



Environmental Appeal Board

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DECISION NO. 2013-WAT-009(a)

In the matter of an appeal under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	John Vlcek, doing business as Cariboo Water Wells Ltd.	APPELLANT
AND:	Regional Water Manager	RESPONDENT
AND:	Hazel Collins	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on April 15, 2013	
APPEARING:	For the Appellant: Grant Zimmerman, Counsel For the Respondent: Livia Meret, Counsel	

PRELIMINARY DECISION: STAY APPLICATION

[1] On March 28, 2013, Robert Kopecky, the Regional Water Manager (the "Regional Manager"), Northeast Region, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") issued an order under the *Water Act* requiring John Vlcek, doing business as Cariboo Water Wells Ltd., to take interim measures with respect to a water well he drilled on property owned by Hazel Collins, located in Chetwynd, BC. When Mr. Vlcek drilled the well, he encountered artesian conditions involving a high flow of pressurized ground water. Although Mr. Vlcek took steps to control the artesian flow of water, ground water has been flowing from the well and across Ms. Collins' and neighbouring properties for several months, causing flooding and a sink hole.

[2] The Regional Manager's order requires Mr. Vlcek to retain a qualified professional to prepare and submit a site remediation plan for the Regional Manager's approval, and retain a qualified professional to supervise the carrying out of measures to stabilize the area around the well and install a ditch or drainage course to drain the flow of water from the well to a stream. The order requires the work under the approved site remediation plan to be completed by April 17, 2013.

[3] On April 8, 2013, Mr. Vlcek appealed the Regional Manager's order to the Board. In his Notice of Appeal, Mr. Vlcek requested, among other things, a stay of the order pending a final decision from the Board on the merits of the appeal.

[4] This preliminary decision addresses Mr. Vlcek's application for a stay. The application was conducted by way of written submissions.

BACKGROUND

[5] Ms. Collins hired Mr. Vlcek, doing business as Cariboo Water Wells Ltd., to drill and construct a domestic ground water well on her property. On or about August 30, 2012, Mr. Vlcek commenced drilling the well on her property. Artesian conditions were encountered. The Ministry estimates that approximately 100 gallons of water per minute flow from the well.

[6] According to Mr. Vlcek's submissions, on September 8, 2012, he installed an outer eight-inch diameter surface casing and then an outer twelve-inch diameter surface casing, to a depth of 40 feet, around the innermost (production) well casing. He equipped the well with an overflow valve, to allow the controlled flow of water from the well to reduce water pressure. Mr. Vlcek recorded the well water pressure at approximately 30 pounds per square inch ("p.s.i.") with the valve closed. There is no dispute that an artesian well pressure of 30 p.s.i. is high.

[7] On September 9, 2012, Mr. Vlcek notified the Ministry of the artesian conditions.

[8] On September 10, 2012, representatives of the Ministry attended at the well site. Water was flowing from the well into an existing ditch on Ms. Collins' property. According to Mr. Vlcek's submissions, water was flowing from the overflow valve on the well, and no ground water was leaking outside of the outer casing. According to the Ministry's submissions, some of the water flowing from the well was muddy, indicating erosion, and it was unclear whether the source of the erosion was soil from the space between the well casings or from the confining layer overlying the artesian aquifer.

[9] On September 11, 2012, Mr. Vlcek returned to the well site. According to his submissions, he observed no leakage around the outer casing, and he believed that the artesian conditions were under control. He advises that he heard nothing further about the well until March 2013.

[10] However, according to the Ministry's submissions, the surface (outer) well casings did not seal properly against the confining layer above the aquifer, and artesian flow continued from both the inner (production) well casing and from outside of the outer well casings.

[11] On October 9, 2012, Ministry staff inspected the site and found that artesian flow was occurring, but there was no evidence of instability at the land surface. Water was flowing from the well through improvised drainage channels in a westerly or northwesterly direction, toward a field on the adjacent Fowler property located northwest and down slope of Ms. Collins' property, and eventually into Centurion Creek.

[12] Ministry staff visited the site again on October 31 and November 23, 2012, and no significant changes were observed.

[13] On March 8, 2013, the Peace River Regional District contacted the Ministry and Emergency Management BC to advise that a sink hole had developed around the well, and the well was continuing to flow.

