



# Environmental Appeal Board

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## DECISION NO. 2014-WAT-019(a)

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

<b>BETWEEN:</b>	Steven Vestergaard	<b>APPLICANT</b>
<b>AND:</b>	Engineer under the <i>Water Act</i>	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Alan Andison, Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on September 30, 2014	
<b>APPEARING:</b>	For the Applicant: George E.H. Cadman, Q.C., Counsel For the Respondent: James Davies	

## STAY APPLICATION

[1] Steven Vestergaard applied for a stay of an order (the "Order") issued to him under section 88 of the *Water Act*. The Order was issued on July 28, 2014, by James Davies (the "Engineer"), a designated Engineer under the *Water Act*, with the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry").

[2] The specific requirements of the Order are set out below, but in general, the Order requires Mr. Vestergaard to: remove a road berm and culvert crossing on Battani Creek by no later than August 15, 2014; immediately retain a qualified professional to develop a road deactivation plan for a road located on Crown land; submit the road deactivation plan to the Ministry by no later than September 30, 2014; and, implement the road deactivation plan under the supervision of a qualified professional upon receipt of written authorization issued by the Ministry.

[3] On September 10, 2014, Mr. Vestergaard filed an appeal against the portions of the Order pertaining to the road deactivation plan. In his Notice of Appeal, he requested "an immediate stay pending a hearing."

[4] By a letter dated September 12, 2014, the Engineer consented to a short interim stay to allow the Board time to obtain submissions from the parties on the application for a stay of the Order.

[5] The Board heard this stay application by way of written submissions. The Board received written submissions from both of the parties. This is the Board's decision on the stay application.

## BACKGROUND

[6] Mr. Vestergaard holds conditional water licence 64497 (the "Licence"), which was issued on February 16, 1987, and is appurtenant to land that he owns on Howe Sound near Lions Bay. The Licence authorizes the diversion of 500 gallons of water per day from Battani Creek for domestic purposes. The point of diversion on Battani Creek is located on Crown land to the east of, and upslope from, Mr. Vestergaard's land. The Licence authorizes the construction of a "diversion structure and pipe" at a location indicated on a plan attached to the Licence.

[7] As the holder of the Licence, Mr. Vestergaard also holds permit no. 15946 (the "Permit") under the *Water Act*, authorizing the occupation of Crown land. The Permit was issued on February 16, 1987, and states that the holder of the Licence "is hereby authorized to occupy Crown land by constructing, maintaining and operating thereon the works authorized under said licence...." Specifically, the Permit states that the Crown land that may be occupied under the Permit is a portion of unsurveyed Crown land "the location of which is shown approximately on the plan attached to" the Licence. The Permit also states that the "approximate dimensions of the Crown land authorized to be occupied under this permit are 800 feet in length and 15 feet in width, having an area of 0.28 acre." Further, the Permit authorizes the permittee to "cut and remove from Crown land any timber necessary to permit construction and maintenance of said works", and "[p]rior to the cutting, destruction or flooding of any timber, the permittee shall apply for and obtain a licence to cut timber from the District Manager [within the Ministry] ...." The Permit provides that "[i]n the event of a dispute at any time with respect to the area or boundaries of the land affected by this permit, the holder shall, at his own expense, have the said land surveyed by a duly qualified surveyor."

[8] Sometime in the past, a diversion structure and water pipe was constructed on Crown land to divert and transport water from Battani Creek to Mr. Vestergaard's land.

[9] According to Mr. Vestergaard's submissions, in or about June 2011, he enquired with government staff through Front Counter BC regarding building an access road parallel to the existing water pipe, and whether he could do so within the scope of the existing Permit. He submits that he applied for a timber mark, on the advice of a Natural Resource Officer, and he was granted a licence in October 2011 to clear timber from the proposed access road.

[10] From November 2011 to January 2012, Mr. Vestergaard cleared the access road. He submits that this resulted in a "simple dirt trail" which was intended to be used on foot or by an excavator.

[11] During September 2012, a small forest fire occurred in an area above the licensed diversion point on Battani Creek. Firefighting crews used the access road to fight the fire. According to Mr. Vestergaard, this caused damage to the access road, which caused it to wash out during the winter of 2012/2013.

[12] Mr. Vestergaard advises that, to repair the damage to the access road, he covered the road surface with aggregate and asphalt, and he dug a drainage ditch and installed culverts.

