explained the Approval Holder will only be using treated wastewater for irrigating the golf course, not fresh groundwater, so the Director is removing “irrigation” from the purpose sections of the Licences.

[43] The Director agreed all the issues listed by the Board as not being proper issues for the hearing are either within the jurisdiction of other regulators, are planning and development matters, or are not environmental issues over which the Director or the Board have any legislative authority.

B. Analysis

[44] In order for an issue to be validly before the Board, it must be mentioned in the Notice of Appeal and it must be within the Board’s jurisdiction.

[45] In the Board’s February 4, 2013 letter, the Board outlined issues it considered were valid issues and those which the Board did not have jurisdiction to hear. The Parties agreed with most of the issues identified for the Approval and Licences and did not request that any additional issues be added.

1. Approval Issues

[46] The Director sought clarification that issue (a) of the Approval Issues did not include the issue of the number of boats allowed at the marina and the impact of the number of boats on the lake. As stated in issue (a), the Board referred to the footprint of the marina and the related environmental impacts resulting from the footprint. The Board did not intend to include

the number of boats as an issue, as stated in issue (g) in the Exclusion List. Therefore, the footprint of the marina as it impacts the environment is a valid issue before the Board.

[47] The Director disagreed with the inclusion of the phrase “including from boats” in reference to toxic materials in issue (e). The Director argued that jurisdiction to deal with possible contaminants from boats rests with federal, not provincial, agencies. In this issue, the Board was referring to the sedimentation and toxic materials that could be released into the lake as a result of being “churned up” by the boats and during construction of the marina and not to substances coming from the boats. Therefore, issue (e), with this clarification, is validly before the Board.

[48] Issues (a), (b), and (d) deal with the environmental impacts related to the construction and operation of the marina. These include the impacts on: (1) fish and bird habitat; (2) sport fishing; (3) aquatic and riparian vegetation, both native and invasive, and the resulting impacts on lake quality, if any. As stated, the footprint of the marina will be considered only to the extent the size of the marina will affect the degree of environmental impact.

[49] The Board considers the potential impacts of the channel on Gull Lake are different than those from the inland marina. Therefore, the Board considers it beneficial to hear evidence of the impacts of the channel as well as those related to the inland marina. In evidence presented at the hearing, the Parties raised the issue of the size of the channel and if it had to be deepened and widened, the potential for additional impacts. The issues regarding sedimentation, impacts on fish and wildlife habitat, and vegetation also apply to the channel. There was also the discussion of one channel versus two. The Board considers all of these matters relevant in determining whether the Approval should be confirmed, reversed, or varied.

[50] Therefore, the first issue the Board will consider is: What are the environmental impacts of the construction and operation of the marina? As stated, marina means both the inland marina and the channel connecting the inland marina to Gull Lake.

[51] Issues (c), (f), and (g) relate to the soils at the marina site. These issues include: (1) the design of the marina and if dredging will be required as a result of the design; (2) increase in sediments and potential release of toxic materials from the sediments as a result of the construction and operation of the marina; (3) impacts on soils, including erosion and compaction;

and (4) placement of till material during construction. Therefore, the second issue the Board will consider is: Will there be an increase in sediments or increased erosion as a result of the design, construction, and operation of the marina and what will be the impacts, if any? Again, marina includes both the inland marina and the channel connecting the inland marina to Gull Lake.

[52] In reviewing the issues listed under the Approval, the Board has determined issue (h) is captured in the other issues. Condition 3.2 of the Approval provides: "The Approval Holder shall not undertake the activity in a manner or use any material that causes or may cause an adverse effect on the aquatic environment, human health or public safety." This is captured in the first issue identified above.

[53] Clause 3.3 of the Approval states: "The Approval Holder shall not release water affected by the activity to any water body unless the quality of the water is equal to or better than the quality of water in the receiving water body." This is captured in the second issue identified by the Board regarding toxic materials and sedimentation.

[54] Clause 3.6 of the Approval states: "The Approval Holder shall ensure that all spoil material is removed to a point where it will not re-enter the water body." This condition is included in the second issue regarding erosion and the placement of fill material.

[55] Clause 4.0 of the Approval was amended when the Approval Holder provided its Environmental Construction Operations (ECO) Plan to the Director.⁵ As a result, the initial concerns regarding Clause 4 in the original marina Approval are now moot. However, any concerns that may remain are captured within the second issue regarding sedimentation and erosion.

