



Environmental Appeal Board

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DECISION NO. 2013-WAT-025(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
AND:	Patrick and Rebecca Barton Carson and Theresa Warncke Leslie and Sonya Warncke	PARTICIPANTS
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on October 24, 2013	
APPEARING:	For the Appellant: Lorne A.J. Dunn, Counsel For the Respondent: Anthony Fraser, Counsel For the Third Party: Hazel Collins For the Participants: Not appearing	

PRELIMINARY DECISION: STAY APPLICATION

[1] On August 30, 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 permanently close an artesian well on the property owned by the Third Party, Hazel Collins, located in Chetwynd, BC (the "Permanent Order"). The Permanent Order includes a schedule of activities to be performed in order to stop the artesian flow permanently, without any leakage, by October 31, 2013.

[2] On September 24, 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.¹

[3] This is Mr. Vlcek's second appeal in relation to the artesian well on the Third Party's property. His first appeal was against a March 28, 2013 order of the Regional Manager requiring Mr. Vlcek to implement "interim measures" to stabilize the area around the well, and to install a ditch or drainage course to drain the flow of water from the well to a stream (the "Interim Order"). Mr. Vlcek applied for a stay of the Interim Order which was denied by the Board on April 16, 2013: see *John Vlcek v. Regional Water Manager*, Decision No. 2013-WAT-009(a).

[4] The Board has joined the two appeals for the purposes of a hearing. An eight-day oral hearing has been scheduled to commence in Dawson Creek on November 4, 2013.

[5] This application for a stay of the Permanent Order has been conducted by way of written submissions.

BACKGROUND

[6] Mr. Vlcek is a licensed water well driller and owns Cariboo Water Wells Ltd. In 2012, he was retained by the Third Party to drill and construct a domestic ground water well on her property.

[7] On August 30, 2012, Mr. Vlcek began drilling the well. An artesian condition was encountered (later recorded at approximately 207 kilopascals or 30 pounds per square inch). This compromised the well casing and seal, and groundwater began to flow outside of the conductor casing to ground surface.

[8] Mr. Vlcek took measures to stop the artesian condition or bring it under control. He then advised the Ministry of the artesian condition.

[9] In early September of 2012, Ministry officials attended the site. A plan to address the situation was approved by the Ministry, and Mr. Vlcek performed the agreed upon work to stop or control the flow. Mr. Vlcek maintains that there were no signs of uncontrolled flow or leakage around the well when the work was completed on or about September 11, 2012.

[10] Ministry staff inspected the site in September and October of 2012, and monitored the property through the winter. During these inspections, they 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 property and eventually into Centurion Creek.

[11] 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

¹ On October 15, 2013, the Board received an amended Notice of Appeal from Mr. Vlcek. The amendment is dated October 10, 2013.

the well, and that the well was continuing to flow. A sink hole is indicative of erosion caused by subsurface water flow.

[12] Ministry staff attended the property. They observed a contractor, employed by the Third Party, filling the sink hole with gravel. The Third Party states that she had over fifty truckloads of gravel and materials delivered to the property to place in the hole. According to the Ministry's submissions, the sink hole continued to expand after that time, and was not stabilized by the gravel fill.

[13] On March 28, 2013, the Interim Order was issued by the Regional Manager to Mr. Vlcek. The order required him to "prevent the situation from worsening" and to "stabilize the area around the well." There were specific requirements and deadlines in this order. As stated earlier, Mr. Vlcek appealed the Interim Order to the Board (Appeal No. 2013-WAT-009) and requested a stay.

[14] In its decision dated April 16, 2013, the Board refused to stay the Interim Order. Although the Board found that Mr. Vlcek's appeal raised serious issues and that he had established a likelihood, or a reasonable possibility, of irreparable harm, the Board found that the evidence provided by the Regional Manager established the potential for a greater harm if a stay of the Interim Order was granted. At paragraph 63 the Board concluded:

63. 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.