[14] On March 9, 2013, Ministry staff attended the site and confirmed the existence of a sink hole, which is indicative of erosion caused by subsurface water flow. They observed a contractor, employed by Ms. Collins, filling the sink hole with gravel. According to the Ministry's submissions, the sink hole continued to expand after that time, and was not stabilized by the gravel fill.

The Regional Manager's order

[15] On March 28, 2013, the Regional Manager issued the order pursuant to sections 77, 85(2), and 88 of the *Water Act*. The order requires Mr. Vlcek to take "interim measures" to "prevent the situation from worsening" and to "stabilize the area around the well." The order requires Mr. Vlcek to do a number of things, including preparing a site remediation plan and installing means to drain the flow from the well to a stream or other suitable place until more permanent measures can be undertaken "to ensure public safety and to prevent flooding or damage to adjacent homes, property, infrastructure and the environment." Specifically, the order states, in part, as the follows:

1. Retain a Qualified Professional that has experience and expertise in hydrology, geotechnical engineering, and flood protection... by April 3, 2013.
2. Submit to the Regional Water Manager a Site Remediation Plan, prepared by a Qualified Professional by April 8, 2013, describing interim measures to be undertaken to stabilize the area around the well to ensure public safety and to prevent flooding or damage to adjacent house, infrastructure, property and the environment.

The Site Remediation Plan must include, but is not limited to, the following measures;

- a) measures to minimize further instability around the wellhead,
 - b) measures to prevent continued site erosion on the land surface from the flow of water from the well, and
 - c) measures to prevent further flooding and damage to adjacent houses, infrastructure, property and the environment by draining or conveying artesian flow from the well to a stream or other suitable place, such as Centurion Creek.
3. Upon approval of the Site Remediation Plan by the Regional Water Manager, commence remediation work under the supervision of the Qualified Professional in accordance with the specifications of the approved Plan.

4. All remediation work must be completed in accordance with the approved Site Remediation Plan as soon as possible, but no later than April 17th, 2013.

...

The appeal and the application for a stay of the order

[16] On April 8, 2013, the Board received Mr. Vlcek's Notice of Appeal. It states that he appeals the order on the basis that he "is not responsible for complying with the *Water Act* because the well and artesian condition was in compliance when he left the Property on September 11, 2012." In his Notice of Appeal, Mr. Vlcek requests that the order be cancelled, and that the Board issue a stay of the order pending the Board's decision on the merits of the appeal.

[17] By a letter dated April 8, 2013, the Board invited Ms. Collins to participate in the appeal as a Third Party. The Board also requested that the Regional Manager advise whether he would consent to an interim stay of the order, pending a decision on the merits of Mr. Vlcek's stay application, given that Mr. Vlcek was required to complete the interim remediation work required by April 17, 2013. In the event that the Regional Manager did not consent to a voluntary stay of the order, the Board set a schedule for submissions on the merits of the stay application.

[18] On or about April 9, 2013, the Regional Manager received a proposed site remediation plan, prepared by GeoNorth Engineering Ltd. ("GeoNorth") on behalf of Mr. Vlcek.

[19] By a letter dated April 9, 2013, counsel for the Regional Manager advised that the Regional Manager had, that day, received a site remediation plan from Mr. Vlcek, along with Mr. Vlcek's request that the plan be approved. The letter also advised that the Regional Manager was reviewing the plan, and was not prepared to consent to a stay at that time, pending input from the technical officer who was involved in recent site visits.

[20] By a letter dated April 10, 2013, the Regional Manager advised that he did not consent to a stay of the order. The Regional Manager advised that the interim remedial measures required under the order are necessary to address pressing risks to public safety, adjacent houses, infrastructure, property and the environment. Specifically, he submitted that the situation needs to be stabilized to prevent it from worsening, especially given the onset of Spring thaw, and "to avoid further impacts to the Collins Property, the Fowler property (located to the north west), as well as to other adjacent properties, a road, CN railway and BC Hydro infrastructure located down slope of the flowing well."

[21] According to Mr. Vlcek's submissions, he has engaged a contractor to carry out the remediation work, and has engaged GeoNorth to supervise the contractor. In addition, he advised that he expects the contractor to commence the remediation work by April 15, 2013, in order to be completed by April 17, 2013.

The parties' positions on the application for a stay

[22] Mr. Vlcek submits that the appeal raises serious issues, and that he will suffer irreparable harm if a stay is denied.

[23] The Regional Manager opposes the stay application. The Regional Manager submits that the appeal does not raise a serious issue to be decided by the Board, and the balance of convenience favours denying a stay.

