BRITISH COLUMBIA

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DECISION NO. EAB-WSA-21-A006(a)

In the matter of an appeal under the *Water Sustainability Act,* SBC 2014, c. 15

BETWEEN:	Larry Jones	**APPELLANT**
AND:	Assistant Water Manager Ministry of Forests, Lands, Natural Resource Operations and Rural Development	**RESPONDENT**
BEFORE:	A panel of the Environmental Appeal Board David Bird, Vice-Chair	
DATE:	Conducted by way of written submissions concluding on May 26, 2021	
APPEARING:	For the Appellant: Self-represented	
	For the Respondent: Tyna Mason, Counsel Livia Meret, Counsel	

STAY APPLICATION DECISION

BACKGROUND

[1] In March 2021, a conservation officer noticed an excavator operating in and around two streams near Grand Forks, British Columbia. On March 26, 2021, the officer saw work happening in and around Volcanic Creek. On March 29, 2021, the officer saw work happening in and around Granby River. Both incidents occurred on the land owned by Red Hawk Ranch Ltd, of which Larry Jones (the "Appellant") is a director.

[2] On each occasion, the conservation officer told the Appellant that section 11 of the *Water Sustainability* Act (the "WSA") required him to apply for authorization to make changes in or about a stream before doing any work.

[3] On March 30, 2021, the Appellant applied to the Front Counter BC office in Cranbrook, British Columbia for an authorization to make changes in or about a stream, starting on March 31, 2021.

[4] On April 1, 2021, Jennifer Andrews, an Assistant Water Manager (the "Respondent") with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), issued a stop-work order (the "Order") under

section 93(2)(b) of the *WSA* in response to alleged unauthorized activities occurring in or about Volcanic Creek and Granby River.

[5] On April 29, 2021, the Appellant filed an appeal of the Order to the Environmental Appeal Board (the "Board"). On May 10, 2021, he applied for a stay of the Order. A stay is an order by the Board, that the decision under appeal does not take effect until the Board makes a final decision on the appeal and depending on that decision. If the Board does not stay the Order, it remains effective and enforceable even while the appeal is underway.

[6] The Appellant sought to complete immediate riverbank remediation and stabilization before the Spring freshet to mitigate loss of farmland and livestock due to expected continued flooding.

[7] The Respondent opposes the application for a stay of the Order.

[8] The Board heard this preliminary stay application by written submissions.

ISSUE

[9] Should the Board grant a stay of the Order pending the outcome of this appeal?

RELEVANT LEGISLATION AND LEGAL TEST

[10] Section 25 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), allows the Board to order a stay. Section 25 provides that an appeal does not operate as a stay of a decision under appeal unless the Board orders otherwise[1].

[11] As described in the Board's Practice and Procedure Manual[2], the Board decides stay applications using the test described in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 DLR (4th) 385 (SCC) [*RJR-Macdonald*]. This test was referenced in both parties' submissions. The test involves three prongs:

- whether the appeal raises a serious issue;
- whether the applicant for a stay will likely suffer irreparable harm if a stay is refused; and
- whether the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted (the "balance of convenience" test).

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[1] Section 25 of the *ATA* appears in Part 4 of that Act. Section 105(4) of the *WSA* provides that Division 1 of Part 8 of the *Environmental Management Act*, S.B.C. 2003, c.53 (the "*Environmental Management Act*") applies to appeals brought under the *WSA*. Division 1 of Part 8 of the *Environmental Management Act* contains section 93.1, which provides that Part 4 of the *ATA* applies to the Board (subject to some exemptions not relevant to this decision).

[2] Publicly available at: http://www.eab.gov.bc.ca/fileappeal/eab_proc_manual.pdf

[12] The Appellant, who has applied for the stay, bears the onus of proof in this application. A stay of an order is considered an extraordinary measure.

DISCUSSION AND ANALYSIS

Does the appeal raise a serious issue?

Summary of the Appellant's submissions

[13] The Appellant did not expressly address whether the appeal raises a serious issue, but his submissions imply that the subject matter of the appeal is serious in his view.

[14] The Appellant's ranch has a commercial herd of cattle. Registered horses are also raised on the ranch. In his notice of appeal, the Appellant states that there has been "major flooding" in the last two years. He estimates that flooding resulted in the removal of 600 dump truck loads of silt and soil in 2020. He recently started work in the streams on his company's property, in advance of Spring freshet.

[15] In the last two years (2019-2020), he submits the ranch has incurred significant damage and financial loss related to flooding during Spring freshet. One year, the flooding resulted in emergency evacuation of people and livestock. Flooding has blocked access to the highway. The ranch has lost land at the river and creek banks, sustained damage to equipment and a residence, and he experienced financial loss.

[16] The Appellant submits that he has consulted with, Dr. Rosgen, who holds a Ph. D. in geomorphology. Dr. Rosgen provided a remediation plan which the Appellant started to implement when the Order was issued.

[17] The Appellant submits the Respondent told him that authorization under the *WSA* was not likely to be granted until September 2022 and in his opinion, the Respondent does not appreciate the urgency of the situation. The Appellant does not agree that proceeding with the remediation plan now will result in more harm than the expected flooding related to Spring freshet.

[18] The Appellant provided photographs with his submissions.