[15] Even before that decision was released, Mr. Vlcek had complied with the requirements of the Interim Order.

[16] Five months after the issuance of the Interim Order, the Regional Manager issued the Permanent Order which Mr. Vlcek has also appealed, and which is the subject of this application for a stay.

The Permanent Order

[17] The Permanent Order was issued pursuant to sections 77, 88 and 93 of the *Water Act*. The basis for the order is summarized in the preamble as follows:

- a. Mr. Vlcek encountered flowing artesian conditions while constructing the well but did not take sufficient steps to ensure that any artesian flow was stopped or controlled;
- b. The artesian flow has been observed around the outside of the well's production casing, as well as flowing from the well;

- c. The artesian flow around the outside of the well's production casing is silt-laden, indicating subsurface erosion is occurring;
- d. The flow from this well has caused flooding of the adjacent area and formation of a sinkhole;
- e. I made the Interim Order in March of 2013 requiring measures to be taken to prevent the situation from worsening until more permanent measure could be undertaken;
- f. Mr. Vlcek carried out those measure, but the artesian flow has continued to date, the flow remains silt laden and the ground around the wellhead is still slumping;
- g. Permanent measures are required to be taken in order to ensure public safety, to prevent flooding and damage to adjacent houses, property, infrastructure and the environment, and to preserve ground water resources.

[18] Therefore, the Regional Manager ordered Mr. Vlcek to:

...

2. Stop the artesian flow permanently without any leakage and close the well by 31st October 2013, following the general methodology outlined in the report of Piteau Associates dated 2nd April 2013, in particular constructing one or more relief wells as necessary to pump groundwater from the aquifer to reduce the groundwater pressure sufficiently to allow the well to be permanently closed;

3. Construct the relief well(s) so that the surface casing is properly grouted into the confining layer above the aquifer to prevent erosion of the overlying geologic materials, to confine the flow entirely within the production casing, and to allow flow to be stopped permanently without leakage;

4. After the well is closed close all but one relief well;

5. After the well(s) are closed remove all existing drainage ditches constructed for the purpose of receiving the artesian flow; and restoring the surface to its original condition;

...

The appeal (as amended) and the application for a stay

[19] Mr. Vlcek appeals the Permanent Order on the basis that the Regional Manager provided no specifics or particulars in support of the concerns identified in the preamble to the order, and on the basis that the order is wrong in fact and law. The Panel has summarized his amended grounds for appeal as follows:

1. the evidence from photographs and sampling confirms that the water inside and outside of the well is silt-free and clear;
2. the water within the well is "potable";

3. the Third Party wants the well to remain operational;
4. the ground around the wellhead is not still slumping;
5. flooding has stopped and poses no inconvenience or damage to the neighbouring properties;
6. the permanent measures are not required to ensure public safety, to prevent flooding and damage to adjacent homes, property, infrastructure and the environment, and to preserve ground water resources;
7. the artesian flow from the well was "under control" as required by section 77 of the *Water Act*;
8. the Regional Manager failed to consider any or all reasonable alternative solutions to the Third Party's well situation; and
9. cost efficiencies were not considered.

The parties' positions on the application for a stay

[20] Mr. Vlcek asks the Board to stay the Permanent Order until his appeal has been decided by the Board. He submits that the appeal raises serious issues, that he will suffer irreparable harm if a stay is denied, and that the measures required in the Permanent Order will not likely work, and may result in further environmental and public safety issues than the status quo. He tendered two expert reports in support of his application.

[21] The Regional Manager does not take a position on the stay application. He states:

The Respondent [Regional Manager] takes no position of the granting of a stay until the disposition of the Appeal. If an application for an adjournment of the 4th November 2013 hearing date is made the Respondent considers that all parties should have liberty to make further submissions on the continuation of any stay granted.

