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DECISION NOS. 2017-EMA-015(a) to 2017-EMA-019(a) (Grouped as 2017-EMA-G06)

In the matter of five appeals under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53

BETWEEN:	Ayreborn Audio Video, Marilyn Henderson, Brookswood Fernridge Community Association, Frank Mueggenburg and IronGait Ventures Inc.	**APPLICANTS**
AND:	District Director, *Environmental Management Act*	**RESPONDENT**
AND:	Weir Canada Inc.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Brenda L. Edwards, Panel Chair	
DATE:	Conducted by way of written submissions concluding on February 15, 2018	
APPEARING:	For the Applicants: Ayreborn Audio Video: Murray McFadden Marilyn Henderson: Murray McFadden Brookswood Fernridge Community Association: Murray McFadden Frank Mueggenburg: Frank Mueggenburg IronGait Ventures Inc.: Dianne Orringe For the Respondent: Susan Rutherford, Counsel For the Third Party: Wes Wadle, Counsel	

STAY APPLICATIONS

[1] On November 9, 2017, Ray Robb, District Director (the "District Director") for the Greater Vancouver Regional District ("Metro Vancouver") issued Permit GVA 1081 (the "Permit") to Weir Canada Inc. ("Weir"). The Permit was issued under both section 15 of the *Environmental Management Act,* S.B.C. 2003, c. 53 (the "*Act*") and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008 (the "Bylaw"). The Permit authorizes Weir to discharge contaminants to the air from nine authorized emission sources at Weir's industrial rubber rebuilding facility located in Surrey, B.C. (the "Surrey Facility").

[2] On December 5, 2017, Ayreborn Audio Video ("AAV") and Brookswood Fernridge Community Association ("BFCA") filed Notices of Appeal against the issuance of the Permit.

[3] On December 6, 2017, Marilyn Henderson, Frank Mueggenburg, and IronGait Ventures Inc. ("Irongait") also filed Notices of Appeal against the issuance of the Permit.

[4] In their Notices of Appeal, each of the Appellants (collectively, the "Applicants") applied for a stay of the Permit, pending a hearing of the appeal on the merits.

[5] Section 25 of the *Administrative Tribunals Act*, which applies to the Board under section 93.1 of the *Act*, empowers the Board to order stays.

[6] This decision addresses the applications for a stay against the Permit. The hearing of the appeals on the merits has yet to be scheduled.

BACKGROUND

Weir's Surrey Facility

[7] On September 14, 2014, Weir signed a 20-year lease for the Surrey Facility at a cost of $43 million. Weir then spent approximately $4.1 million installing "state-of-the-art" equipment for the Surrey Facility including: a grist blasting booth, welding stations, paint booth, rubber buffing station, boiler, autoclave and forklifts. Weir also installed overhead cranes and track systems to integrate operations and facilitate movement of pipe. According to Weir, the Surrey Facility is used for custom cutting, assembly and rubber lining of pipeline segments used in the mining and oil and gas industries. Metal pipe and rubber sheets are not produced at the Surrey Facility; rather, they are brought there.

[8] On March 30, 2016, Weir applied to the District Director for an air discharge permit.

[9] Weir retained an environmental consultant, Hemmera Envirochem Inc. ("Hemmera"), to support it in the permit application process.

[10] In addition, Weir retained GHD to prepare and implement an emission dispersion modelling plan. GHD produced an Air Dispersion Modelling Report dated August 3, 2017 (the "Air Dispersion Modelling Report").

The Permit

[11] The Permit is valid for just under 15 years (November 9, 2017 to October 29, 2032) and applies to "existing or planned works" at Weir's Surrey Facility. The Permit authorizes the discharge of air contaminants from nine emission sources at the Surrey Facility.

[12] According to Weir's submissions, it previously operated industrial rubber rebuilding facilities in Delta and Richmond, but the lease for the Delta facility ended in November 2016, and the Richmond lease ended in February 2017. Emissions from the Richmond facility were regulated by a permit.