[24] Ms. Collins provided no submissions on the stay application.

ISSUE

[25] The only issue to be decided is whether the Board should grant a stay of the order pending a final decision on the merits of the appeal.

RELEVANT LEGISLATION AND LEGAL TEST

[26] Section 92(9) of the *Water Act* grants the Board the authority to order a stay:

- 92 (9)** An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.

[27] In *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. The test requires an applicant to demonstrate the following:

- (1) There is a serious issue to be tried;
- (2) Irreparable harm will result if the stay is not granted; and,
- (3) The balance of convenience favours granting the stay.

[28] The onus is on Mr. Vlcek, as the applicant for a stay, to demonstrate good and sufficient reasons why a stay should be granted under this test.

[29] The Panel will address each aspect of the *RJR MacDonald* test as it applies to this application.

DISCUSSION & ANALYSIS

Whether the Board should grant a stay of the order pending a final decision on the merits of the appeal.

Serious Issue

[30] In *RJR-MacDonald*, the Court stated that, as a general rule, unless the case is frivolous or vexatious or is a pure question of law, the inquiry as to whether a stay should be granted should proceed to the next stage of the test.

[31] Mr. Vlcek submits that the appeal raises serious issues to be decided by the Board. He submits that he stopped or brought under control the flow of water from the well before he left the site on September 11, 2012, and he disputes the allegation that he failed to comply with section 77 of the *Water Act*. In addition, he submits that a serious issue to be decided is whether he should be responsible for the costs of remediation. He submits that the site remediation plan and

remediation work required by the order will cost between \$60,000 and \$100,000, and the cost to abandon the well could be \$500,000.

[32] The Regional Manager submits that the appeal does not raise a serious issue to be decided. Specifically, the Regional Manager submits that section 77 of the *Water Act* clearly indicates that, when artesian conditions are encountered, the qualified well driller is responsible for stopping the artesian flow or bringing it under control. Section 77(1) of the *Water Act* states as follows:

77 (1) If a qualified well driller or a qualified professional encounters artesian conditions while constructing a well or supervising the construction of a well, that person must ensure that

(a) any artesian flow is stopped or brought under control, or

(b) if the artesian well is likely to flow periodically, steps are taken to ensure that that artesian flow will be stopped or controlled.

[33] The Regional Manager submits that, for an artesian well to be “under control,” the entire flow from the well must be brought through the casing and must be capable of being stopped indefinitely without leaking onto the ground surface. The Regional Manager argues that there is evidence that the artesian flow from the well has not been stopped or adequately controlled, and therefore, Mr. Vlcek is responsible for implementing the interim measures required by the order.

[34] Moreover, the Regional Manager submits that it appears from Mr. Vlcek’s submissions that he has engaged a contractor to commence work under the site remediation plan required by the order, and he intends to complete that work by April 17, 2013, as required by the order. The Regional Manager submits, therefore, that it is unclear why Mr. Vlcek is requesting a stay of the order.

[35] Moreover, the Regional Manager emphasizes that the order under appeal only requires interim measures, and no decision has been made yet regarding possible permanent measures. The Regional Manager submits that Mr. Vlcek is premature in seeking a stay of any prospective order that may be made regarding possible next steps in relation to the well.

Panel’s findings re: serious issue

[36] The Panel finds that it is unclear why Mr. Vlcek is seeking a stay of the order when he has already complied with the requirement to submit a remediation plan to the Regional Manager, and his submissions indicate that he intends to comply with the remaining requirements of the order by the specified deadline. It appears that Mr. Vlcek may be conflating the interim measures required under the appealed order with more permanent measures, such as abandonment of the well, which could be the subject of a future order if the Regional Manager requires Mr. Vlcek to take further steps. The stay application may be moot, but Mr. Vlcek continues to pursue the stay application, and he is represented by legal counsel.

[37] In any event, the Panel finds that the appeal of the present order raises serious issues. In particular, the appeal raises issues including whether Mr. Vlcek should be the person responsible for carrying out the interim steps required by the order, and what constitutes having the artesian flow “under control” for the

purposes of section 77 of the *Water Act*. Also, some material facts are in dispute, such as whether Mr. Vlcek took appropriate steps to attempt to control the flow of water from the well. On its face, the appeal raises serious issues which are not frivolous, vexatious, or pure questions of law.