[22] The Third Party does not take a position on whether the stay should be granted or denied, but identified three concerns with the present state of the well. She states:

1. The water lines leading from the well to her home have been heat taped, insulated and covered in mats, however there remains concern that the lines will freeze during the winter given that they are above the ground surface;
2. The well head is at risk of freezing in the winter, particularly if it is not heated, resulting in potential breakage of the well head and resulting water discharge; and
3. It appears that the water flowing from the well is high in iron content given the staining of surrounding rocks, which raises questions about how this water may impact the Third Party's health.

ISSUE

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

RELEVANT LEGISLATION AND LEGAL TEST

[24] 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.

[25] 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.

[26] 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.

[27] 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 Permanent Order pending a final decision on the merits of the appeal.

Serious Issue

[28] 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.

[29] Mr. Vlcek submits that the appeal raises serious issues to be decided by the Board. Although he was denied a stay of the Interim Order by the Board, he notes that the Board accepted that his appeal of that order raised serious issues. Since his appeal of the Permanent Order raises even more legal and factual issues to be decided by the Board, he argues that he has clearly met this first branch of the test.

[30] As evidence of the seriousness of his issues, Mr. Vlcek produced two expert reports: one by Steve Foley, principal hydrologist of Waterline Resources Inc.,

dated October 2, 2013 (the "Waterline Report"); the other by Mr. McDougall, P.Eng., of GeoNorth, dated October 8, 2013 (the "GeoNorth Report").

The Panel's findings

[31] The Panel finds that there are clearly serious legal and factual issues raised by the appeal which are not frivolous, vexatious, or pure questions of law. Mr. Vlcek has met the first branch of the test.

Irreparable Harm

[32] 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.

[33] 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.)).

[34] Under this branch of the test, Mr. Vlcek observes that the Board has previously confirmed that the applicant for a stay is not required to establish, with certainty, that his interests will suffer irreparable harm if a stay is denied. In the Board's decision on his previous stay application (*supra*), it states at paragraph 44:

... 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. [Emphasis added]

[35] In its decision on his previous stay application, the Board held at paragraph 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 [interim] 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.

[36] Since compliance with the Interim Order required less work than is required by the subject Permanent Order, Mr. Vlcek submits that the Panel should have no hesitation to find that he has established irreparable harm in the present case.

[37] In addition, Mr. Vlcek refers to an April 2, 2013 "letter report" by Piteau Associates Engineering Ltd. ("Piteau"). This report contains the findings of an initial assessment, and includes recommendations for construction of relief well(s) and decommissions of the flowing borehole and a summary of the estimated costs of the work. This report appears to form the basis for some of the requirements in the Permanent Order.

[38] Piteau estimates that it will cost approximately \$660,000 to construct and test one relief well, and decommission the flowing well. However, in the event that an additional relief well is required, Piteau states that the total costs would increase by between \$300,000 and \$350,000. Mr. Vlcek notes that these estimates do not include any allowance for decommissioning the relief wells, nor does it consider what costs might arise if the attempt to permanently close the well fails or the associated costs of other outcomes, should things go awry (e.g., if there are further fractures of the sub-surface and surface with further leakage of water through these new fractures).

[39] In terms of irreparable harm, Mr. Vlcek states:

Despite Piteau Associates quantifying the estimated cost to perform the work required to close the Collins well at \$660,000 and potentially an additional \$300,000 to \$350,000, it is reasonably clear that the Appellant's family business, Cariboo Water Wells Ltd., will not be able to collect from the owner of the Property, subject to insurance monies being available, ...

The Panel's findings

[40] The Panel finds that Mr. Vlcek's submissions regarding irreparable harm are even more forceful in the context of this application than in his previous application. In the context of the Permanent Order, the costs of compliance and the risk to the

financial viability of his business are even more substantial than they were in relation to the Interim Order. Further, 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. The Panel finds that there is a likelihood, or reasonable possibility, of irreparable harm to Mr. Vlcek if a stay is denied.