[13] The Permit identifies the Surrey Facility's emission sources as "Emission Sources 01 through 09". The Panel has summarized the Permit's description of each emission source as follows:

- Emission Source 01: Rubber Adhesive Booth discharging through a stack(s), with a 13.6-metre-high stack;
- Emission Source 02: Small Urethane Curing Oven discharging through a stack(s), with a 11.4-metre-high stack;
- Emission Source 03: Large Urethane Oven discharging through a stack(s), with a 11.4-metre-high stack;
- Emission Source 04: Urethane Adhesive Booth discharging through a stack(s) with a 13.6-metre-high stack;
- Emission Source 05: Urethane Adhesive Booth discharging through a stack(s) with a 13.6-metre-high stack;
- Emission Source 06: Paint Booth discharging through a stack(s) with a 13.6-metre-high stack;
- Emission Source 07: Rubber Buffing Room discharging through a stack(s) with a 13.6-metre-high stack;
- Emission Source 08: Grit Blasting Booth discharging through a stack(s) with a 6.3-metre-high stack;
- Emission Source 09: Nine Welding Stations discharging through a stack(s) with a 10.5-metre-high stack.

[14] The Permit sets certain requirements for the emissions from each source, including maximum emission flow rates and maximum emission concentrations. The types of emissions that are regulated for each emission source vary. For example, for emission sources 04 and 05 (urethane curing booths), the Permit sets maximum concentrations for epichlorohydrin, ethylbenzene, hexachlorocyclopentadiene, methyl isobutyl ketone, toluene, total hazardous air pollutants, total volatile organic compounds, xylene, and opacity. For sources 07 and 08 (rubber buffing room and grit blasting booth), the Permit sets maximum concentrations for particulate matter and opacity.

[15] According to Weir, the Surrey Facility is presently discharging emissions from emission sources 06 through 09 only (paint booth, rubber buffing room, grit blasting booth, and welding stations). Weir's evidence is that it has not installed the equipment for emissions sources 01 through 05, and it has no plans to utilize those emission sources for at least the next six months.

[16] The Permit contains a number of monitoring and reporting requirements. For example, at page 14 of the Permit, Weir is required to submit to the District Director, for review and approval, a plan (prepared by a qualified professional) for testing the discharge rate and concentration of volatile organic compounds ("VOCs") from the stack at emissions source 01, by July 31, 2018. At page 10 of the Permit, Weir is required to submit, by August 31, 2018, a written report completed by a qualified professional estimating the discharge rate and concentration of certain hazardous air pollutants from emission sources 04 and 05.

[17] In addition, at pages 13 to 14 of the Permit, Weir is required to submit reports regarding the impact of the authorized emissions on the surrounding habitat. For example, by February 28, 2018, Weir must provide a written report

prepared by a qualified professional, that provides a plan for sampling and assessing the impact of the emissions on nearby soil, plant tissue, and water (the "Impact Assessment"). Further reports assessing the impact of the emissions are due biannually commencing October 31, 2021. By November 30, 2018, Weir must provide, for the District Director's review and approval, a communication plan to inform the local communities if odours are detected beyond the Surrey Facility's boundaries.

[18] On pages 12 and 13 of the Permit, further informational reports are required, including:

- by March 31, 2018, and on or before March 31 of each subsequent year, reports detailing the previous years' types and amounts of fuel burned, the number of hours and days the Surrey Facility operated, and the types, amounts and end use of organic solvents and solvent-containing materials used;
- by April 30, 2018, a complaint management and communication plan to be reviewed and approved by the District Director; and
- by May 31, 2018 (and every 6 months following until November 30, 2019), a report summarizing all complaints regarding air emissions received by the Permittee for the previous calendar year from the community.

[19] Finally, on page 15 of the Permit, Weir is required to provide for the District Director's review and approval, by September 28, 2029, a qualified professional's report outlining a plan to assess the best available control technology ("BACT") for emissions from an industrial rubber rebuilding facility and by September 30, 2030, a report of the findings of the BACT for emissions from an industrial rubber rebuilding facility.

[20] After the Permit was issued (and the appeals were filed), Weir retained Hemmera to conduct a "screening level risk assessment". This was done in response to a condition in the Permit requiring Weir to submit a written report prepared by a qualified professional to the District Director for review, outlining a plan for sampling and assessment to determine the impacts of the Surrey Facility's emissions on nearby soil, plant tissue and water. In a report dated February 1, 2018 (the "Risk Assessment"), Hemmera provided its findings regarding the potential for contaminant accumulation and adverse effects on soil, groundwater and surface water.