Irreparable Harm

[38] The second factor to be considered is whether Mr. Vlcek, as the applicant for a stay, will suffer irreparable harm if the stay is denied. As stated in *RJR-MacDonald*, at page 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[39] In assessing the question of irreparable harm, the Panel is also guided by this statement from *RJR-MacDonald*, at page 405:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)).

[40] Mr. Vlcek submits that he will suffer irreparable harm if a stay is denied, because he will have no opportunity to recover the costs of complying with the order before the Board decides the merits of the appeal. He submits that the total cost of remediation could be over \$750,000. Specifically, he submits that it will cost \$10,000 for GeoNorth to prepare a site remediation plan, plus an additional \$50,000 to \$90,000 for a contractor to complete the remediation work and for GeoNorth to supervise the contractor. He estimates that it will also cost \$20,000 for legal advice and expert opinion evidence related to the issues under appeal. Further, he estimates that the cost to abandon the well could be up to \$500,000.

[41] Moreover, Mr. Vlcek submits that he has spent significant time on the matter already, and further time will be required to monitor the remediation work and deal with the appeal. He submits that Cariboo Water Wells Ltd. is a small company and does not have unlimited resources to expend on these matters without causing harm to its operations. He submits that it is unclear whether he would be able to recover any of the money or time he expends as a result of the order.

[42] Additionally, Mr. Vlcek submits that once the well and surrounding area is altered as required by the order, vital information will be permanently destroyed, and there is insufficient time to arrange for experts or other witnesses to visit the area to gather evidence. He argues, therefore, that denying the stay will seriously prejudice his appeal rights.

[43] The Regional Manager submits that Mr. Vlcek's submissions fail to take into account the ongoing impacts on other persons, property, and the environment from the flooding and erosion caused by the flowing well, as well as the potential for increased impacts if the existing flow is allowed to continue in an uncontrolled manner. The Regional Manager submits that the situation at the site is no longer as it was when Mr. Vlcek left the site in September 2013, and in any case, it is unacceptable to allow him time to gather evidence while adverse impacts on other persons, property and the environment continue to increase.

Panel's findings re: irreparable harm

[44] The Panel notes that, in accordance with the test set out in previous Board decisions such as *Chief Richard Harry et al v. Assistant Regional Water Manager*, Decision Nos. 2011-WAT-005(a) and 2011-WAT-006(a), June 10, 2011, the applicant for a stay is not required to establish with certainty that its interests will suffer irreparable harm if a stay is denied. Rather, the applicant is required to provide sufficient evidence to establish that there is a likelihood or reasonable possibility of irreparable harm to its interests if a stay is denied.

[45] The Panel finds that Mr. Vlcek's submissions disclose a likelihood or reasonable possibility of irreparable harm to his interests if a stay is denied. In particular, the Panel finds that he will incur costs to comply with the order and carry out the required interim measures. Although those costs are quantifiable, it is uncertain whether Mr. Vlcek would be able to recover those costs if a stay is denied and he is ultimately successful in his appeal. For example, there is no evidence as to whether he or his company may have insurance that would cover such costs. Mr. Vlcek estimates that the costs of complying with the order will be \$60,000 to \$100,000, which is significant, especially for a small business owner. As such, the Panel finds that there is likely to be irreparable harm to Mr. Vlcek's financial interests, if a stay is denied.

[46] The Panel finds that any additional costs that are not associated with the interim measures required under the order, such as the cost of abandoning the well, are beyond the scope of this stay application, which only pertains to the order issued on March 28, 2013.

[47] Regarding Mr. Vlcek's submission that denying a stay will seriously prejudice his appeal rights due to the loss of vital evidence at the site, the Panel finds that there is evidence that the site has already changed physically since Mr. Vlcek left the site on September 11, 2013, due to ongoing erosion and siltation from the flowing water. Further, the Panel finds that Mr. Vlcek already has some evidence of the site conditions he encountered up to September 11, 2012. In support of the stay application, he provided a report dated April 9, 2013, prepared by a professional geoscientist, which contains a summary of Mr. Vlcek's work in relation to the well, and states that "the methods used by Cariboo established well

control in compliance with the British Columbia Water Act at the time the well was completed." That report also contains a September 9, 2013 photograph labeled "Collins' Well Final Completion". The Panel notes that the report appears to support the Regional Manager's submission that the well site has changed since September 11, 2012, as it states on page 5 that "the integrity of the well seal was apparently compromised when the well was visited in March, 2013... ." In any event, the Panel finds that Mr. Vlcek's ability to gather further evidence at the site must be weighed against the need to take steps to mitigate the existing effects of the water flow, and to prevent further impacts on other persons, property and the environment.