[41] Accordingly, the Panel finds Mr. Vlcek has satisfied this branch of the test.

Balance of Convenience

[42] 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.

[43] Mr. Vlcek again refers to Piteau's April 2, 2013 estimate of \$660,000 to close the well, with the potential for additional costs of \$300,000 to \$350,000. He submits that his small family business cannot accommodate these significant costs and that the performance of the work under the Permanent Order makes his appeal rights "moot".

[44] Moreover, Mr. Vlcek submits that it is not at all clear that the permanent closure of the well will be successful. In support, he relies upon the Waterline Report where Mr. Foley states at page 7 that:

... flowing artesian aquifers intersected at shallow depths in unconsolidated deposits are difficult to manage. In particular, once the confining layer is compromised, as in case of the Collins well, it is very difficult to restore the layer's integrity. It is highly unlikely that the well and cavities formed outside the well can be sealed permanently by introducing grout or cement by gravity feeding techniques. By applying more advanced technology used in deep well reclamation, cement grout pressure squeezes can be effective in sealing wells permanently. Nevertheless, applying this technology in the shallow environment, similar to the Collins well, is considered highly risky as the natural overburden pressure is low and the pressure cementing operation can easily fracture the confining unit. Propagating secondary fractures across the confining unit could result in additional uncontrolled flow to surface that cannot be stopped. This condition places the public under greater risk relative to current conditions. [Emphasis added]

[45] Mr. Foley further states:

Although constructing pressure relief wells can likely be completed successfully, given the current knowledge of site specific conditions, these wells would not lead directly to an improvement in local groundwater conditions or reduce the risk of pressure cementing well closure operations. (page 7)

[46] Mr. Vlcek submits that, based upon the expert evidence contained in the Waterline Report, the GeoNorth Report, and the documents provided in support of his stay application, the harm that he will suffer if a stay is not granted, far exceeds

any harm that will result if the Permanent Order is stayed pending a decision on his appeal.

[47] Since the works in the Permanent Order were to be completed by October 31st and the hearing does not commence until November 4th, much of Mr. Vlcek's expert evidence and submissions were focused on the potential harms that may result over the upcoming winter months if he does not comply with the order (i.e., it is stayed). In particular, he addressed the harms that were of concern to the Board in the previous stay decision (harm to public safety, private property, public and private infrastructure and the environment), as well as the impact of freezing. Mr. Vlcek submits that the evidence he presented establishes the following:

- the discharge rate from the well exceeds the expected freezing rate;
- the sub-surface conditions in the area of the wellhead have stabilized and further subsistence is expected to be limited, and should not compromise further public safety;
- allowing the well to flow continuously would likely lead to establishing long-term equilibrium, or "steady-state conditions" between the aquifer recharge and artesian flow from the well;
- the lowest risk mitigation program would allow sustained artesian flow to continue while monitoring the pressure effects in the aquifer and ground stability in the vicinity of the wellhead;
- sustained artesian flow from the well is unlikely to compromise the water supply to other wells in the same aquifer;
- the present channel is stable with no significant erosion occurring, and no imminent chance of avulsion, and is flowing to Centurion Creek with no apparent environmental or public safety concerns;
- the present situation should not pose risks during the winter provided that the ditch be monitored for ice jams;
- the water is clear and not silt laden; and
- the water is not affecting BC Hydro poles or the CNR right-of-way.

[48] In addition, Mr. Vlcek points out that the Waterline Report puts into question whether the requirements in the Permanent Order will be an improvement over the present situation, and whether they can be successfully executed. The report suggests that more advanced high pressure techniques may be required which are highly risky in the circumstances, and could result in additional uncontrolled flow to surface that cannot be stopped. Mr. Vlcek submits that this would place the public at greater risk relative to the current conditions.