The applications for a stay of the Permit

[21] On December 13, 2017, the Board wrote to the parties, acknowledging receipt of the five stay applications and inquiring whether the District Director and Weir would consent to a stay of the Permit until the appeals could be heard. The Board further advised the Applicants that, if the District Director and Weir did not consent to a voluntary stay, the Board would seek submissions from the parties regarding the stay applications.

[22] The District Director and Weir did not agree to a voluntary stay, and therefore, the Board sought submissions from the parties.

[23] On January 11, 2018, the Applicants filed their submissions regarding the stay applications.

[24] On January 19, 2018, the District Director notified the Board that he took no position in response to the Applicants' stay applications.

[25] On February 2, 2018, Weir filed its submissions in reply to the stay applications.

[26] The Applicants filed their final reply submissions on February 15 and 16, 2018.

[27] In general, the Applicants submit that the appeals raise serious issues, and denying a stay of the Permit will result in irreparable harm to their health, the health of school children, the viability of their farm operations, and/or the environment including soil, water, fish, domestic animals, wildlife and crops located near the Surrey Facility. In addition, some of the Applicants maintain that they will suffer harm to their business' reputation which is based on the existence of a clean, rural environment. The Applicants submit that Weir has provided insufficient evidence or information to support its claims that the Permit will cause no harm. They argue that a stay will not cause Weir to suffer significant harm. The Applicants also argue that the balance of convenience favours granting a stay.

[28] In addition, some of the Applicants submit that granting a stay would allow time, before the Surrey Facility is allowed to operate, for the Applicants to receive a decision on an appeal involving a request under the *Freedom of Information and Protection of Privacy Act* regarding alleged unknown chemical emissions from the Surrey Facility – information which they may seek to introduce at the appeal hearing.

[29] The District Director takes no position on the stay applications.

[30] Weir opposes the stay applications. It submits that the appeals raise no serious issues, and the Applicants have not discharged their onus of proving that their interests will suffer irreparable harm if a stay is denied. Weir maintains that the evidence on this stay application is that the Surrey Facility will cause no harm to the environment or the health of the residents and animals in the surrounding communities. Weir also submits that, if a stay is granted, Weir will suffer significant business disruption, additional costs, potential adverse effects on customers, lost business opportunities, reduced air quality for its employees, and increased injury risk to employees. Weir submits that, given the nature and extent of the harm that granting the stay would cause to it, as compared to the harm (if any) to the Applicants if a stay is denied, the balance of convenience favours denying the stay.

ISSUE

[31] The sole issue arising from these applications is:

> Whether the Panel should grant a stay of the Permit, pending a decision from the Board on the merits of the appeals.

RELEVANT LEGISLATION AND CASE LAW

[32] Section 25 of the *Administrative Tribunals Act*, which applies to the Board under section 93.1 of the *Act*, empowers the Board to order stays:

Appeal does not operate as stay

25 The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

[33] In *North Fraser Harbor Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997), [1997] B.C.E.A. No. 42 (Q.L.), 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. That test requires an applicant for a stay 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 favors granting the stay.

[34] The onus is on the applicant(s) for a stay to demonstrate good and sufficient reasons why a stay should be granted. In this appeal, the Applicants bear that onus.

DISCUSSION AND ANALYSIS

Whether the Panel should grant a stay of the Permit pending a decision from the Board on the merits of the appeals.

Serious Issue

[35] In *RJR MacDonald*, *supra*, the Supreme Court of Canada stated as follows:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one.

[36] The Court also stated that, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

The Parties' submissions

[37] The Applicants, generally, submit that the Permit poses a risk of harm to the environment and to the health of fish, animals and humans. Most of the Applicants express concern regarding whether there may be unknown emissions from the Surrey Facility that are not permitted and have not been addressed in the Air Dispersion Modelling Report. Others question the reliability of that report and

argue, for example, that it fails to acknowledge that there is an aquifer underlying the Surrey Facility. That aquifer is the source of potable water to homes, farms and businesses in the surrounding community.

