Environmental Appeal Board

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DECISION NO. 2013-WAT-011(a)

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

BETWEEN:	Sage Investments Ltd.	**APPELLANT**
AND:	Assistant Regional Water Manager	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on June 7, 2013	
APPEARING:	For the Appellant: John Nelson, Counsel For the Respondent: Chris Rolfe, Counsel	

PRELIMINARY DECISION: STAY APPLICATION

[1] On April 10, 2013, Michael Knapik, the Assistant Regional Water Manager (the "Water Manager"), Kootenay Boundary Region, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), issued an order under the *Water Act* to Sage Investments Ltd. (the "Appellant"). The order requires the Appellant to provide certain reports to the Water Manager, and to undertake remedial measures to mitigate the effects of unauthorized works in unnamed streams on land ("Lot 860") owned by the Appellant, by specified deadlines. The Appellant has conducted logging on Lot 860.

[2] On May 15, 2013, the Appellant appealed the Water Manager's order to the Board. In its Notice of Appeal, the Appellant requested, among other things, a stay of the order pending a final decision from the Board on the merits of the appeal.

[3] This preliminary decision addresses the Appellant's application for a stay. The application was conducted by way of written submissions.

BACKGROUND

[4] In or about December 2008, the Appellant purchased Lot 860, which is a parcel of land approximately 850 hectares in area, and is located on the west side of Arrow Lake. Lot 860 is traversed by a forest service road.

[5] In or about January 2009, the Appellant commenced logging on Lot 860. According to the Appellant's submissions, 68 percent of the site was logged by April 2010, three years before the present order was issued.

[6] On July 12, 2011, the Ministry received a complaint from the Columbia Shuswap Regional District regarding logging practices on Lot 860.

[7] On July 28, 2011, Ministry staff conducted a site visit to view the forest practices on Lot 860.

[8] On October 25, 2011, a Habitat Officer with the Ministry contacted the Appellant's owner and advised that he intended to inspect Lot 860 within the next week.

[9] According to the Water Manager's submissions, the Habitat Officer was unable to inspect Lot 860 as planned due to inclement weather.

[10] On July 11, 2012, the Habitat Officer, two other Ministry staff, and a representative of Fisheries and Oceans Canada inspected Lot 860.

[11] According to a Compliance Incident Form that the Habitat Officer completed as a result of the site inspection, the Habitat Officer found 18 sites where unauthorized "works" were in streams or stream channels, and those works appeared to have been constructed or created in connection with recent logging on Lot 860. According to the Water Manager's submissions, those works included logging debris introduced to stream channels, the use of stream channels as skid roads, and the use of log bundles rather than culverts as stream crossing structures. The Water Manager submits that the log bundles do not allow the free flow of natural drainage, causing water to be diverted out of its natural channel and onto roads, resulting in erosion and sedimentation.

[12] According to the Appellant's submissions, the Appellant's practice is to use existing infrastructure and road networks for logging, and all of the stream crossings were installed before April 2010.

[13] On August 20, 2012, the Ministry sent a registered letter to the Appellant requesting that the Appellant voluntarily retain a qualified professional to develop a site restoration plan for the unauthorized works in streams on Lot 860, and submit it to the Ministry by October 1, 2012.

[14] On September 4, 2012, the Habitat Officer sent a report regarding the July 12, 2012 site inspection to the Appellant's owner.

[15] According to the Water Manager's submissions, the Ministry received no response to its August 20, 2012 registered letter.

