Environmental Appeal Board

Citation:	*Deep Water Recovery Ltd. v. Director, Environmental Management Act*, 2024 BCEAB 17
Decision No.:	EAB-EMA-24-A014(a)
Decision Date:	2024-06-07
Method of Hearing:	Conducted by way of written submissions concluding on May 22, 2024
Decision Type:	Preliminary Decision on Stay Application
Panel:	Darrell Le Houillier, Panel Chair
Appealed Under:	*Environmental Management Act*, S.B.C. 2003, C.53

Between:

Deep Water Recovery Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on Behalf of the Parties:

For the Appellant:	Graham Walker, Counsel
For the Respondent:	David Cowie, Counsel Alvin Bajwa, Counsel

STAY APPLICATION DECISION

BACKGROUND

[1] This appeal concerns a Pollution Abatement Order (the "Order"), issued on March 15, 2024, against Deep Water Recovery Ltd. ("Deep Water"). The Order was issued by Jennifer Mayberry on behalf of the Director of Operations (the "Respondent"), who works in the Ministry of Environment and Climate Change Strategy (the "Ministry"). The Order was issued pursuant to section 83 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*").

[2] Deep Water's primary business is the maintenance and recycling of marine vessels. The Order addresses pollution the Ministry says is ongoing as a result of effluent being discharged from the location of Deep Water's operations (the "Site") into the waters of Union Bay.

[3] The Order requires Deep Water to do a number of things, including:

- cease the discharge of water from the Site, containing copper, lead, and zinc in concentrations above marine life thresholds taken from the BC Ambient Water Quality Guidelines (the "Guidelines");
- have a qualified professional, as defined in the *Act*, complete a Site Activity and Discharge Identification Update Report (the "Report"), which must identify:
  - points where effluent is discharged from the Site;
  - a description of the activities at the Site that could be contributing to the discharge of contaminants of potential concern from the Site; and
  - which of those contaminants are present in any and all sources of discharge that have been identified in the Report;
- have a qualified professional, as defined in the *Act*, complete an Effluent Sampling and Management Plan (the "Plan"), which must set out a sampling procedure of effluent at the Site and a strategy to reduce the concentration of copper, lead, and zinc if any of these are in excess of the Guidelines;
- implement the Plan on a date to be determined by the Respondent; and
- have a qualified professional, as defined in the *Act*, submit monthly reports of activities undertaken to comply with the Plan.

[4] Deep Water has applied to the Environmental Appeal Board (the "Board") for a stay of the Order. The Respondent opposes this application.

[5] Section 25 of the *Administrative Tribunals* Act, S.B.C. 2004, c. 45 (the "*ATA*"), grants the Board the authority to stay a decision issued under the *Act* which has been appealed to the Board.[1]

APPLICABLE TEST

Both parties agree that the Board should stay the Order if and only if Deep Water provides enough evidence to establish:

- this appeal raises a serious issue;
- either there is a reasonable probability that, or Deep Water is likely to,[2] suffer "irreparable harm" if the stay is not granted; and
- the "balance of convenience" favours granting the stay—that is, the harm that results from not granting the stay is greater than the harm that results from granting the stay.[3]

[6] Both parties also agree that the appeal raises a serious issue. They disagree, however, as to how the latter two questions in the three-part test should be answered. This application was heard by way of a written hearing: Deep Water provided submissions along with its application for a stay, the Respondent provided submissions in response, and Deep Water provided reply submissions to address the Respondent's submissions.

[7] I agree with the parties with the issues they have agreed on. They have identified the correct test the Board must apply, consistent with the law and its previous decisions, and they correctly state that the appeal raises a serious issue. As such, I will focus on the remaining two elements of the three-part test in this preliminary decision.

ISSUE

The issue in this preliminary decision is whether the Board should stay the Order. To do so, the Board must conclude that:

- Deep Water is likely to suffer "irreparable harm" if the Board does not grant the stay; and
- the "balance of convenience" favours granting the stay.

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[1] Section 25 of the *ATA* provides that authority. That section applies to the Board by virtue of section 93(1) of the *Act*.

[2] The parties disagree on the appropriate standard of proof. This will be discussed in the reasons to follow.