[38] Further, some of the Applicants submit that there is a real issue as to the nature and components of the rubber used at the Surrey Facility, and whether lead might be a component. Some of the Applicants point to Weir's lack of disclosure about this to date, and their struggles to obtain information regarding the operations of the Surrey Facility under the *Freedom of Information and Protection of Privacy Act*.

[39] In addition, some of the Applicants express concern regarding whether the Permit ought to authorize the emission of PM2.5 (fine particles with a diameter of 2.5 microns) in the face of medical and scientific information that suggests that there may not be a "safe" level of exposure to PM2.5.

[40] Some of the Applicants raise an issue as to whether the District Director was biased in favour of Weir given a comment that has been attributed to him in the media following the issuance of the Permit.

[41] Finally, some of the Applicants express concern about exposure to "pressurized and contaminated" steam emitted from the autoclave at the Surrey Facility. According to Weir's submissions, rubber inserted into metal pipe is placed under high steam pressure in the autoclave to cure the rubber.

[42] In support of their submissions, the Applicants referred to several reports and articles on the adverse health and environmental effects of pollution in general, PM2.5, emissions from rubber manufacturing, crumb rubber made from recycled tires, the components of tires, lead, zinc, benzene, and hexavalent chromium.

[43] Weir submits that the Applicants have not identified a serious issue to be decided.

[44] Weir maintains that the Applicants' concerns about the autoclave steam discharge do not relate to the decision under appeal, because that discharge is not authorized under the Permit. Weir submits that the appropriate course of action, if the Applicants have a serious concern that Weir is not complying with the *Act,* would be to direct their concerns to the District Director, as the Board is not charged with receiving complaints under the *Act*. That said, Weir is voluntarily taking steps to significantly reduce the size of the steam plume.

[45] More generally, Weir submits that the Applicants have presented no evidence that the Surrey Facility poses a risk to natural resources, the environment or the health of members of the surrounding community. Weir argues that the Applicants are merely speculating and voicing unsupported concerns. Weir submits that the Applicants speculate that the District Director might be wrong about the impact of the permitted emissions on the environment or human health, despite his extensive review and consideration of expert reports, and comments from the Ministries of Environment and Agriculture.

[46] Weir further submits that the Air Dispersion Modelling Report and the Risk Assessment indicate that the emissions from the Surrey Facility are not expected to have any impact on the surrounding environment, or any health effects on

community members. The Applicants have not referenced any conflicting technical or expert reports about any risk posed by the Surrey Facility.

The Panel's findings

[47] The Panel finds that the Applicants have satisfied the low threshold of establishing that there are serious issues to be determined in the appeal. Although the Applicants have only submitted general information about the risks associated with certain contaminants, and have provided no technical or expert reports that address the Surrey Facility specifically, the Panel finds that the *RJR-MacDonald* test generally does not require an extensive assessment of the merits of the case at the first stage of the test. As stated in *RJR-MacDonald*:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[48] The Panel finds that the appeals raise issues regarding whether the emissions authorized under the Permit pose a risk of harm to the environment and to the health of animals and humans. They also raise questions regarding the reliability of the Air Dispersion Modelling Report, and whether it fails to acknowledge the potential for adverse impacts on an aquifer underlying the Surrey Facility.

[49] In addition, the Applicants raise issues regarding whether some risks associated with the emissions were not fully assessed or considered by the District Director. In that regard, the Panel notes that the Risk Assessment states at page 2 that hexachlorocyclopentadiene and epichlorohydrin have the potential to accumulate in soil, groundwater and plant tissues, but those substances were not considered in the Risk Assessment because they are associated with the urethane adhesive booths which Weir does not intend to use in the near term. The Panel notes that, although Weir has no plans to use those emission sources in the near term, the Permit is valid for almost 15 years and authorizes the emission of those substances from those sources, if they become operational.

[50] The Panel finds that the issues raised by the appeals are neither frivolous nor vexatious, and are not pure questions of law. The Panel has, therefore, concluded that it is appropriate to move to the second stage of the *RJR-MacDonald* test.