[48] For all of these reasons, the Panel finds that Mr. Vlcek has established that there is a likelihood or reasonable possibility of irreparable harm to his financial interests if a stay is denied.

Balance of Convenience

[49] The balance of convenience portion of the test requires the Panel to determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay pending a determination of the merits of the appeal.

[50] Mr. Vlcek submits that his interests will suffer greater harm if a stay is denied, as he will suffer lost monies, time, and evidence. In addition, he submits that the Regional Manager has submitted no evidence that further significant damage will be done to Ms. Collins' property, adjacent properties, a road, CN railway, or BC Hydro infrastructure before the Board decides the merits of the appeal, if a stay is denied. He submits that the Ministry has the ability to carry out the remediation work itself, and could order Mr. Vlcek to pay such costs if he is liable. Moreover, he submits that Ms. Collins has stabilized the sink hole by pouring truckloads of material into it.

[51] The Regional Manager submits that the balance of convenience favours denying a stay. The Regional Manager submits that the ongoing and potential impacts from the flowing well are as follows:

- the well continues to flow and, with the onset of seasonal melt, poses an increased risk down slope to public safety, adjacent houses, infrastructure, property, and the environment;
- artesian flow continues to leak from outside of the well's outer casings, as well as from the inner production casing;
- the water flow is silty due to erosion at the well site;
- a large sink hole has developed around the well, impacting Ms. Collins' property, and has the potential to undermine a mobile home and shop on her property;
- the sink hole has not stabilized - 50 truckloads of fill have been deposited into it, and Ms. Collins intends to add more as soon as possible;
- the artesian conditions have resulted in flooding of adjacent areas, including the field on the adjacent Fowler property;

- the artesian flow has eroded the existing ditch, and the ditch channel has silted up and overflowed, causing silty flood water to expand over the field on the Fowler property and extend to other properties, with the potential that water from the silted ditch may be directed onto lots 1 through 6 in the same subdivision as Ms. Collins' property;
- BC Hydro poles are already partly under water/ice on the Fowler field, and there is potential for erosion around the poles;
- water is flowing down the CN railway right-of-way, and there is potential for rail bed saturation;
- water is flowing down a local road and there is potential for water to settle near the sink hole, and potential for flooding of a road.

[52] The Regional Manager submits that the purpose of the interim remedial measures required by the order is to drain the artesian flow to a stream or other suitable place, such as Centurion Creek, to prevent the situation from worsening. He submits that a delay in implementing the interim remedial measures required by the order would cause an increased risk to public safety, adjacent houses, infrastructure, property and the environment. Unless the flow of water is properly controlled and conveyed to a properly designed drainage course, siltation and floodwater may travel to Centurion Creek, which is a fish-bearing stream, and impair its environmental values. The Regional Manager maintains that any impacts of this nature on fish or fish habitat cannot be easily reversed or quantified.

[53] Additionally, the Regional Manager argues that the sink hole, flooding and erosion have already caused irreparable harm to Ms. Collins' property, and the existing impacts on the environment, such as erosion, siltation, and de-stabilization, may also be irreparable.

[54] In response to Mr. Vlcek's submissions that he should not be responsible for the costs of carrying out the remediation work, the Regional Manager submits that Mr. Vlcek drilled the well, and section 77 of the *Water Act* places responsibility for stopping or controlling the artesian flow on the qualified well driller. Moreover, the Regional Manager submits that Ms. Collins has very limited means to address the situation.

[55] In support of those submissions, the Regional Manager provided copies of several documents to the Board and the parties. The documents include an April 10, 2012 technical memorandum signed by the Ministry's Senior Flood Hazard Officer, a list of properties and infrastructure that are or may be affected by the flow from the well, and several maps and photographs of the area. The Regional Manager also provided a copy of an April 2, 2013 report prepared by Piteau Associates Engineering Ltd. ("Piteau"), which was retained by the Peace River Regional District to assess the well site and recommend measures for controlling the water flowing from the well.

Panel's findings re: balance of convenience

[56] The Panel has already found that Mr. Vlcek's financial interests will likely suffer irreparable harm if a stay is denied.