[49] In response to the Third Party's concerns about her water lines freezing, the wellhead freezing and the iron content in the well water, Mr. Vlcek submits that the water lines and wellhead are the responsibility of the owner. In addition, he submits that the wellhead is not at risk of freezing in the winter and notes that the wellhead was present for the entire winter of 2012 "without breakage". He further submits that ice is unlikely to form inside of the wellhead given the temperature of

the water from the aquifer. However, in the unlikely event that ice is able to form inside of the wellhead, he submits that there is room for the ice to expand like a cylinder downwards and the wellhead would not break.

[50] Regarding iron content, Mr. Vlcek states that the water flowing inside and outside of the production casing appears clean and does not have the appearance of high iron content that he has observed at other well sites. In any event, Mr. Vlcek submits that it is the owner's responsibility to deal with any water quality issues, and that she may wish to have the water tested.

[51] Given that the Regional Manager does not oppose the application, the Third Party does not have any substantive opposition, and there is no evidence of any environmental harm or public safety issues should a stay be granted, Mr. Vlcek submits that the Board should find that the balance of convenience favours a stay.

The Panel's findings

[52] Although Mr. Vlcek's previous stay application was denied based on evidence of serious risks of harm to public safety, private property, infrastructure, the environment, as well as the potential for harm to fish and fish habitat, there is no such evidence led in the context of this application. According to Mr. Vlcek's evidence, these risks have been abated. Both the reports of Waterline and GeoNorth support this conclusion, and have not been challenged in this application.

[53] The hearing is currently scheduled to commence in less than two weeks. The evidence of Mr. Vlcek's experts, although not subject to cross-examination, is that there is no risk to the environment, to the Third Party's property, the property of others, or to the public's health or safety, should the present conditions be preserved pending a decision on this appeal. The only qualification on this is found in the GeoNorth Report. Based upon standard heat flow calculations, GeoNorth accepts that "some percentage of the flow is likely to freeze before reaching Centurion Creek depending on weather conditions, the depth of the flow and whether the flow becomes capped by ice then an insulating layer of snow." To ensure that an ice jam does not cause problems over the 2013-14 winter, GeoNorth opines at page 4:

With monitoring and remedial work, if required, the existing channel could be used to convey the artesian flow to Centurion Creek during the 2013-14 winter months. Snow over an ice-covered stream will provide insulation and improve resistance to freezing. Given the uncertainty in the potential for ice jams to develop, the channel should be monitored weekly during the freezing season from November to mid-March, or more frequently if there are indications that ice dams might develop, and less frequently, say bi-weekly, if the flow is stabilized with ice and snow cover. If ice jams develop, the blockage should be removed by mechanical methods to return flow to the channel.

[54] The Panel finds that there is no evidence that there are any serious risks to the environment, or to the public's health or safety, provided that the ditch is monitored during the winter to ensure that an ice jam does not form. Although the Third Party has expressed three concerns, she does not oppose the stay. Further,

the Panel agrees with Mr. Vlcek that the Third Party's concerns appear to be unrelated to his areas of responsibility under the Permanent Order.

[55] Accordingly, the Panel finds that the balance of convenience weighs in favor of granting a stay of the Permanent Order pending a decision on the appeal.

DECISION

[56] 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.

[57] For the reasons provided above, Mr. Vlcek's application for a stay of the Permanent Order is granted, subject to the following conditions:

1. Mr. Vlcek, or his agent, must monitor the channel from the Third Party's well to Centurion Creek during the freezing season from November to mid-March, as follows:
 - a) monitoring must be performed weekly if the flow is stabilized with ice and snow cover, and more frequently if there are indications that ice jams might develop.
 - b) if ice jams develop, the blockage must be removed by mechanical methods to return the flow to the channel.

[58] Finally, if an application to adjourn the upcoming hearing is filed, the stay will remain in place. If any party seeks to have this stay decision set aside, a formal application must be made, and a submissions schedule will be established.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board
October 28, 2013