[3] This test is found in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*").

SUBMISSIONS AND ANALYSIS

Preliminary Issue

[8] Deep Water sought to introduce new evidence during its reply submissions. One piece of evidence related to a reason why a customer cut ties with the company in February 2024. This evidence was available to Deep Water when it made its initial submissions and relates to loss of business—an issue argued in Deep Water's initial submissions. It would be procedurally unfair to allow that evidence to be introduced as part of Deep Water's reply, so I have not considered it. The Board's Rule 16 required Deep Water to, and it ought to have, provided all evidence relevant to its arguments in its application submissions.

[9] Furthermore, Deep Water submitted additional evidence in reply regarding the Plan, as part of a chronology. Deep Water did not specifically clarify those pieces of evidence or explain why they are relevant, it simply provided them and noted the date of their creation. As a result, I have not considered that evidence because Deep Water has not established why the Board should consider it along with Deep Water's reply submissions.

[10] Lastly, Deep Water relied upon new evidence in its reply about the lack of compliance and enforcement actions from the federal Department of Fisheries and Oceans. This evidence was available when Deep Water made its initial submissions, and it did not adequately explain why that new evidence should be admitted by way of reply. For similar reasons as above, I conclude that it would be procedurally unfair to consider that evidence and I decline to do so.

Will Deep Water Suffer "Irreparable Harm" if the Board does not Grant the Stay?

<u>Financial Harm</u>

Deep Water's Submissions

[11] Deep Water argues it will suffer irreparable financial harm if the Board does not grant the stay. Deep Water says that "irreparable harm" includes financial harm that is not recoverable as between the parties.[4]

[12] Deep Water references two prior Board decisions in support of its argument. First, in *Sage Investments Ltd. v. Assistant Regional Water Manager*, 2013 BCEAB 13 (CanLII) ("*Sage*"), the Board found that an estimated $48,000 to $53,000 cost of compliance with an order that could not be recovered, and which would be exceeded by the costs of pursuing the appeal on its merits, amounted to "irreparable harm." Second, in *Chief Richard Harry et*

[4] *RJR-MacDonald*.

al v. Assistant Regional Water Manager, 2011 BCEAB 11 ("*Chief Harry*"), at paragraph 33, and in *Sage,*[5] the Board held that the applicant for a stay only had to establish that there was a "reasonable possibility" or a "likelihood" of irreparable harm, respectively, to satisfy this part of the test.

[13] In the circumstances of this case, Deep Water says it has spent over $200,000 on compliance with environmental orders since early 2023 and expects to pay over $14,000 each month to comply with the Order. Deep Water provided an affidavit from an environmental consultant (the "Consultant") whose company had been retained to conduct monitoring of surface water at the Site, starting in April 2023, to corroborate this estimate of the ongoing cost to comply with the Order. Deep Water's operations manager also provided an affidavit, in which he described the company as "small;" however, no other information was provided about Deep Water's financial circumstances.

The Respondent's Submissions

[14] The Respondent argues the Consultant's estimate of the cost to comply with the Order is inflated. While the Consultant budgets for a senior engineer or scientist to carry out site investigations, the Respondent says that such investigations can be carried out by staff, using a methodology approved by the qualified personnel (in this case, the senior engineer or scientist). The Respondent says that Deep Water has also failed to provide evidence of the harm that it would suffer as a result of these expenditures. Furthermore, given that it has already spent over $200,000 without any reported financial difficulties, the added costs of compliance with the Order should not be expected to harm the company. In any event, financial expenditures do not amount to irreparable harm.[6]

Deep Water's Reply

[15] Deep Water replies that the Respondent's position places an undue burden upon Deep Water, one that is wholly inappropriate for a stay application. Deep Water says it does not have to provide irrefutable evidence on harm, merely a likelihood or reasonable possibility of irreparable harm to its interests. It again references *Sage* and *Chief Harry* in support of that position. Deep Water says that the Respondent seeking additional information improperly attempts to gauge the magnitude of harm, whereas the appropriate focus is on the nature of the harm.[7] Deep Water adds that the Board has correctly concluded that financial cost without any means of recovery constitutes irreparable harm, referencing *Sage* and *Comet Investments Ltd., Inc. No 69349 v. Assistant*

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[5] at paragraph 38.f

[6] The Respondent references *Gibraltar Mines Ltd. v. Director, Environmental Management Act*, 2021 BCEAB 28 ("*Gibraltar*"), at para. 63 and *Harvest Fraser Richmond Organics Ltd. v. District Director, Environmental Management Act*, 2017 BCEAB 9, at para. 55 in support of this argument.