The Regional Manager's order

[16] On April 10, 2013, the Regional Manager issued the order pursuant to sections 85(2) and 88(1)(e) of the *Water Act*. The order was sent to the Appellant by registered mail. The order states, in part, as follows:

> Whereas many of the unnamed streams impacted by unauthorized works within… Lot 860… are streams as defined by the *Water Act*, and

> Whereas you… without authority under the *Water Act*, completed works in and about streams, and
>
> Whereas unauthorized works in and about streams within… Lot 860… have and will continue to result in the deleterious effects to fish and fish habitat, and
>
> …
>
> Therefore pursuant to Sections 85(2) and 88(1)(e) of the *Water Act*, I… hereby order you… to provide me with a report on how to mitigate the effects of the unauthorized works. The following conditions shall apply:
>
> 1. The report shall be prepared by a suitably Qualified Professional (QP).
> 2. The report shall be submitted to me for approval by June 30, 2013.
> 3. The remedial measures recommended in the report, approved by me, shall be completed under the general direction of a QP.
> 4. Remedial measures prescribed in the report, and approved by me, shall include measures to prevent siltation and prevent further damage to habitat during the undertaking of remedial measures and shall comply with the guidelines contained in the document entitled "Terms and Conditions for Changes In and About a Stream Specified by Ministry of Environment (MoE) Habitat Officers, Kootenay Region (Region 4)."
> 5. Within 5 days of the completion of the works, the owner shall contact me to provide me with an opportunity to attend the site prior to work completion.
> 6. Remedial measures prescribed in the plan and approved by me shall be completed on or before November 1, 2013.
> 7. A report, prepared by a suitably qualified professional, documenting the mitigation and restoration activities undertaken shall be provided to me by December 15, 2013.
>
> …

The appeal and the application for a stay of the order

[17] On May 15, 2013, the Board received the Appellant's Notice of Appeal. In the Notice of Appeal, the Appellant requests that the Board "vacate" the order, on the grounds that the order is contrary to the principles of natural justice, is vague, and that no changes to streams have occurred. The Appellant also submits that, if any changes to streams have occurred, such changes are "*de minimus*."

[18] Along with the Notice of Appeal, the Appellant filed an application requesting that the Board issue a stay of the order pending the Board's decision on the merits of the appeal.

The parties' positions on the application for a stay

[19] The Appellant submits that the appeal raises serious issues to be decided by the Board, that the Appellant will suffer irreparable harm if a stay is denied, and that there would be no negative consequences to the environment if a stay is granted.

[20] The Water Manager opposes the stay application. The Water Manager submits that the appeal does not raise a serious issue, and the balance of convenience favours denying a stay.

ISSUE

[21] 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

[22] 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.

[23] 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.

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

[25] 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

[26] 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.

[27] The Appellant submits that the appeal raises serious issues to be decided by the Board. In particular, the Appellant submits that the order is vague and is contrary to the principles of natural justice. The Appellant submits that the order is unclear as to which “works” it pertains to, and that it may be directed at works that have been in existence for over twenty years. The Appellant submits that this makes it unclear as to which works should be addressed by the remedial plan, and

there is a danger that the Appellant could end up fixing things that the Ministry does not require to be fixed. In addition, the Appellant submits that there is an issue as to whether past works created by a previous land owner are now the Appellant's responsibility, as the current land owner.

[28] The Appellant also raised an issue with respect to a three-year limitation period that applies to laying an "information for an offence," pursuant to section 98 of the *Water Act*.

[29] The Water Manager submits that the appeal does not raise a serious issue to be decided. Specifically, the Water Manager submits that the order is clear, when read in its entirety and in the context of the *Water Act*, and the order does not breach natural justice. In addition, the Water Manager submits that the three-year limitation period is irrelevant, because the order is clearly not an "information".

Panel's findings re: serious issue

[30] The Panel finds that, on the face of the appeal, there is no serious issue with regard to the three-year limitation period for laying an "information." The three-year limitation is clearly inapplicable in this case, because an information is laid for the purposes of prosecuting an offence, whereas the order was not issued for the purposes of prosecuting an offence. The order was issued pursuant to sections 85(2) and 88(1)(e) of the *Water Act*, and is an administrative decision that may be issued to a person regardless of whether that person is prosecuted for an offence.