⁵ Clause 4.0 of the Approval initially stated:
"The Approval Holder shall minimize:
(a) siltation; and
(b) erosion
into the water body as a result of the activity."

Clause 4, amended on February 1, 2013, now reads:

"The Approval Holder shall:
(a) implement the Environmental Construction Operations (Eco) Plan for Sandy Point Marina Excavation, Gull Lake, Section 1-41-1-W5, S-12, 41-1-5 Prepared December 27, 2012 by Urban Dirtworks Inc.; and
(b) retain a copy of the Siltation and Erosion Control Plan at the site of the activity at all times while conducting the activity."

2. Licences Issues

[56] All the Parties agreed issues (a), (b), and (d) listed for the Licences are proper issues before the Board. However, the Director did not believe issue (c) was a proper issue before the Board. He argued that, if there is insufficient water, the Approval Holder would have to submit a new application for additional water. Although the Board recognizes the Approval Holder would be required to apply for an amendment to the Licences or another licence to receive additional water, the context of the issue is whether the aquifer can sustain the volume of water allocated. This would require an analysis of the volume of water that would have to be withdrawn on a daily or weekly basis to meet the needs of the development. This would include peak daily capacity, productive capacity, and sustainability of the water source. Therefore, the Board considers issue (c) a proper issue before the Board.

[57] Since issues (a), (b), and (c) relate to the volume of water allocated, the issue the Board will hear is: Can the aquifer sustain the volume of water allocated?

[58] None of the Parties had concerns with issue (d), regarding the connectivity of the wells and the lake. Therefore, the Board will hear evidence on the following issue: Will drawing water from Well A negatively impact the lake?

[59] The Approval Holder recommended the deletion of issue (e), because the water from Wells B and C will be treated prior to being returned used. Although the Approval Holder explained the water treatment plant application is currently before the Director, it has not been approved. The Appellants expressed concern the quality of water in Gull Lake will be impacted by the quality of the water from Wells B and C. However, it appears the real concern in this issue is the impacts the use of Wells B and C will have on the return levels to the Gull Lake. Therefore, the Board accepts issue (e) as validly before the Board. The third issue that will be heard by the Board regarding the Licences is: What will be the impacts on the lake, if any, on using water from Wells B and C?

[60] All of the Parties agreed issues (d) and (f) under the Exclusion List are not issues within the Board's jurisdiction. Impact on property values is not an issue the Board can consider, and neither are municipal planning matters.

[61] The Appellants raised concerns regarding the approval process and the lack of communication between the Director and Approval Holder and the Appellants. The Appellants have now received all of the documentation that was before the Director when he made his decisions. Through the hearing process, the Appellants will be given the opportunity to present evidence and cross-examine the Director and Approval Holder regarding the project as it relates to the Approval and Licences. The Board will review all the documents and submissions provided, will listen to arguments, and based on all of the information before it, including the Appellants' evidence, the Board will make its recommendations to the Minister of Environment and Sustainable Resource Development to confirm, reverse, or vary the Director's decisions. Therefore, the Board will not hear arguments relating to past communications between the Appellants and the other Parties or abuse of process arguments. Any such concerns, to the extent that they will impact the Board's recommendations to the Minister, will be remedied by the substantive hearing of the appeals.

[62] The recreational vehicle resort portion of the development is not an issue under the Approval or Licences. The Approval and Licences deal with the construction and operation of the marina, not the inland portions of the development, and the water wells. Therefore, the size, design, construction aspects, and visual impacts of the recreational vehicle resort are not within the Board's jurisdiction. Information on particular aspects of the recreational vehicle resort would only be relevant if it is directly related to one of the identified issues. For example, as stated, the issue of whether Well A can adequately supply water will depend on the size of the recreational vehicle resort. It is important to note that the Board cannot make any recommendations regarding the recreational vehicle resort. The Board's jurisdiction is limited to issues related to the Approval and Licences.

[63] The number and density of boats and boat safety on the lake are issues that fall within the jurisdictions of the federal and provincial transportation departments. AESRD does not control the number of boats on the lake, and it therefore cannot be an issue before the Board. However, the impacts of the boats, such as disturbing sediment, can be discussed in the submissions and evidence by the Parties. Again, the impacts have to relate to the issues under consideration in respect of the Approval and Licences.