[57] However, the Panel also finds that the Regional Manager has provided evidence of the potential for further harm, some of which may be irreparable, if a stay is granted. There is evidence that water from the well has already caused harm, in the form of flooding, erosion, and siltation. The flow of water has caused a large sink hole to develop on Ms. Collins' property, and although she has taken steps to mitigate the problem, it may not be under control. The situation was serious enough to lead the Peace River Regional District to alert both the Ministry and Emergency Management BC. According to the Ministry's April 10, 2013, technical memorandum, on April 5, 2013, Piteau advised that the sink hole has not stabilized as turbid water continued to discharge from outside of the well casing from upward artesian pressure. The silt in the turbid water may be from underground erosion, which may be causing an underground cavity, and the sink hole is considered to be unstable. The April 5, 2013 report prepared by Piteau states, "Any subsequent subsidence associated with the flowing well should continue to be backfilled."

[58] Also, according to the Ministry's technical memorandum, on April 2, 2013, Ministry staff observed that a ditch which had been conveying water from the well was filled with silt, and as a result, water was flowing onto the field on the adjacent Fowler property. The technical memorandum states that saturation of the field may impact BC Hydro power poles located in the field, and continued flows through the field and along a CN Rail line to the north of the field may compromise the integrity of the rail bed. It also states that pooling in the field could pose a risk of flooding to a local road. Further, it states that "Any rain event will add to the surface drainage in addition to the uncontrolled flows from the artesian well, and increase the risk of flooding to properties down slope of the well site."

[59] Based on this evidence, the Panel finds that the flow of water from the well has caused a large sink hole on Ms. Collins' property, which appears to be unstable despite her efforts to stabilize it with fill, and there is an ongoing risk of further harm to her property. In addition, the flow from the well has silted up an existing ditch, causing the water to be directed onto a field on the Fowler property. That water has pooled on the field, causing flooding, and the water is partially covering BC Hydro poles, which creates a risk of harm to that infrastructure. Flood water from the field is also flowing along a CN railway right-of-way, causing a risk of rail bed saturation. Moreover, the flood water poses a risk of flooding a local road. These situations, which all stem from the flow of water from the well, pose risks of harm to public safety, private property, public and private infrastructure, and the environment.

[60] Additionally, the Panel finds that the onset of Spring thaw is imminent, and when that occurs, added flows of surface water will compound the existing flows, causing a risk of increased erosion, flooding, and siltation. Silty floodwater is at risk of entering Centurion Creek, which could cause harm to fish and fish habitat.

[61] The Panel finds that the interim remedial measures required under the order are intended to re-direct the water flowing from the well into an adequate drainage channel. This is aimed at stopping any further erosion, siltation and flooding, and thereby mitigating the risks associated with the existing situation. It is also aimed

at preventing the increased risk of harm associated with the impending Spring thaw.

[62] The issue of who should be held responsible for the remediation costs goes to the merits of the appeal, and the Panel will make no binding findings on that issue in the context of this preliminary stay application. However, for the limited purposes of deciding this stay application, the Panel finds that Mr. Vlcek has a responsibility on the face of section 77(1) of the *Water Act* to ensure that “any artesian flow is stopped or brought under control” in relation to the well on Ms. Collins’ property, as it appears that he is a qualified well driller and is the person who drilled the well. Regardless of whether the Ministry has the ability to carry out the remediation work itself, and could order Mr. Vlcek to pay such costs if he is liable, the legislation does not put the onus on the Ministry to deal with the flow from artesian wells and then seek to recover its costs from responsible parties at a later date. The legislation appears to put the onus on the qualified well driller to stop or control the flow from an artesian well that the qualified well driller has drilled.

[63] A stay would prevent the operation of the order until the Board issues a decision on the merits of the appeal. The existing flooding, erosion and siltation will continue as long as the remedial work is not undertaken, and the appeal will not be decided before Spring thaw, at which time the situation could worsen. In these circumstances, the Panel finds that, if a stay is granted, the risks of harm to public safety, private property, public and private infrastructure, and the environment outweigh the harm to Mr. Vlcek’s interests if a stay is denied.

Accordingly, the balance of convenience weighs in favor of denying a stay.

Finally, the Panel emphasizes that the findings in this decision are made for the limited purpose of deciding the preliminary stay application, and have no bearing on the merits of the appeal.

DECISION

[64] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

[65] For the reasons provided above, Mr. Vlcek’s application for a stay of the order is denied.

“Alan Andison”

Alan Andison, Chair
Environmental Appeal Board

April 16, 2013