[31] However, the Panel finds that the appeal raises other issues that are serious issues for the Board to decide. In particular, the appeal raises issues including whether the order is too vague for the Appellant to understand which "works" it is required to remediate, and whether the order is contrary to the principles of natural justice. Also, some material facts are in dispute, such as whether the Appellant caused or is responsible for some, or any, of the alleged unauthorized works in or about streams on Lot 860.

[32] In summary, the Panel finds that the appeal, on its face, raises some serious issues which are not frivolous, vexatious, or pure questions of law. Accordingly, the Panel has proceeded to consider the next stage of the test.

Irreparable Harm

[33] The second factor to be considered is whether the Appellant, 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."

[34] 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.))."

[35] The Appellant submits that it will suffer irreparable harm if a stay is denied, because it will unnecessarily incur the costs of complying with the order, if the Board ultimately determines that the order is invalid. The Appellant submits that the cost of preparing a remediation plan is estimated to be $5,000 to $10,000, and the cost of carrying out remediation could be $43,000. The Appellant submits that this harm would be irreparable in nature, because the Appellant has no legal remedy to sue the government, and if it did, the litigation cost would likely outweigh the recovery of expenditures.

[36] The Appellant provided affidavit evidence in support of its submissions with respect to the estimated costs of complying with the order.

[37] The Water Manager submits that in considering irreparable harm (and the balance of convenience), the Board should only consider the cost of preparing the remedial plan, and not the costs of removing every unauthorized stream crossing, as such requirements are purely speculative.

Panel's findings re: irreparable harm

[38] 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.

[39] The Panel finds that the Appellant's submissions disclose a likelihood or reasonable possibility of irreparable harm to its financial interests if a stay is denied. In particular, the Panel finds that the Appellant will incur costs to comply with the order; namely, having a qualified professional prepare a remedial plan, and then carrying out the approved remedial measures. The Panel accepts the Appellant's affidavit evidence which discloses that two different qualified professionals provided verbal quotes as to the likely cost to prepare a remedial plan, and the cost is likely to be between $5,000 and $10,000. The Panel finds that the potential costs of carrying out the approved remedial plan are more speculative, as it is uncertain which remedial steps may be recommended by the qualified professional and approved by the Water Manager. However, the Panel accepts that those costs are likely to be significant.

[40] The Panel also finds that, although the costs of complying with the order are quantifiable, it is uncertain whether the Appellant would be able to recover those costs if a stay is denied and the Appellant is ultimately successful in the appeal. As such, the Panel finds that the Appellant has established that there is a likelihood or reasonable possibility of irreparable harm to the Appellant's financial interests if a stay is denied.

Balance of Convenience

[41] 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.

[42] The Appellant submits that its interests will suffer greater harm if a stay is denied. The Appellant submits that it will suffer irreparable harm to its financial interests, whereas there is no evidence of ongoing damage to the environment, or that significant environmental harm will occur before the Board decides the merits of the appeal, if a stay is denied. The Appellant submits that, if the damage to the environment is ongoing or significant, then this raises a question regarding why the Ministry did not act sooner.

[43] The Water Manager submits that the balance of convenience favours denying a stay. The Water Manager submits that granting a stay before the remedial plan is completed does not allow the remedial requirements in the order to be considered. The Water Manager also submits that a stay should be denied to avoid continuing harm to fish habitat that occurs intermittently due to erosion, especially during heavy rains. The Water Manager submits that some of the alleged unauthorized works have resulted in streams being diverted onto road surfaces, resulting in erosion of road materials with eventual discharge downstream. The Water Manager argues that a delay in remedial work will pose a continuing risk to stream features, functions and conditions. The Water Manager submits that the impacts to streams on Lot 860 have the potential to cause slope failures.

[44] The Water Manager acknowledges that there is no proof that the streams on Lot 860 are fish bearing, but the Water Manager submits that not all of the streams have been sampled (the Habitat Officer tested four sites on one stream). However, the Water Manager submits that some of the streams are either potentially fish-bearing or fish-bearing, because they contain suitable habitat for fish. In addition, the Water Manager submits that Arrow Lake contains fish and fish habitat, and the streams on Lot 860 flow into Arrow Lake.