[64] The Gull Lake Intermunicipal Development Plan was developed in conjunction with the municipalities surrounding the lake, including Lacombe County, Ponoka County, and the Summer Villages of Gull Lake and Parkland Beach. Although there may be information in the document that is relevant to the issues before the Board, the Board cannot make any determination on whether the Approval Holder is complying with the document or whether the Approval and Licences comply with the plan. The Director's decision must comply with the legislation and policies within his jurisdiction. The plan does not bind the Director in his decision making. Therefore, the Board will not hear arguments on whether the proposed project complies with the plan.

[65] However, the Board wants to make it clear that the information and data provided in the Gull Lake Intermunicipal Development Plan can be used by the Parties at the hearing. The information in the plan can provide the Board with an understanding of the existing conditions at Gull Lake and provide a basis of understanding any impacts that could occur as a result of the proposed project.

[66] The decision of which consultant will be hired for a specific project is a decision made by the project proponent. The Board has no ability to specify who the consultant should be. In reviewing the evidence presented to it at a hearing, the Board will determine the appropriate weight to be given to the expert evidence depending on the issue being discussed and the witnesses' experience and qualifications.

[67] The last issue listed as not properly before the Board is no longer an issue. The Appellants raised concerns regarding the quality of the water in Wells B and C on the presumption the water was to be used directly from the wells. However, the Approval Holder and Director confirmed the water from Wells B and C will be treated before being used for human consumption. Treated waste water will be used for irrigation. The water treatment plant and waste water treatment plant fall under EPEA Registrations, which are not appealable to the Board. Therefore, arguments related to the treatment plants will not be considered by the Board, and the Board will not hear evidence on the fitness of Wells B and C for human consumption or irrigation.

[68] Therefore, the Board will not accept any of the issues identified in the Exclusion List.

3. Summary

[69] The following issues will be heard by the Board at the hearing:

1. What are the environmental impacts of the construction and operation of the marina?
2. Will there be an increase in sediments as a result of the construction and operation of the marina and what will be the impacts, if any?
3. Can the aquifer sustain the volume of water allocated?
4. Will drawing water from Well A negatively impact the lake?
5. What will be the impacts on the lake, if any, on using water from Wells B and C?

IV. STAY APPLICATION

A. Submissions

1. Appellants

[70] The Appellants argued the Stay should stay in place. They expressed concern that, if the Approval Holder was allowed to proceed, it will be difficult to stop the project if the appeals are ultimately successful.

[71] The Appellants noted the Approval Holder could re-apply for an approval from the Department of Fisheries and Oceans if this existing federal approval expired due to the project not being constructed by April 1, 2013.

[72] The Appellants argued that, if the Board determined the channel should be deepened, then it would also have to be widened to comply with the 5:1 slope ratio required.

2. Approval Holder

[73] The Approval Holder requested the Stay be lifted in order for it to complete construction of the channel before the expiry of its approval from the Department of Fisheries and Oceans.

3. Director

[74] The Director did not take a position on the Stay application.

B. Legal Basis for a Stay

[75] 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.”

[76] The Board also has the ability to lift a Stay it previously granted.

[77] The Board’s test for a Stay, as stated in its previous decisions of *Pryzbylski*⁶ and *Stelter*,⁷ is adapted from the Supreme Court of Canada case of *RJR MacDonald*.⁸ 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,

⁶ *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.).

⁷ *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.).

⁸ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR MacDonald*”). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid v. Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

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.”⁹

[78] The same analysis is applied when determining whether a Stay should be lifted.

[79] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is some basis on which to present an argument.

[80] The second step in the test requires the decision maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.¹⁰ Irreparable harm will occur if the applicant will be adversely affected by the conduct the Stay is meant to prevent, should the applicant ultimately be successful in its appeal(s). It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other. In *Ominayak v. Norcen Energy Resources*,¹¹ 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 of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.”¹²

The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.¹³ The damage that may be suffered by third parties may also be taken into consideration.¹⁴

[81] 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.”¹⁵ The decision-maker is required to weigh the burden that the remedy

⁹ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

¹⁰ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

¹¹ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

¹² *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

¹³ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

¹⁴ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

¹⁵ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

would impose on the respondent against the benefit the applicant 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,¹⁶ third parties who may suffer damage,¹⁷ or if the reputation and goodwill of a party will be affected.¹⁸

[82] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. Public interest includes the "...concerns of society generally and the particular interests of identifiable groups."¹⁹ The effect on the public may sway the balance for one party over the other.

C. Analysis

[83] The Board has determined the issues that will be heard at the hearing. The appeals are not frivolous or vexatious. As the Approval Holder filed the request to have the Stay lifted, the Board must also look at whether there is a serious issue raised by the Approval Holder. The Approval Holder has limited time to complete the work this year because of the construction periods allowed under the *Fisheries Act* approval. The first part of the Stay test has been met.