Irreparable Harm

[51] The Applicant, AAV, submits that the emissions from Weir's Surrey Facility will be immediately drawn into its premises, which are situated within 60 metres of the Surrey Facility. AAV maintains that the emissions will negatively impact the health of Murray McFadden, his family members, and AAV's employees. AAV submits that, in addition to the known emissions, there are unknown chemical emissions in the steam from the autoclave, and it would be negligent to allow the Permit to stand without conclusively establishing that there are no harmful chemicals in the steam. AAV is also concerned that Weir may be using neoprene or other synthetic compounds (which may contain lead) in their rubber, which AAV asserts could have serious health consequences for those exposed to it, particularly

children. AAV submits that further due diligence and analysis, by the authorities, of the emissions and rubber components are required.

[52] AAV submits that based on "the known as well as speculative concerns regarding unknown quantities and characteristics of Weir's toxic emissions allowable under the Permit," it has a valid concern that denying a stay will negatively impact human health, and this cost cannot be quantified. AAV maintains that "that which is currently being done cannot be undone despite any subsequent alterations/revocation of the Permit."

[53] The Applicant, Ms. Henderson, submits that there will be irreparable harm to the local water supply if a stay is denied. She submits that the aquifer underlying the Surrey Facility is vulnerable, as it is a large, shallow aquifer with a porous base that allows groundwater and surface water to easily seep into the ground without remediation. If the aquifer is contaminated, residents who rely on it for their drinking water will have to obtain their water, at a cost, either from Metro Vancouver or some alternative source.

[54] BFCA is also concerned for the safety of the local potable water supply. BCFA submits that, despite the Air Dispersion Modelling Report, it is not convinced that there will be no long-term implications for water safety arising from the Surrey Facility. BFCA is concerned that the Air Dispersion Modelling Report is based on an assumption that there is silt loam soil underlying the Surrey Facility, and BFCA argues that there has been widespread excavation into bare glacial gravel at the Surrey Facility. In addition, BFCA submits that there may be a buildup of toxic chemicals leading to negative health impacts on humans and wildlife in the area. BFCA is concerned that there is no assurance that local crops will not be adversely affected by the emissions from the Surrey Facility. BCFA submits that it is requesting a stay to preclude irreparable harm to the aquifer and the local environment, pending a comprehensive examination of the contaminants from the Surrey Facility.

[55] The Applicant, Mr. Mueggenburg, resides 1.6 kilometres from the Surrey Facility, and submits that he has health concerns given the elevated level of PM2.5 in the area that will occur as a result of emissions from the Surrey Facility. He is also concerned for the effect of cumulative emissions on what he characterizes as the "relatively pristine farming area". He operates an aquaculture business on his property, which is reliant on uncontaminated water. He derives the water for his aquaculture business from naturally occurring groundwater and by the collection of rainwater from the roofs on his property. He maintains that contamination from a plume from the Surrey Facility could be fatal to his fish. Mr. Mueggenburg is also concerned for the safety of the aquifer, as he uses well water from the aquifer for his home and his animals.

[56] The Applicant, IronGait, operates an equestrian business, boarding and breeding horses, from the property where Mr. Mueggenburg's aquaculture business is located. IronGait is concerned for the safety of the water supply it uses for its horses. IronGait submits that the emissions from the Surrey Facility will undermine its current claim that it has a healthy facility where patrons can leave their horses. IronGait is also concerned for the health impacts on pregnant mares and newborn foals from depositions from the Surrey Facility. If the foals that IronGait raises for

sale are found to be deficient, the business will suffer an economic loss. IronGait is also concerned with the exposure of people residing at the property to the PM2.5 emissions from the Surrey Facility. There is a Pre and After School Program on the same property where children play outside, and Irongait is concerned that they may be harmed as a result of exposure to emissions from the Surrey Facility.

[57] The Applicants submit that a stay will permit forensic testing of the rubber and components used at the Surrey Facility to determine whether lead or heavy metal contamination may occur from either the emissions from the Surrey Facility or from foot and vehicle traffic leaving the Surrey Facility.

[58] Weir submits that the Applicants have failed to establish that they will suffer any harm, let alone irreparable harm, to their interests if the stay is denied. Weir submits that the Applicants have provided no evidence to support their claims that emissions form the Surrey Facility will harm the aquifer, air quality, or the health of residents and animals in the surrounding community.