[7] As described in *RJR-MacDonald*.

Regional Water Manager and Regional Water Manager, 2011 BCEAB 17 ("*Comet*"), at paragraphs 40–42.

[16] Furthermore, Deep Water adds that the Board in *Sage* found that less detailed and more speculative estimates of costs of complying with an Order were sufficient to establish irreparable financial harm.

[17] Furthermore, Deep Water says the Respondent was wrong when saying the Consultant overinflated the estimated cost of complying with the Order. Deep Water says the Order's requirements are that a qualified professional supervise sampling; staff following an approved methodology is not enough. In any event, the Consultant's evidence is sufficient to establish irreparable financial harm even absent the supervision hours by a qualified professional.

Panel's findings

[18] Deep Water argues it does not have to demonstrate it is certain to suffer irreparable harm in order to be granted a stay; it must merely show that there is a likelihood or a reasonable possibility of such harm occurring. Deep Water references *Sage* and *Chief Harry* in support of that argument. *Sage* does not provide any analysis on this point, simply adopting the reasoning in *Chief Harry*.

[19] The reasoning in *Chief Harry* is provided at paragraph 33, which reads, in its entirety:

> The Panel notes that Applicant is not required to establish with certainty that its interests will suffer irreparable harm if a stay is denied, but the Applicant is required to provide sufficient evidence to establish that there is a likelihood or reasonable possibility of irreparable harm to its interests.

[20] The basis for this analysis is unclear. It is also internally inconsistent, insofar as it equates "likelihood" with "reasonable possibility." These are not the same. I agree that "likelihood" is the correct standard, insofar as it means more likely than not. I disagree that a different standard of "reasonable possibility" is equivalent or appropriate. This is inconsistent with the standard of proof before the Board generally and is not adequately supported by the reasoning in *Chief Harry*. To the extent that the Board has relied on a standard of proof of "reasonable possibility" to establish irreparable harm, I consider these decisions to be incorrectly decided. The correct standard of assessing evidence before the Board is the balance of probabilities, as referenced within more recent Board decisions.[8]

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[8] See, for example, *Gibsons Alliance of Business and Community Society v. Director, Environmental Management Act*, 2017 BCEAB 30 (CanLII), at para. 57; *Harvest Fraser Richmond Organics Ltd. v. District*

[21] Deep Water argues that irrecoverable financial losses constitute "irreparable harm," relying on the following excerpt from *RJR-MacDonald*:

> '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.

[22] As noted in this excerpt, this requires evidence of harm. A financial expense is not, on its own, sufficient to establish harm. Some evidence of the impact that expense has on an applicant for a stay is required. Deep Water did not provide sufficient evidence to describe the impact of its estimated expenditures and, as noted by the Respondent, Deep Water seems to have spent over $200,000 on compliance measures to date without any professed financial harm. Accordingly, there is insufficient information before me to establish "irreparable harm" on the basis of financial expense. As a result of this finding, I do not need to address the Respondent's concern over the estimated cost of compliance with the Order that was provided by the Consultant.

[23] I recognize the Board seemed to make a finding in *Sage* that irrecoverable financial expenditures that were "significant" amounted to irreparable harm. The basis for this finding is unclear, although I note the respondent in that case seemed to argue only about the quantum of the expected cost of compliance. I do not consider *Sage* to adequately explain its conclusion in this respect and I do not find it persuasive for that reason. I consider the excerpt from *RJR-MacDonald* more applicable, and it requires evidence of harm, not merely irrecoverable financial expenditure. To the extent that *Sage* may say otherwise, it is not binding upon me and I do not find it persuasive.