[84] The second step is to determine whether the Approval Holder would suffer irreparable harm if the Stay is not lifted. The Approval Holder argued it would suffer irreparable harm because of the limited construction period under the federal approval which provides that construction must be completed by April 1, 2013. The Approval Holder explained it has contractors in place to start the work, and the Approval Holder would be liable for costs associated with the delay in construction.

[85] In determining if the Approval Holder will suffer irreparable harm if the Stay is not lifted, the Board looks at whether the Approval Holder could be compensated monetarily for any damages that may occur. The concerns expressed by the Approval Holder relate to costs it could incur and the postponement of starting construction on the channel. Any costs the

¹⁶ *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

¹⁷ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

¹⁸ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

¹⁹ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

Approval Holder will incur may be compensated for monetarily. The Board does not regard these concerns raised by the Approval Holder as sufficient grounds to warrant lifting the Stay.

[86] The Board is aware the federal approval expires on April 1, 2013. The Approval Holder is not precluded from applying for a new approval. The Approval Holder explained it applied for the federal approval on the fall of 2011 and received the approval in July 2012. The Board expects similar timelines would apply this year if the Approval Holder resubmits the application for federal approval. As the hearing is scheduled for May 14 and 15, 2013, the Board's recommendations will be provided to the Minister by June 14, 2013, for her to review prior to making her decision. The Board is confident the decision will be made in sufficient time should the Approval Holder need to re-apply for the federal approval and receive the approval in time for construction next year, if the Minister recommends the Approval be confirmed.

[87] If the Board recommends the Approval be varied and the Minister accepts the Board's recommendations, and if these recommendations include a re-design of the channel, the Approval Holder may be required to re-construct the channel in order to comply with the newly-varied Approval. Additional work could compound the impacts on the lake. By postponing construction of the channel until after the Minister makes her decision may benefit the Approval Holder and, in the long run, offset costs incurred. This would also apply should the Approval be reversed.

[88] The Stay was originally granted because irreparable harm could occur if the channel was constructed. The Approval Holder argued there will not be irreparable harm if the channel is constructed, because the removed soil could be replaced if needed. Remediation requires more than the replacement of soil. It requires the reestablishment of aquatic vegetation and ecosystems, which can be challenging in some situations, particularly in an area that has been identified as environmentally sensitive. The Board is of the view that none of the evidence presented by the Approval Holder at the preliminary motions hearing was persuasive enough to change the Board's view that irreparable harm could occur. According to the Approval Holder, in order to maintain the proper slope, the channel would have to be dredged 165 metres into the lake. This is a significant portion of Gull Lake that would be disturbed and, depending on the evidence the Board will hear at the substantive hearing, potentially harmed.

[89] The Board assures the Parties that it has not made any decision regarding the issuance of the Approval at this stage of the process. It is only after the Board has heard all of the evidence at the substantive hearing that it will determine whether it should recommend the Approval be confirmed, reversed, or varied.

[90] There will be no irreparable damage to the Approval Holder while the appeal is heard, because the concerns expressed by the Approval Holder could be compensated for monetarily. However, there could be irreparable harm done to the environment if the Stay was lifted. Therefore, the Board will not lift the Stay.

[91] The third step in the Stay test is to assess who will suffer the greater harm, the Approval Holder if the Stay is not lifted or the Appellants if the Stay is lifted. In determining who will suffer the greater harm, the Board considers the timeframe in which the appeal would be resolved. Essentially, would the Approval Holder suffer a greater harm during the time the appeals are considered and the Minister's decision released? The hearing will determine if there will be actual harm to the environment and if the Approval adequately reflects what must be done to minimize impacts.

[92] The Appellants argued that if the Stay was lifted, the damage to the lake would be done and alternatives would be limited at the hearing. Although the Board recognizes the Appellants' argument may be correct, the Board is also looking at whether the environment would suffer a greater harm if the Stay was lifted than would the Approval Holder if the Stay remained in place.

[93] The Board reviewed the reports that have been prepared to identify areas of the lake with significant environmental concern. The first report, the Gull Lake Management Plan, was prepared in 1979, and it was updated in 2000. The latest report, the Gull Lake Intermunicipal Development Plan was released in 2010. All of these reports identified the area where the proposed development is to occur as one of the most critical areas of the lake. In the 1979 plan, the area was described as critical wildlife and extensive fish spawning and feeding area, so no development was proposed for the area.