[13] In January 2013, Mr. Vestergaard enquired with the Ministry to determine whether it would provide compensation for the costs incurred to repair the access road. Mr. Vestergaard submits that the issue remained unresolved until litigation ensued, and his "claim for damages was successful."

[14] On January 30, 2013, a Ministry Compliance and Enforcement Officer visited Mr. Vestergaard's property and the access road.

[15] On February 13, 2013, Mr. Rosenboom, an Assistant Regional Water Manager with the Ministry, sent an advisory letter to Mr. Vestergaard. That letter states, in part, as follows:

The Water Licence C064457 and the Permit over Crown Land 15946 authorize you to construct, operate and maintain the following works at Battani Creek:

- A diversion structure, and
- A pipe.

Our records indicate that the diversion structure authorized in Battani Creek on this licence is a 1'x1'x1' wooden box with a screened intake.

After I received a question from the public about construction works on Battani Creek, [a] FLNRO Compliance and Enforcement Officer... visited the site on January 30, 2013. On the site, he found equipment belonging to Whittaker Equipment Ltd., and he thus phoned Mr. Whittaker. Mr. Whittaker informed [the Officer] that you hired him to construct a reservoir and catch basin; therefore he was drilling and blasting within Battani Creek.

As this reservoir is not mentioned in either your Water Licence or Permit over Crown Land, I consider these works to be unauthorized under the *Water Act*.

Therefore, I request you to do the following:

1. Stop all works at the site immediately, and;
2. Submit an application for an amendment of your Water Licence to include the reservoir by March 15, 2013. With this amendment you should at least include an environmental assessment of all recent works at the site, and design drawings of the reservoir.

[16] On February 14 and March 11, 2013, Mr. Vestergaard provided information to Mr. Rosenboom via email.

[17] On March 13, 2013, Mr. Rosenboom issued another advisory letter to Mr. Vestergaard. That letter states, in part, as follows:

... we do require more information on the following works that do require authorization under the *Water Act*:

- Private bridge over Magnesia Creek; and
- Ditching for the purpose of supplying water to generate electricity.

Please submit a complete description of these works (including whether the bridge has been designed to withstand a 1 in 200 year flood), and design drawings done by a Qualified Engineering Professional. Please have the Qualified Engineering Professional follow the attached Drawing Standards. ...

For future reference, both of these works may require either a Section 9 Approval or Notification under the *Water Act*.

We are not prepared to authorize Approvals retroactively for works already completed, but please do submit the attached applications to amend your water licence:

- Amendment application for change to works (to include reservoir and ditching); and
- Amendment application for change of purpose (to include Power-Residential purpose).

...

We also recommend that each of your neighbours submit an application for a Water Licence ...; and that in cooperation with your neighbours, you submit a completed Joint Works Agreement according to the attached guidelines. ...

[18] According to Mr. Vestergaard's submissions, during the next year, he attempted to work with the Ministry to comply with the request to amend the scope of the works listed in the Licence, and he provided the Ministry with information including photos and descriptions of what he describes as "the diversion site, the water intake pond and the Access Road." However, he advises that he was "unable to get clarity on what precisely he needed to do to amend the Licence and he eventually put those efforts on hold."

[19] On July 25, 2014, a Natural Resource Officer with the Ministry visited the diversion point on Battani Creek, and observed further works that appeared to be unauthorized. According to the Order, the Natural Resource Officer found an unauthorized stream crossing of Battani Creek, and he observed the construction of an access road that involved the use of drilling and blasting on sloping land.

### **The issuance of the Order**

[20] The Order is dated July 28, 2014, but was delivered to Mr. Vestergaard on August 7, 2014. The Order states that Battani Creek is tributary to Magnesia Creek, and three creeks in the area including Magnesia Creek "have a known

history of natural hazards, that resulted in the construction of debris basins or a concrete flume on these streams."