[24] I also recognize that *Comet* concluded "… the lack of a mechanism to obtain recovery of monte spent in complying with an order that is later set aside constitutes irreparable harm." I disagree with this conclusion. *RJR-MacDonald*, the case referenced in support of that conclusion, requires evidence of harm, including "harm which … cannot be cured, usually because one party cannot collect damages from the other." The court in *RJR-MacDonald* makes clear it is not irrecoverable losses that must be established, it is irreparable harm. To say that any expenditure which is irrecoverable constitutes irreparable harm ignores the requirement for evidence of "harm which … cannot be cured".

Director, Environmental Management Act, 2017 BCEAB 9 (CanLII), at para. 55; and *GFL Environmental Inc. v. District Director, Environmental Management Act*, 2018 BCEAB 18 (CanLII), at para. 92.

[25] Requiring evidence of harm does not mean measuring its magnitude. There must be evidence of some harm, which is not present in this case. It is also a line of analysis followed by the Board in more recent years.[9]

Reputational Harm

Deep Water's Submissions

[26] Deep Water says that, despite appealing the Order and vigorously disagreeing that it is causing any pollution, media coverage of its operations and the existence of the Order imply Deep Water's operations are causing pollution. Deep Water says it has suffered irreparable harm to its business reputation as a result, and argues it will continue to do so if a stay is not granted.

[27] Deep Water notes the Board concluded, at paragraph 53 of *Executive Flight Centre Fuel Services Ltd. v. Director, Environmental Management Act*, 2015 BCEAB 4 (CanLII) ("*Executive*"), that a company in similar circumstances as itself was likely to suffer irreparable reputational harm. In that case, a company was subject to a cost recovery certificate, indicating the company was liable for environmental damage resulting from the overturning and rupturing of a truck it operated.

[28] The Board's decision notes that, while there had already been media coverage, a certificate that was the subject of an appeal was unlike one that was being enforced through court processes—a possible consequence if the stay had not been granted.

[29] Furthermore, Deep Water's operations manager provided an affidavit in support of the stay, in which he describes customers calling and saying they had heard that Deep Water had been shut down by the Ministry. Deep Water argues that this is evidence of the reputational harm it has suffered.

The Respondent's Submissions

[30] The Respondent argues Deep Water has not established that media attention will persist if the stay is denied, arguing that the media has a short attention span and a stay may, in fact, bring about additional media coverage that would not occur otherwise. Additionally, the Respondent notes that media publications submitted by Deep Water show that the Order is not the only subject of media interest in Deep Water, as coverage also focuses on complaints from nearby residents about environmental concerns and on ongoing litigation regarding the company's compliance with land use bylaws.

[31] Furthermore, the Respondent argues the evidence submitted by Deep Water does not relate customer concerns about the company shutting down in response to the Order. The Respondent asserts there is no evidence Deep Water has lost any customers,

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[9] See, for example, *Gibraltar* at para. 55–63 and *Richmond Steel Recycling Ltd. v. Director, Environmental Management Act*, 2022 BCEAB 29 (CanLII), at para. 100–101.

customers are taking business elsewhere, or that the Order prevents Deep Water from carrying on its business. The Respondent asserts the operations manager's belief that Deep Water's reputation would suffer irreparable harm is insufficient to establish this as a fact.

Deep Water's Reply

[32] Deep Water responds that, regardless of any other issues, the Order implies Deep Water is causing pollution, a contention with which it disagrees. Media reports reference the Order and are available upon any Internet search. This impacts Deep Water's reputation with existing and prospective clients. Deep Water argues denying a stay of the Order would perpetuate and increase this harm, as the Board has found in similar circumstances: *Worthington Mackenzie Inc. v. Director, Environmental Management Act*, 2010 BCEAB 2, at paragraph 59. Deep Water also clarifies that it is not concerned with its reputation with a portion of the public that is already opposed to its operations, but rather with its business reputation.

Panel's findings

[33] As set out previously in these reasons, Deep Water, in arguing that it will suffer loss of professional reputation, must show that it is more likely than not to suffer irreparable reputational harm.