[59] Weir submits that the Air Dispersion Modelling Report explicitly concludes that the predicted emissions from the Surrey Facility are well below ambient background concentrations and jurisdictional limits, and that they are not expected to have any impact or health effects on the surrounding environments and communities. Further, Weir submits that the Risk Assessment demonstrates that it would take 2,797 years for barium concentrations (the only non-negligible substance in the permitted emissions) in soil to exceed the soil standards in the *Contaminated Sites Regulation* for agricultural land use.

[60] In addition, Weir submits that it is presently emitting substantially less than its permitted levels. It is emitting only from sources 06 to 09 (rubber buffing, grit blasting and welding), as it has not installed the equipment for, and is not therefore not discharging from, emissions sources 01 to 05 (rubber adhesive booths, urethane curing ovens and urethane adhesive booths), nor does Weir plan to utilize these emissions sources for at least six months.

[61] In reply to Weir's submissions, Mr. Mueggenburg provided an affidavit that consists almost entirely of arguments rather than evidence. Attached to his affidavit is one exhibit, a copy of the Bylaw.

[62] In his affidavit, Mr. Mueggenburg submits that, contrary to the affidavit evidence provided by Weir (discussed below under "Balance of Convenience"), the public consultation regarding the proposed Surrey Facility was not "fulsome and transparent", as it was based on draft information which was unavailable to the public. Further, the air dispersion modelling, which was subsequently made public, was predictive in nature and not tested on the actual emission stacks at the Surrey Facility.

[63] Mr. Mueggenburg submits that a "central reason" for the stay application is to allow sufficient time for the analysis of all uses associated with emission sources 01 to 05 (rubber adhesive booths, urethane curing ovens and urethane adhesive booths) – none of which are presently operating. In his submission, Weir has failed to disclose information regarding an integral part of the industrial process that will occur in either the short or midterm; i.e., vulcanizing and buffing the rubber-lined pipes. He maintains that the emissions from the vulcanizing autoclave are not

currently accounted for in the emissions analysis or the Permit. Similarly, he asserts that the stack that will be discharging from the rubber buffing room (emission source 07) is a primary source of unaccounted lead and other compounds, which he submits are being disguised as "particulate matter". In sum, he submits that the agencies involved in the permitting process have relied on the information provided by Weir, which has "facilitated a lack of robust and exhaustive information being disclosed regarding all emissions arising from their facility".

[64] Similarly, in reply to Weir's submissions, IronGait submits that Weir has not been forthcoming regarding all of the emissions from the Surrey Facility. IronGait expresses concern regarding the autoclave emissions and the possibility of lead being emitted from the rubber buffing room. IronGait also appears to submit that the District Director may have been biased in favour of Weir. IronGait alleges that the District Director "has been prejudicial" as he has been quoted in the media as saying that a single wood-burning fireplace emits more harmful air contaminants than all the permitted emissions from the Surrey Facility.

[65] In reply to Weir's submissions, Mr. McFadden (on behalf of AAV, Ms. Henderson, and BFCA) provided an affidavit that consists almost entirely of arguments and challenges to Weir's evidence, rather than Mr. McFadden's own evidence. Attached to his affidavit are exhibits consisting of an email from the Mayor of Surrey, and general articles about lead-cured neoprene and hexavalent chromium.

The Panel's finding

[66] At this stage of the *RJR MacDonald* test, the Panel must determine whether any of the Applicants have demonstrated that they are likely to suffer irreparable harm if a stay is denied and the Surrey Facility continues to operate under the Permit. As stated in *RJR MacDonald, "*irreparable" harm is harm that either cannot be quantified monetarily or cannot be cured, and includes non-compensable harm to human health, a permanent loss of natural resources, an Applicant suffering permanent business loss, or an Applicant suffering permanent market loss or irrevocable damage to its business reputation.

[67] The onus is on the Applicants to establish that their interests are likely to suffer irreparable harm unless a stay is granted. Although the Applicants need not conclusively prove that their interests will suffer irreparable harm if a stay is denied, a stay is an extraordinary remedy and the Applicants must provide sufficient evidence to establish that their interests are likely to suffer irreparable harm. Speculative claims, and assertions that are not supported by adequate evidence, are insufficient to establish that an Applicant's interests are likely to suffer irreparable harm.