[21] The requirements in the Order state as follows:

NOW THEREFORE, ... hereby order pursuant to Section 88 of the *Water Act* of British Columbia, that the Landowner [Mr. Vestergaard] is:

1. To immediately remove the road berm and culvert crossing on Battani Creek located near or at his point of diversion, PD46257, no later than August 15, 2014.
2. To immediately retain a qualified professional to develop a road deactivation plan for the portion of the access road located on Crown Land to the east of his property, to prevent and manage the potential for slope failure resulting in sediment-laden water, or any other deleterious substances into an of the streams near or crossed by this road.
3. The road deactivation plan shall:
  - a. be submitted for FLNR [Ministry] review by September 30, 2014.
    - i. The work is to commence upon receipt of written authorization issued by FLNR [the Ministry].
  - b. Be implemented under the supervision of a qualified professional(s) experienced with road deactivation on sloping lands.

### **The appeal and the application for a stay**

[22] Mr. Vestergaard's Notice of Appeal states, in part, as follows:

Mr. Vestergaard seeks a stay of the Order requiring him to deactivate the Access Road pending a hearing. Mr. Vestergaard has complied with the terms of the Order requiring him to remove certain works at the diversion site on Battani Creek. Mr. Vestergaard takes the view that the improvements he made to the Access Road were necessary by the damage caused by forest fire crews and their equipment which led to the washout the following winter. He believes the Access Road remains within the physical dimensions as set out in the Permit. He attempted to have the Water Licence amended such that the works that had been constructed would be in full compliance but was unable to accomplish that despite much communication and exchange of information with FLNR. The original Access Road was constructed with the knowledge and approval of FLNR and the subsequently improved Access Road remains within the dimensions originally authorized in the [P]ermit. For these reasons, Mr. Vestergaard believes he has sufficient grounds to appeal the Order as it pertains to deactivation of the Access Road.

[23] The remedies sought in Mr. Vestergaard's Notice of Appeal are as follows:

- stay pending a hearing.
- set aside Parts 2 and 3 of the Order.

[24] As stated above, Mr. Vestergaard advises that he has already complied with the first requirement in the Order.

[25] On September 12, 2014, the Engineer consented to a short interim stay to allow the Board time to obtain full submissions from the parties on the application for a stay of the Order.

[26] Mr. Vestergaard submits that a stay should be granted, pending a hearing on the merits of the appeal. He submits that the appeal raises serious issues to be decided, his interests will suffer irreparable harm if a stay is denied, and the balance of convenience favours granting a stay.

[27] The Engineer opposes a stay of the Order.

## ISSUE

[28] 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

[29] 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.

[30] 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.) [*RJR-MacDonald*] 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.

[31] The onus is on the applicant for the stay, in this case Mr. Vestergaard, to demonstrate good and sufficient reasons why a stay should be granted under this test.

[32] 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

[33] 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.

[34] Mr. Vestergaard submits that the appeal raises serious issues to be decided by the Board. He submits that the Order requires him to decommission a road that was first allowed by the Permit when it was issued in 1987. Further, he argues that the Order requires the removal of the access road which was built in 2011 with the Ministry's approval, and was subsequently upgraded as a result of damage caused by the Ministry's fire crews.

[35] The Engineer submits that there is no serious issue to be decided. He states that Mr. Vestergaard constructed new works and made changes in and about a stream without meeting the requirements of the *Water Act*; namely, he did not apply for an approval under section 9 of the *Water Act*, or an amendment to the Licence under section 18 of the *Water Act*.

[36] Also, the Engineer disputes Mr. Vestergaard's assertion that the access road is within the Crown land corridor that is the subject of the Permit. The Engineer submits that the access road is not in the same location as the diversion structure and pipe, and that the access road is generally located outside of the area covered by the Permit.

[37] The Engineer submits, therefore, that there is no legal authority under the Licence or the Permit for the culvert (which has now been removed), access road, and related road berm (which has also been removed). Moreover, the Engineer submits that Mr. Vestergaard has been advised on more than one occasion to apply for lawful authority for constructing those works and making changes in and about a stream.

[38] In addition, the Engineer submits that the access road is located on sloping land immediately adjacent to or within the channel of Battani Creek, such that slope failures or washouts could result in material moving downslope into the stream, and potentially into other streams in the area. He submits that a failure at a stream crossing could mobilize bank material, resulting in danger downslope and/or downstream to public safety, and damage to property, utilities, a transportation route, a railway line, and to the works of other downstream water licensees.

[39] In summary, the Engineer argues that, taking into account those risks, and the lack of lawful authority for the access road and related road berm, there is no serious issue to be decided for the purposes of deciding the stay application.