[34] Deep Water references *Executive* in support of its application; however, the circumstances of this case are different. The Board in *Executive* considered an application for a stay of a certificate issued under section 80 of the *Act*. Such a certificate was, upon service to the person(s) named in the certificate, certified as a debt due to the government and could be recovered as if it were a judgment of the Supreme Court of British Columbia immediately after it was filed with the court.

[35] In this case, the Order requires Deep Water to submit information to the Ministry. It also requires Deep Water to devise, implement, and report on a strategy to mitigate any exceedances of the Guidelines identified by environmental sampling for specific metals in effluent being discharged into the environment. Section 83 of the *Act*, which authorizes the Order, requires that a director be "… satisfied on reasonable grounds that a substance is causing pollution …." This does not certify responsibility, only that the director has reasonable grounds for considering that pollution is taking place. Issuing such orders is one of the functions of a director. I do not agree that the possibility or likelihood of media attention when a director acts within that purview necessarily amounts to irreparable harm. It may in some circumstances, but in this case Deep Water is experiencing negative press for a variety of reasons. The Order is largely focused on information-gathering and addressing the presence of possible contaminants that have been shown to be present in effluent streams from the Site. The Order does not impose debt on Deep Water with the registration of a certificate, unlike the case in *Executive*. It is one step in a process, in which objectives are identified by the Order and enforcement is achieved by imposing administrative penalties or charging offenses. Neither of these enforcement mechanisms

are automatic, unlike the case in *Executive*, and each offers further procedural safeguards and the further opportunity for Deep Water to defend itself in processes before the Board or in court.

[36] For these reasons, *Executive* is not analogous to the circumstances of this case. The Board's decision in *Executive* relies heavily on the certificate's ability to be registered and enforced as a Court judgment, which is the crucial point of distinction between that case and this one. I accordingly do not find the rationale in *Executive* to be persuasive in the circumstances of this case.

[37] I am left with the evidence provided by Deep Water that there has been unfavourable media attention related to, among other things, the Order. While Deep Water argues that the denial of a stay will result in more negative media attention, I do not find that argument persuasive, nor has Deep Water provided me with persuasive evidence that this will occur. First, it is unclear that a stay being granted makes any further media attention more or less likely than a stay being denied. This is particularly significant in this case, as Deep Water is involved in other proceedings, including the dispute of an administrative penalty and litigation over its business operations from a zoning perspective. Second, Deep Water has not established that any media attention associated with a denial of the stay application is likely to be more negative than what has already taken place. Deep Water has also not established, or argued, how the different outcomes of the stay application are likely to affect the media response, nor has it addressed the possibility it could release its own position to the media, which is not contingent upon a stay being either granted or refused. For the above reasons, I conclude that Deep Water's argument on media coverage is speculative and does not meet the appropriate standard of proof to establish irreparable harm.

[38] I recognize that Deep Water provided evidence that a customer had called to express concern that the Ministry had shut the company down. I agree with the Respondent, however, that Deep Water has not provided sufficient information to relate this to the Order, as opposed to the other compliance actions Deep Water is facing. Regardless of if Deep Water were able to make this evidentiary connection, an inquiry or a concern from one customer does not amount to irreparable harm. Indeed, the fact that the customer asked shows that Deep Water had the opportunity to address their customer's misunderstanding.

[39] For these reasons, I conclude that Deep Water has not demonstrated it is more likely than not to experience irreparable harm, either financial or reputational, if the Order is not stayed.

Does the "Balance of Convenience" Favour Granting the Stay?

Deep Water's Submissions

[40] Deep Water asserts that "the vast majority" of surface water that falls onto or enters the Site evaporates or discharges into Union Bay. According to Deep Water, it has recycled only three marine vessels between Spring 2022 and Spring 2023. Deep Water says the only activities at the Site since Spring 2023 have been barge maintenance and repair, and these "do not contribute to elevated levels of concentrations of metals or other substances."

[41] Deep Water says it has no plans to recycle any marine vessel before there is a decision on the merits of this appeal. As a result, Deep Water asserts there is no risk of increasing metal concentrations in the environment near the Site as a result of its operations: the concentrations will remain as they were measured in 2021.