[68] The Panel finds that the Applicants have failed to provide any evidence that, if a stay is denied, emissions from the Surrey Facility are likely to cause permanent loss of natural resources, permanent harm to the environment or human health, or permanent harm to any of their business interests, between the dates when the Permit was issued and when the Board reaches its final decision on the merits of the appeals. The Applicants have raised general concerns about the potential harm to human health, the environment, and their business interests, but those issues

have not risen above the level of speculation and conjecture. In this regard, the Panel agrees with the Board's findings in *Isabel and Mark Brenzinger v. District Director, Environmental Management Act (City of Richmond and Harvest Fraser Richmond Organics Ltd., Third Parties)* (Decision No. 2016-EMA-155(b), June 20, 2017)[*Harvest Fraser Richmond Organics Ltd.*], at paragraphs 63 and 65:

> … General information about the potential harm to the environment from air pollution is insufficient to establish that the [applicants'] interests with respect to the environment is likely to suffer irreparable harm if a stay is denied. …
>
> … General information regarding the potential health effects of air contaminants is insufficient to establish that the [applicants'] are likely to suffer irreparable harm if the Facility continues to operate under the Permit, pending a decision on the merits of the appeal. …

[69] None of the Applicants have provided any evidence that they are currently suffering, or are likely to suffer from, any of the negative health effects that they fear may result from the permitted emissions from the Surrey Facility. Nor have the Applicants pointed to any business losses or costs that they have incurred, or are reasonably likely to incur, as a result of the emissions. The Panel notes that in *Harvest Fraser Richmond Organics Ltd.*, where the applicants alleged that they were experiencing adverse effects from a facility's air emissions, the Board found at paragraph 65 that:

> … More specific information or evidence of a likely connection between the Facility's air emissions and the adverse effects experienced by the [applicants] is necessary to support a finding that denying a stay would likely cause irreparable harm to the [applicants'] health, well-being and lifestyle, pending the Board's decision on the merits of the appeals.

[70] In addition, the Panel finds that the facts in the present applications are unlike those in *Nickomekl Enhancement Society et al v. District Director, Environmental Management Act (Ebco Metal Finishing L.P, Third Party)* (Decision No. 2016-EMA-107(a) to 2016-EMA-119(a), May 26, 2016), where Ebco had obtained an approval from the District Director to discharge emissions from a galvanizing plant in Surrey for nine months, before providing the District Director with a number of reports including an air dispersion modelling report and a risk assessment. When weighing the balance of convenience, the Board found that Ebco had provided no scientific or technical information to the Board to support its claim that the emissions would cause no harm to the environment or human health, and Ebco had also provided little such information to the District Director before the approval was issued. As such, the Board held that it could not assume that the approval, on its face, provided adequate protection for the environment and human health consistent with the public interest objectives of the *Act*, and the balance of convenience weighed in favour of granting a stay pending Ebco's submission to the District Director of certain reports and/or plans.

[71] Here, the evidence before the Panel is that after Weir submitted its application for the Permit, but before the Permit was issued, Weir provided the District Director with the Air Dispersion Modelling Report, which concluded at page

14 that emissions from the Surrey Facility are "not expected to have an adverse impact on either the surrounding environment or public health" and "will operate in compliance with the [Bylaw]." Further, after the Permit was issued, Weir provided the District Director with the Risk Assessment, which concluded at page 4 that "deposition of substances released by the Facility to the air will have a negligible impact on soil, groundwater and surface water quality."

[72] The Panel finds that the Applicants have provided insufficient evidence to establish that, contrary to the conclusions in the Air Dispersion Modelling Report and the Risk Assessment, the emissions are likely to cause harm to human health or the environment before the Board decides the merits of the appeals.

[73] In summary, the Panel finds that the Applicants have failed to establish that their interests are likely to suffer irreparable harm if the stay is denied.

Balance of Convenience

[74] This branch of the *RJR MacDonald* test requires the Panel to determine which party will suffer the greater harm from the granting or the denial of the stay applications.