[40] In reply, Mr. Vestergaard submits that one of the issues to be decided in the appeal is the scope of the authorization and approval for the works in question, based on the terms of the Permit and the Licence. Moreover, he submits that

deactivation of the access road would render his appeal moot, and would restrict his ability to service the water line.

*The Panel's findings*

[41] The Panel finds that one of the issues at the heart of this appeal is the question of whether, or to what degree, the access road, road berm, and related works constructed by Mr. Vestergaard, and particularly the works constructed in 2012/2013, may be in accordance with the terms of the Permit, the Licence, and/or any other legal authorization that Mr. Vestergaard obtained.

[42] The Panel finds that the Licence, on its face, does not authorize any works other than a "diversion structure and pipe." However, the Licence must be considered together with the Permit, because the authorized point of diversion under the Licence is located on Crown land, and not on the land to which the Licence is appurtenant. The Permit authorizes the licensee to occupy Crown land "by constructing, maintaining and operating thereon the works authorized under" the Licence. The Permit also authorizes the holder of the Licence to cut timber, subject to Ministry approval, on the Crown land that is covered by the Permit. The Panel finds that, by necessary implication, the holder of the Licence is authorized by the Permit to create access to the licensed works within the strip of Crown land covered by the Permit, so that the licensee can construct, maintain and operate the works authorized by the Licence. Thus, the Panel finds that the terms of the Licence alone are not conclusive of whether Mr. Vestergaard had authority to build the access road in 2011 or conduct further work in relation to the access road in 2012/2013.

[43] Another issue at the heart of this appeal is whether the works installed in 2012/2013 are within the area covered by the Permit. The parties disagree in this regard.

[44] In addition, the Panel finds that the appeal raises questions regarding whether some or all of the works constructed in 2012/2013 were necessitated by damage arising from Ministry firefighting activity in September 2012, and whether Mr. Vestergaard made reasonable inquiries and efforts to obtain legal authority for the works.

[45] In deciding all of these questions, the Board will require more evidence, including evidence about the exact nature of the works, as well as the exact location of the works and the boundaries of the area covered by the Permit. These are mixed questions of fact and law.

[46] Consequently, the Panel finds that the appeal raises serious issues which are not frivolous, vexatious, or pure questions of law. Therefore, the Panel finds that Mr. Vestergaard has met the first branch of the test.

Irreparable Harm

[47] The second factor to be considered is whether 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.

[48] In assessing the question of irreparable harm, the Panel is 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.)).

[underlining added]

[49] Mr. Vestergaard submits that, if a stay is denied, he will be required to comply with the Order and remove the access road. He argues that this would render his appeal moot, and he would be unable to collect damages from the Ministry for the cost of replacing the access road should his appeal be successful. On this basis, he submits that the test for irreparable harm has been met.

[50] The Engineer submits that the appealed portions of the Order require Mr. Vestergaard to retain a qualified professional to develop a road deactivation plan in a timely manner, before the Fall and Winter rains, because the Engineer is concerned that the access road, culvert, and road berm were not designed and developed under the direction of qualified professionals. The Engineer submits that when a person applies for an approval or licence amendment involving an access road with a stream crossing, the application is normally accompanied by a plan to construct the road, and this plan would normally address issues such as whether the area is safe for road drilling and blasting, particularly on sloping land, and the proper design, materials, and construction practices including the appropriate size of the culvert for a stream crossing.

[51] The Engineer acknowledges that, if a stay is not granted, road deactivation may preclude the use of a vehicle to access and service the water line and diversion works. However, the Engineer submits that there would still be other means to access the water line and diversion works, including by foot, mountain bike, all-terrain vehicle, trail motorbike, or horse. The Engineer submits, therefore, that Mr. Vestergaard could still access the works authorized by the Licence, but the level of practicality and efficiency would change. In addition, the Engineer argues that, although road deactivation may undo certain enhancements that Mr. Vestergaard

made to improve his access to the authorized works, he made those changes without lawful authority.

[52] Regarding Mr. Vestergaard's assertion that the culvert, access road and road berm are within the area covered by the Permit (which the Engineer disputes), the Engineer notes that the Permit has a clause that addresses disputes of this nature. Specifically, clause (h) of the Permit states as follows:

In the event of a dispute at any time with respect to the area or boundaries of the land affected by this permit, the holder shall, at his own expense, have said land surveyed by a duly qualified surveyor.