[42] In support of this assertion, Deep Water submitted an affidavit sworn by the Consultant. The Consultant also reviewed surface water analyses taken at the Site by a different environmental consultant in January 2022. The Consultant stated, after reviewing those data, that the concentration of copper, lead, zinc, and "other substances" in the surface water have remained stable since 2021, regardless of whether Deep Water was operating or not.

[43] The analytical results referenced by the Consultant indicate numerous exceedances of the Guideline thresholds.

[44] In sampling events from February and March 2023, background sampling upstream of the Site indicated copper concentrations above the one recommended for chronic exposure in the Guidelines (2 μg/L), with a maximum reading of 7.1 μg/L. Copper measurements at four locations where the Site discharges into Union Bay ranged from 3.04 to 55.5 μg/L. Lead concentrations were not elevated in any background readings, but were elevated at two discharge points from the Site (ranging from 2.91 to 9.32 μg/L, compared to chronic exposure limits in the Guidelines of 2 μg/L). Zinc concentrations were not elevated in background readings but were elevated at three discharge points from the Site (ranging from 11 to 390 μg/L, compared to chronic exposure limits in the Guidelines of 10 μg/L).

[45] Sampling for copper concentrations in November 2023 revealed one exceedance for in background measurements (4.21 μg/L) and exceedances at three locations of effluent discharge at the Site (ranging from 15 to 57.4 μg/L). Two of those effluent discharge sampling locations also showed exceedances in zinc concentrations (ranging from 14 to 327 μg/L).

[46] Sampling in December 2023 revealed concentration exceedances of the criteria in the Guidelines for copper at three Site effluent discharge locations (ranging from 8.38 to

34.2 µg/L) and for zinc at two Site effluent discharge locations (ranging from 74.2 to 309 µg/L).

[47] Sampling in January 2024 revealed one exceedance for copper in background sampling (2.03 µg/L) and at three Site effluent discharge locations (ranging from 13.4 to 32 µg/L). Those same three Site locations also show exceedances for zinc concentrations (ranging from 17.7 to 254 µg/L). Two of those Site locations also show concentration exceedances for lead (2.18 and 3.04 µg/L, compared to a chronic exposure threshold of 2 µg/L).

[48] Sampling in February 2024 revealed one copper concentration exceedance in background sampling (2.06 µg/L) and exceedances at three Site effluent discharge locations (ranging from 11.3 to 31.4 µg/L). Background sampling also showed one zinc concentration exceedance (3.6 µg/L), the same three Site effluent discharge locations experienced concentration exceedances ranging from 17.7 to 206 µg/L. One Site effluent discharge location also showed an exceedance for lead concentration of 2.51 µg/L.

[49] Deep Water describes the area around the Site, Union Bay, as heavily industrialized, with nearby projects including: an underground natural gas pipeline; a contaminated site which has extensive, low-grade coal waste on the shoreline and releases acid rock drainage into a body of water connected to Union Bay; and the Cumberland area, which includes minerals rich in heavy metals and mines that produce coal and copper. Deep Water asserts the area is also rich in natural gas and, as a result of nearby operations and the natural environment in the area, certain metals and other substances are present at "elevated" concentrations.

[50] Given these asserted circumstances, Deep Water says that the balance of convenience favours staying the Order. It argues that, in situations where ongoing operations do not increase the discharge of contaminants into the environment, the balance of convenience favours the stay.[10] Deep Water argues that the financial and reputational harm it will suffer (as discussed above) also favours the granting of the stay. By contrast, Deep Water asserts the Respondent will not suffer any prejudice if the Order is stayed.

The Respondent's Submission

[51] The Respondent says that the "balance of convenience" test requires a consideration of the public interest. As stated at paragraph 71 of *RJR-MacDonald*, this test should typically be resolved to deny a stay where a decision-making authority charged with the protection of the public interest made an impugned decision pursuant to that responsibility. The Respondent says that is the case here.

[52] The Respondent also argued I should consider the lack of regulatory alternatives that would allow them to monitor the environmental situation at the Site, given the

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[10] See *R.T. Newton v. Regional Waste Manager*, 2000 BCEAB 26 (CanLII), at para. 7–8.

lapsing of a preceding Information Order allowing the Respondent to require information to be gathered at the Site. Additionally, the Respondent argued I should consider what it describes as Deep Water's poor history of compliance with its obligations under the *Act*.