[45] In support of those submissions, the Water Manager provided affidavit evidence from Cory Legebokow, the Ministry Habitat Officer that inspected the site on July 11, 2012. Attached to Mr. Legebokow's affidavit are a number of site photographs that were taken during the inspection. Several of those photographs show indications of eroded road surfaces and scoured stream channels, as well as water flooding a road surface.

[46] The Water Manager also provided an undated letter from Alan Davidson, a Regional Forest Hydrologist with the Ministry, who conducted a site inspection with Mr. Legebokow on May 30, 2013. He states that the site has moderately steep

slopes "higher up in the block" and alongside gullies, and the area has "highly erodible sandy material." He advises that poor drainage practices are common on the site, and fine sediment is being transported downstream, resulting in sedimentation. He states that it is "critical to mitigate the uncontrolled drainage through these highly erodible soils before high intensity summer rainstorms, sustained autumn rainfalls, and especially prior to the next freshet."

[47] In reply, the Appellant submits that it remains unclear, based on the order and the parties' submissions, which of the "works" are to be remediated. Moreover, the Appellant argues that the Water Manager's evidence is inconsistent as to whether the streams contain fish, and it is unclear where the Water Manager's photographs showing erosion adjacent to a road were taken. The Appellant submits that it is unclear whether the photos are of a road recently built by the Appellant, or whether the erosion is the result of historical logging by former land owners. The Appellant acknowledges that "fines" are present in some of the streams, but the Appellant submits that it is unknown whether the fines were deposited as a result of logging by the Appellant or by a previous land owner.

Panel's findings re: balance of convenience

[48] The Panel has already found that the Appellant's financial interests will likely suffer irreparable harm if a stay is denied.

[49] In terms of the potential harm to the Water Manager's interests, if a stay is granted, the Panel finds that the measures required under the order are intended to remediate harm that has occurred to streams on Lot 860, and to prevent any further harm to the environment. A stay would prevent the operation of the order until the Board issues a decision on the merits of the appeal. The Water Manager has provided evidence that some harm has already occurred to the environment, in the form of erosion and sedimentation on Lot 860. The existing harm will continue to exist as long as the remedial work is not undertaken, but it appears that some of this harm has been in existence since at least July 2011, when the Ministry received the complaint that led to the investigation. In terms of the reasons for the Ministry's delay in taking action, the Panel understands that the Ministry intended to conduct a site inspection in the Fall of 2011, but was unable to do so until July 2012. However, it is unclear why the Ministry waited until March 2013 to issue the order, given that the Ministry conducted the site inspection in July 2012 and notified the Appellant in August 2012 about the problems with unauthorized works on Lot 860.

[50] The Water Manager submits that a stay should be denied to avoid continuing harm that occurs intermittently due to erosion, especially before the next freshet, which would be next Spring. However, it is unclear from the evidence whether, or to what extent, the existing environmental harm will worsen, or the risk of further harm will increase, if a stay is denied. It appears that there may be some risk of slope failure, but the evidence is very limited. Further, it is unclear whether the denial of a stay would prevent harm to fish, given that the evidence is inconclusive as to whether fish are present in any of the streams on Lot 860, or whether any of the erosion on Lot 860 is causing sediment to enter fish habitat in Arrow Lake. As a result, the Panel finds that the evidence is unclear as to the likelihood that the existing harm to the environment may worsen or increase, if a stay is granted.

[51] In these circumstances, the Panel finds that there is insufficient evidence to conclude that risk of further harm to the environment, if a stay is denied, outweighs the likelihood of harm to the Appellant's interests if a stay is granted. Accordingly, the balance of convenience weighs in favor of granting a stay.

[52] 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

[53] 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.

[54] For the reasons provided above, the application for a stay of the order is granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

June 18, 2013