[53] The Engineer advises that he would be agreeable to the use of GPS with a tracking feature, operated by a qualified person, to determine the location of the culvert, access road and related road berm relative to the area covered by the Permit.

[54] Finally, although the Engineer made the following submission in addressing the third part of the *RJR-MacDonald* test, the Panel finds that it is relevant to this portion of the test. The Engineer submits that there are "levels" of road deactivation, typically known as temporary, semi-permanent, and permanent, that may be considered by the Ministry in reviewing and approving the road deactivation plan contemplated by the Order. The Engineer submits that the level of deactivation that is required will depend on the results of the Ministry's assessment of the plan, once it has been prepared. The Engineer argues that, in these circumstances, the requirement to develop a road deactivation plan poses no risk of irreparable harm to Mr. Vestergaard's interests.

[55] In reply, Mr. Vestergaard submits that the Engineer failed to address the fact that denying a stay would render the appeal moot.

#### *The Panel's findings*

[56] The Panel finds that, if a stay is denied, Mr. Vestergaard would have to comply with requirements 2 and 3 of the Order before the appeal is heard and decided by the Board. Specifically, he would have to "immediately" retain a qualified professional to develop a road deactivation plan, and then he would have to implement the plan under the supervision of a qualified professional, which may involve some level of decommissioning of the road, depending on the Ministry's assessment of the plan. However, the Panel finds that this would not render his appeal moot, because Mr. Vestergaard may be able to return the access road to its present state if the appeal is decided in his favour. Denying a stay in those circumstances would cause him to incur additional costs, because he would have to decommission the access road to some degree, but if his appeal succeeds he may be able to return the access road to its present condition (or a similar condition which would allow for vehicle access).

[57] Mr. Vestergaard provided no evidence on the estimated costs to comply with the Order, or to return the access road to its present condition should his appeal succeed. However, the test for irreparable harm considers the nature of the harm, not the magnitude of the harm. Thus, the question becomes whether the potential

additional costs that Mr. Vestergaard would incur from complying with the Order and then reconstructing the access road, should his appeal succeed, constitute “harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other,” according to the test in *RJR-MacDonald*.

[58] Mr. Vestergaard argues that he would be unable to collect damages from the Ministry for the cost of replacing the access road, should his appeal be successful. However, he has advised that, in 2013, he sought compensation from the Ministry for the costs he incurred in making repairs to the access road, and his “claim for damages was successful” after litigation ensued. Based on that information, the Panel is not convinced that Mr. Vestergaard would be unable to collect damages from the Ministry for the cost of complying with the Order and then returning the access road to its current condition, if a stay is denied and his appeal is successful. The Panel finds that his own submissions suggest that any costs he incurs as a result of complying with the Order, and then returning the access road to its current condition in the event that his appeal is successful, may be compensable through litigation. If that is so, those costs would not be irreparable in nature.

[59] Finally, the Panel finds that deactivating the access road would not mean that Mr. Vestergaard would be unable to access the water pipe and diversion structure. As noted by the Engineer, deactivating the road would still allow Mr. Vestergaard to access the area by means other than a vehicle. In addition, the Panel notes that the original access road that Mr. Vestergaard cleared in 2011/2012 was, according to his submissions, a “simple dirt trail which was intended to be used on foot or by excavator.” This indicates that he originally intended to access the diversion structure and water pipe on foot or using an excavator, and not by vehicle. Thus, it appears that denying a stay may return Mr. Vestergaard to the same type of access he had when he built the original access road in 2011/2012.

[60] For these reasons, the Panel finds that Mr. Vestergaard has not established that there will be irreparable harm to his interests, including his right to an appeal, his financial interests, or his ability to access the licensed diversion structure and water pipe, if a stay is denied.

#### Balance of Convenience

[61] The balance of convenience portion of the *RJR-MacDonald* 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.

[62] Mr. Vestergaard submits that the Ministry will suffer no harm if a stay is granted. He submits that no element of public safety is involved.