[94] In the 2000 report, the shoreline was designated as "restricted shoreline" to correspond to critical fish and waterfowl habitats. In the 2010 report, the shoreline is still

considered a critical waterfowl area and a pelican loafing area. This indicates the area where the marina is being constructed is environmentally sensitive and could be more difficult to remediate if the Approval is reversed or varied.

[95] The Approval Holder argued the purchasers of the lot properties are expecting to have a marina. During questioning, the Approval Holder indicated the purchase agreements provided that the purchasers would have access to their lots by July or August of 2013. It is the Board's understanding that there was no clause in the purchase agreement ensuring the marina would be available to the purchasers this year. The Board understands the purchasers may be anticipating the ability to have boat access to the lake. The Approval Holder confirmed at the hearing that there are other public marinas around the lake that could be used as lake access by those who have purchased lots.

[96] If the Stay is not lifted, the Approval Holder could be delayed in starting the construction of the channel. Although this may be an inconvenience, it is not the type of harm that would support denying the Stay. The Board understands it will take less than two weeks for the channel to be constructed. The Approval Holder stated construction on the channel must be completed by April 1, 2013. Although the construction period will have expired by the time the Minister's decision is released, the Approval Holder can re-apply for the federal approval. The work can be completed in 2014 if federal approval is obtained. Based on the information provided, the Board cannot conclude the Approval Holder would suffer harm if the Stay is not lifted.

[97] Therefore, the Board finds the Approval Holder will not suffer a greater harm if the Stay is maintained than the Appellants or Gull Lake would suffer if the Stay was lifted.

[98] The final step in the test is whether the public interest favours the continuation of the Stay. In this case, there is a public interest in having the Stay remain in place. The lake is used by those who live or own property along the lake, such as the Appellants, and those who visit the lake for recreational purposes. At the hearing, the Appellants stated three of the four adjoining municipalities, including the Summer Villages of Parkland Beach and Gull Lake and Ponoka County, expressed concerns regarding the development and the marina. These entities represent the interests of their residents, indicating a strong public interest in ensuring any

development along the lake is completed in an environmentally responsible manner. Therefore, Board is of the opinion the public interest favours the Stay remaining in place.

[99] In summary, the Board is of the view that the application of the Stay test developed by the courts to the facts presented to date, supports a decision by the Board to dismiss the Approval Holder's application to lift the Stay.

V. OTHER MATTERS

[100] During the hearing, the Appellants submitted a letter from Ms. Julia Frohlich.²⁰ The letter was unsigned, but the Board notes a signed copy was provided to the Board on March 3, 2013, as required by the undertaking agreed to by the Appellants. In reviewing the letter, the Board found the information was not relevant to the issues currently before the Board, specifically the issues for the hearing and the request to lift the Stay. Therefore, the Board did not consider Ms. Frohlich's letter in making its decision.

VI. CONCLUSION

[101] The issues for the hearing are:

1. What are the environmental impacts of the construction and operation of the marina?
2. Will there be unacceptable increases in sediments or erosion as a result of the construction and operation of the marina?
3. Can the aquifer sustain the volume of water allocated?
4. Will drawing water from Well A negatively impact Gull Lake?
5. What will be the impacts on Gull Lake, if any, on using water from Wells B and C?

[102] The Board dismisses the application to lift the Stay and directs the Stay remain in place under the same conditions as previously stated. The Approval Holder can proceed with the construction of the inland marina if it decides to do so at its own risk, but it is prohibited from conducting any work or activities on the bed, bank, and shore and in the waters of Gull Lake,

²⁰ See: Exhibit No. 4.

including but not limited to: (1) the building of the boat launch in the lake; (2) the excavation of the channel; (3) the stripping of the shoreline to create a beach; and (4) no materials of any kind are to be placed on the bed, bank, and shore of the lake.

[103] The Approval Holder is reminded that, should the Board recommend to the Minister that the Approval be varied or cancelled, and the Minister agrees with the recommendation, the Approval Holder will be responsible for returning the site, including the inland marina, to pre-disturbance conditions or making the necessary changes to comply with any amendments. Also, whether or not any work has been done by the Approval Holder will not be a factor in the Board's decision-making regarding any recommendations.

Dated on March 28, 2013, at Edmonton, Alberta.

"original signed by"

Alex MacWilliam
Panel Chair

"original signed by"

Dan Johnson
Board Member

"original signed by"

Nick Tywoniuk
Board Member