Deep Water's Reply

[53] Deep Water responds that the Guidelines do not have the force of law and have not been well-explained. They are guidelines only, and the Board cannot infer any harm will be the result if they are exceeded.

[54] Deep Water also addressed the allegations of noncompliance described by the Respondent, saying the Respondent mischaracterized keys facts involved. Furthermore, at least one alleged event of noncompliance gave rise to an administrative penalty that is the subject of a separate appeal before the Board. Deep Water also argued that the Respondent had other regulatory tools available to require the production of additional information, but even if they did not, they chose to let the preceding Information Order lapse. Furthermore, the *Act*'s prohibitions on the introduction of pollution into the environment adequately safeguard the environment.

[55] Deep Water also says that it has put appropriate mitigation strategies in place at the Site and, given that it is not recycling any marine vessels, there is no urgency to complete further strategies. Deep Water also says that the complaints from the public are generated by a limited number of people, whom it says has placed increasing pressure on the Ministry to shut Deep Water down.

Panel's findings

[56] While I do not necessarily need to address this third part of the *RJR-MacDonald* test, because the second part of the test was not met, I will nonetheless do so for the sake of completeness, and to provide the parties with the Board's full rationale on the issue.

[57] As noted by the Respondent, they were acting within the scope of their decision-making authority granted under the *Act*, in furtherance of their responsibility to protect the environment. This will ordinarily favour the denial of a stay application on the basis of the "balance of convenience." Not only does Deep Water bear the burden of proof with respect to this third branch of the test under *RJR-MacDonald*, it also needs to establish that the harm resulting from denying a stay is greater than the presumed harm to this protected public interest if the stay is granted.

[58] A central point of Deep Water's submissions is that it will "… not contribute to elevated levels of concentrations of metals or other substances" because such concentrations are associated with the recycling of marine vessels at the Site and no such activities are planned during the anticipated lifespan of the appeal. The operational impact of various activities at the Site is considered later. First, I consider whether Deep Water has established that no vessel recycling is likely to take place at the Site during the life of the appeal.

[59] Deep Water did not provide sufficient evidence to establish its lack of a plan to recycle marine vessels in the foreseeable future means that it is unlikely to actually recycle any such vessels. No evidence was provided with respect to lead times required to take on such activity or that the opportunity to engage in that activity is unlikely to arise; all Deep Water established to my satisfaction is that they have no plans to do so at the moment. There is another independent, fatal flaw in Deep Water's argument, based on the analytical sampling results it provided.

[60] In addressing this argument, both parties referenced the Guidelines. While the Guidelines do not have the force of law, no other benchmarks were provided by the parties by which I can address the potential environmental impacts associated with effluent leaving the Site and entering the environment. Because both parties relied to some extent on the Guidelines, I will do so as well.

[61] An evaluation of the analytical sampling results at the Site do not support the contention advanced by Deep Water or the Consultant. Deep Water seems to consider that all exceedances of the Guidelines are equivalent. This is incorrect. While it is true that there are some background readings that establish copper concentrations in surface water that exceed the chronic toxicity levels set by the Guidelines, those values range from 2.03 to 7.1 µg/L. Analytical samples taken from Deep Water's property—by the Consultant retained by Deep Water—show copper concentrations beyond those background levels in every sampling event. The maximum cooper concentrations at those points in each sampling event range from 31.4 to 57.4 µg/L, significantly above the maximum background concentration measured. These levels also are, significantly, up to 15 times or more than the chronic threshold listed in the Guidelines. Furthermore, according to the evidence provided by Deep Water, the concentration in effluent measured from the Site has been more than ten times the acute threshold from the Guidelines (3 µg/L).

[62] Furthermore, these analytical results also showed effluent discharges containing elevated zinc concentrations, exceeding both the background levels and the chronic toxicity criterion in the Guidelines. Maximum zinc concentrations at each sampling event ranged from 206 to 390 µg/L, well above the highest background concentration referenced in the information submitted to the Board and, as documented in evidence provided by Deep Water, the acute threshold in the Guidelines of 55 µg/L.