[63] The Engineer submits that, if a stream crossing is improperly designed, the stream can become blocked and water can be re-directed elsewhere. Similarly, if road drainage is improperly designed, water can be directed onto areas that result in the movement of soil, and sediment-laden water into streams. The Engineer argues that, in the present case, the culvert, access road, and road berm were constructed on sloping land, and there is a potential for slope failures or washouts that may result in material moving downslope and/or downstream in Battani Creek

and other streams. He submits that such conditions pose a danger to public safety, property, utilities, a transportation route, a railway line, and the works of downstream licensees. In particular, he submits that there is considerable development and infrastructure located downstream and/or downslope of the unauthorized works, and a slope failure would likely impact some of those developments and infrastructure. He submits that such harm may be incapable of being remedied in the event of a slope failure or washout.

[64] Further, the Engineer argues granting a stay would pose a risk of irreparable harm to the environmental values in Battani Creek and other streams, and any harm arising from a slope failure or washout exposes the Crown to a potential risk of legal claims if damage to others occurs.

[65] The Engineer submits that these issues outweigh any potential harm to Mr. Vestergaard's interests. He submits that the Order provides a means for managing and preventing the potential for slope failure or washouts that could cause harm to the values and interests downstream and/or downslope.

[66] In support of his submissions, the Engineer provided an extract from a report of the Geological Survey of Canada titled "Field Trip – Guidebook: Some Geological Hazards in North Vancouver and along the Sea to Sky Highway, BC", 2004, at p. 28. This document states that a flood occurred in 1960, and debris flows occurred in 1962 and 1981, at Magnesia Creek. It describes the future debris flow probability as "very high", and it states that multiple residences, access roads, a highway and a railway are at risk from such an event. It also states that a concrete debris basin and barrier were designed by an engineering firm and constructed by the BC Ministry of Transportation in 1985 at a cost of \$3.1 million.

[67] In reply, Mr. Vestergaard notes that the Ministry issued a separate Trespass Notice to him on September 4, 2014, after the appeal of the Order was filed. The Trespass Notice was issued under the *Land Act*. Mr. Vestergaard argues that, in issuing the Trespass Notice, the Ministry is seeking to circumvent the appeal process and the Board's powers, and this should not be tolerated.

#### *The Panel's findings*

[68] The Panel has already found that Mr. Vestergaard has failed to establish that his interests will suffer irreparable harm if a stay is denied pending a decision on the merits of the appeal. However, the Panel finds that he will suffer some harm and/or inconvenience if a stay is denied. He will incur costs to comply with the Order, and he may in the future incur costs to restore the access road to its current conditions, depending on the outcome of the appeal, although those costs may later be recoverable through litigation. If a stay is denied, Mr. Vestergaard will also have less convenient access to the water pipe and diversion works, pending the Board's decision on the merits of the appeal.

[69] In regard to the potential harm to the Engineer's and/or Ministry's interests if a stay is granted, the Panel finds that there is evidence that granting a stay could result in a risk of irreparable harm to the environment, as defined in *RJR-MacDonald* (i.e., "permanent loss of natural resources"). Based on the Engineer's evidence, the Panel finds that the area in issue is sloping and has experienced

significant debris flows in the past. The Panel finds that, if a slope failure and/or washout occurred as a result of inadequate construction of the access road and the related berm, this could cause permanent damage to the environmental values associated with Battani Creek and the streams that it connects to, including Magnesia Creek. The Panel also finds that the risk of a slope failure and/or washout, if a stay is granted, creates associated risks to public safety and of damage to residences, roads, a railway, and the licensed works of other water licensees located downslope and/or downstream from the access road and related berm.

In these circumstances, the Panel finds that the balance of convenience in this case weighs in favour of denying a stay of the Order, pending the Board's decision on the merits of the appeal.

Finally, in regard to the Trespass Notice that was issued by the Ministry, the Panel notes that it was issued under section 59 of the *Land Act*, and relates to alleged contraventions of section 60 of that Act. The Board has no jurisdiction under the *Land Act*, and as such, no remedy lies before the Board in regard to the Trespass Order.

## DECISION

[70] 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.

[71] For the reasons provided above, the interim stay granted by the Board on September 12, 2014, is hereby rescinded. However, as the date for submission of the road deactivation plan as set out in the Order has expired the Panel hereby orders that the road deactivation plan be submitted for Ministry review by not later than October 24, 2014.

[72] The application for a stay of the Order is denied.

"Alan Andison"

Alan Andison, Chair  
Environmental Appeal Board

October 8, 2014