The Parties' submissions

[75] AAV, Ms. Henderson, and BFCA submit that the Board ought to favour their interests over those of Weir, as it is better able to bear any loss as the "cost of doing business" whereas they will suffer greatly. They also submit that they will be unable to pass on the costs that they may incur if the aquifer is polluted and cannot be remediated, or they suffer economic loss as a result of adverse health impacts, or loss of business due to the emissions from the Surrey Facility.

[76] Mr. Mueggenburg submits that he is most at risk due to the issuance of the Permit based on the lack of pertinent information. He also submits that Weir should be required to "cease and desist" until outstanding concerns have been addressed.

[77] IronGait submits that the balance of convenience tips in their favour given that Weir chose to build the Surrey Facility in an area where the emissions will risk the health of the local population and put small businesses at risk, largely because they have failed to implement zero emission controls on the Surrey Facility.

[78] Weir submits that the Applicants have failed to provide any evidence that they would suffer harm if a stay of the Permit is denied, whereas Weir will suffer financial, operational, and commercial harm if the stay is granted.

[79] Specifically, Weir submits that it will suffer significant business disruption, additional costs, potential adverse effects on customers, lost business opportunities, reduced air quality for its employees, and increased risk of injury to employees, if the stay is granted. Weir submits that its American-based facilities do not have capabilities or capacity to do the work of the Surrey Facility. Further, if Weir is unable to operate under the Permit, it will not be able to use its built-in filtration system for buffing, welding, grit blasting and painting, resulting in increased exposure to particulate matter for Weir employees.

[80] Weir submits that if it were to contract out its welding and grit blasting work, it would incur costs of approximately $264,000 per month. Further, contracting out the welding and grit blasting work would result in Weir experiencing delays in meeting their commitments, increased traffic and diesel emissions at the Surrey Facility, and increased risks to employees who would need to load and unload large metal pipe pieces onto vehicles for transport. Additionally, the painting work would need to be completed by hand if the ventilated spray booth could not be used under the Permit, which would also cause Weir delays in meeting its business commitments.

[81] In support of its submissions, Weir provided affidavit evidence from Ricky Nolan, General Manager of the surrey Facility, and Glen Wakelin, Weir's Senior Safety Manager. Among other things, Mr. Nolan attested to the adverse impacts on Weir's business interests if a stay of the Permit was granted, including the increased costs of using contractors for welding and grit blasting, and delays in meeting commitments to its customers. Mr. Wakelin attested to the increased health and safety risks for employees at the Surrey Facility if a stay was granted, particularly due to decreased air quality where the welding, buffing, and painting occur, as well as increased risks of injury for shipping and receiving staff.

The Panel's findings

[82] The Panel has found that there are serious issue to be decided in the appeals, but there is no evidence that the Applicants will suffer irreparable harm if a stay of the Permit is not granted.

[83] Conversely, the Panel finds that Weir has provided evidence that it will suffer operational, financial and commercial harm if the stay is granted. The Panel finds that there is a substantial likelihood that Weir will suffer increased costs and harm to its business interests, and that its employees will be placed at greater risk of adverse health effects from particulate matter if Weir is unable to operate under its permit and to utilize the Surrey Facility's built-in filtration system. The Panel finds that it is unclear whether the increased costs and damage to Weir's business interests could be recovered by Weir in the event that the appeals are unsuccessful.

[84] The Panel notes that the Permit was issued after the District Director received and reviewed the Air Dispersion Modelling Report and the Risk Analysis, (both of which concluded that the emissions from the Surrey Facility did not pose a risk to human health or the environment), and after input was sought from the Ministries of Environment and Agriculture on the impacts to water quality and soil from the permitted emissions. The Panel notes that there are operational, monitoring and reporting requirements under the Permit that, on their face, are protective of the environment and human health. However, the Panel cautions that these findings are made solely for the purpose of deciding the stay applications, and have no bearing on the merits of the appeals.

[85] The Panel finds that, for all of these reasons, the balance of convenience favours denying the stay, and maintaining the *status quo* pending the Board's final decision on the merits of the appeals.

DECISION

[86] The Panel has considered all of the submissions and arguments made by the parties, whether or not they have been specifically referenced herein.

[87] For the reasons provided above, the applications for a stay of the Permit are denied.

"Brenda L. Edwards"

Brenda L. Edwards
Panel Chair

March 9, 2018