[63] Similarly, the analytical results indicated that lead concentrations were elevated in three Site sampling events between February 2023 and February 2024. These measurements all exceeded the chronic threshold indicated in the Guidelines and exceeded all measured background concentrations in the data provided to the Board.

[64] It is also significant to note that most of the analytical sampling events occurred when there was no marine vessel recycling ongoing at the Site. As a result, the discharge of contaminants into the environment appears, on the basis of the evidence submitted by the parties, to continue whether or not marine vessel recycling is ongoing at the Site. As such, whether or not Deep Water recycles marine vessels during the life of this appeal,

they have not provided persuasive evidence to support their contention that their operations will "… not contribute to elevated levels of concentrations of metals or other substances." I recognize that the Consultant supported Deep Water's contention. My assessment is not to provide my own opinion, but rather to point out that the Consultant's opinion did not adequately address the analytical results he relied upon, in the context of the Guideline he referenced, to render his opinion persuasive.

[65] While Deep Water argued that the receiving environment around the Site already features elevated metal concentrations, this does not support their position that a stay should be granted. As the Board observed in *Tŝilhqot'in National Government v. Director, Environmental Management Act*, 2023 BCEAB 37 (CanLII), at paragraph 359:

> An emitter takes the environment as they find it. The environment could be robust and healthy, capable of safely receiving emissions. Alternatively, the environment could be vulnerable and not capable of receiving even a small volume of emissions. The cause of this vulnerability, or robustness, could be natural or human made, or, most likely, some combination of both.

[66] While that case considers a permit authorizing the discharge of contaminants into the environment, the same principle applies here. Elevated background concentrations do not suggest that more contaminants ought to be introduced, but rather that the receiving environment may be approaching, at, or beyond its capacity to absorb such contaminants. In this case, while there is not sufficient evidence to determine what the capacity of the environment is for additional contaminants, Deep Water bears the burden of proof and did not present persuasive evidence that the receiving environment is able to tolerate further effluent discharges without ill effect. For the same reasons, I find that Deep Water has not provided persuasive evidence to establish that it has adequately protected the environment with the mitigation strategies it has implemented so far. Effluent with metal concentrations that are addressed in the Order are still being discharged into the environment at levels significantly above background levels and significantly above the relevant thresholds in the Guidelines, at times even at levels that are acutely toxic, according to the Guidelines.

[67] As discussed above, Deep Water has provided evidence of financial expenditure but not of financial harm. Furthermore, Deep Water has not provided sufficient evidence to establish it is likely to suffer additional reputational harm if the stay is denied, compared to if it is granted, either through media attention or concerns from customers or other stakeholders.

[68] I also disagree with Deep Water's suggestion that protections to the environment found in the *Act* are adequately protective of the public interest. If such legislated protections were sufficient, enforcement mechanisms like pollution control orders would not be necessary. As noted in *RJR-MacDonald*, decision-making undertaken with authority granted to protect the public interest weighs significantly in the balance of convenience.

This includes authority to issue orders and to otherwise promote compliance and enforcement of the protections and requirements within the *Act*. The mere existence of those protections and requirements does not displace the public interest in compliance and enforcement.

[69] Based on the foregoing, I conclude that Deep Water has not established that the “balance of convenience” favours granting the stay, let alone that it is sufficient to override the presumed harm to the public interest of the protection of the environment. In so finding, I do not need to address the Respondent’s argument about Deep Water’s compliance history or the availability of other regulatory methods to monitor any environmental impacts associated with Deep Water.

DECISION

[70] For the reasons above, I find that the Order should not be stayed. Deep Water has not met the required burden of proof, which is the balance of probabilities, to establish that it will likely suffer irreparable harm if the stay is denied, or that the balance of convenience favours the granting of the stay.

[71] I have read and considered all submissions and evidence provided, except where noted above, even if not specifically referenced in these reasons.

[72] Deep Water’s application is denied.

“Darrell Le Houillier”

Darrell Le Houillier, Panel Chair
Environmental Appeal Board