Summary of the Respondent's submissions

[19] The Respondent submits that she is aware that Spring freshet is imminent but notes that the Appellant has been aware of the flooding issues over the last two years and has had lots of opportunity to request the necessary authorizations to complete works in or about a stream. The Respondent also submits the Spring freshet for 2021 is not forecasted to cause similar flooding as in 2019 and 2020.

[20] In the Respondent's submission, the Appellant's application for a stay and his appeal to the Board are without merit because the Appellant does not have the required authorization under section 11 of the *WSA* to engage in works in or about the streams. The Respondent submits it is an offence contrary to section 106(2)(b)(ii) of the *WSA* to make unauthorized changes in or about a stream.

[21] While Spring freshet is imminent, since the Appellant does not have authorization under section 11 of the *WSA* to start works in or about a stream, and does not meet the criteria under section 39 of the *Water Sustainability Regulation* (the "*Regulation*") to make changes in and about a stream in response to an emergency, the application should be denied. The Respondent notes that no emergency has been pronounced under the *Emergency Program Act*, and the Appellant does not qualify as a person or agency that may be authorized to make changes in and about a stream in an emergency under section 39 of the *Regulation*.

[22] The Respondent submits that the Order is essential to prevent potential harm to stream bed channels and aquatic ecosystems from unauthorized works in or about streams. The Respondent argues that such an order is "*de facto*, reasonable" and the stay application should be denied on that basis alone.

[23] The Respondent submits that since receiving the Appellant's application for an authorization under section 11 of the *WSA*, the Assistant Water Manager has been attempting to gather additional information from the Appellant that is necessary to assess his application. For example, some of the requirements not yet satisfied by the Appellant's application according to the Respondent include:

- the application does not meet the requirements of section 4(e) of the *Regulation*, which requires an application for approval of changes in and about a stream to include a drawing that complies with the Application Drawing Standards described in section 3(1)(p) of the *Regulation*;
- the Appellant's drawings indicate work on Crown land but the Appellant has not applied for a permit over Crown land as required by section 4(i) and 11 of *Regulation*. While the Appellant has been informed of this requirement, he has not sought the required permit;
- the application was for works intended to begin on March 31, 2021, which does not reflect the Least Risk Timing Window for Volcanic Creek and Granby River (in September of each year), and did not provide adequate time for the Ministry to review, assess and approve the application;
- the application required the Ministry to consult with local First Nation communities and other local governments regarding potential impacts on claimed interests;
- the Appellant's proposed works require an Environmental Management Plan to be completed, and the works will need to be overseen by a qualified professional;
- the remediation plan submitted by the Appellant is comprised of a chain of email exchanges with Dr. Rosgen presenting a rough conceptual design for the proposed works; and
- Dr. Rosgen is not a professional engineer or professional geoscientist with membership in Engineers and Geoscientists BC (EGBC) or with any professional association in British Columbia, nor does he appear to be familiar with BC's legislative framework for applying for and receiving approval prior to carrying out changes in and about a stream, including in-stream work.

[24] In response to the three-part test in *RJR-MacDonald*, the Respondent submits the Appellant has failed to establish there is a serious issue to be tried.

[25] The Respondent submits that prior decisions of the Board have found that an appeal that is frivolous or vexatious can be found to fail the test of a serious issue to be tried. Specifically, in *Klassen v British Columbia (Ministry of Health)*, [1998] BCEA No. 56 [*Klassen*], at para. 34, the Board said:

> To summarize, an appeal might be said to be "frivolous" if there is no justiciable question, little prospect that it can ever succeed and it is lacking in substance or seriousness; and "vexatious" if it is instituted maliciously or based on improper motives, intended to harass or annoy.

[26] The Respondent submits the Appellant's case is without merit because it is based on an inaccurate assumption that he can continue to make changes in or about a stream without legal authorization if the Order is stayed. For this reason, the application for a stay and the Appellant's appeal is frivolous because there is no justiciable question, little prospect that the appeal can ever succeed, and it is lacking in substance or seriousness.

[27] The Respondent notes that section 93 of the *WSA* grants her the statutory authority to inspect or act in relation to the construction of works for the purpose of enforcing the provisions of the *WSA*. By definition, "works" include changes in and about a stream. Also, by definition, "take action" in relation to works includes allow, start, stop, shut or prohibit their construction or operation.

[28] In summary, the Respondent submits that there is no legal issue with the Assistant Water Manager's authority under the *WSA* to issue the Order nor have any other deficiencies been raised by the Appellant. Rather, the Appellant is arguing that he should be able to proceed with works without first obtaining the requisite lawful authority under the *WSA*. Therefore, the application for a stay of the Order is frivolous, in the Respondent's submission, because there is little prospect that the appeal can ever succeed.

[29] The Respondent provided photographs as part of her submissions.

The Panel's analysis and findings

[30] The first question I must decide is whether the appeal raises a serious issue to be decided by the Board. The Court in *RJR-Macdonald* set this first part of the test at a low threshold with no specific requirements outlined for the determination on this question. In general, a prolonged examination of the merits is neither necessary nor desirable at this stage of the test, subject to two exceptions.

[31] For clarity, the argument raised by the Respondent, as I understand it, is not whether the flooding is an important issue or whether there is a need to carry out works to prevent flooding, but that the stay application and the appeal are frivolous because there is not a justiciable question, little prospect that the appeal can ever succeed, and the application is lacking in substance or seriousness.

[32] The argument raised by the Respondent addresses some fundamental questions regarding the question of the Board's jurisdiction and balancing that jurisdiction in the context of the practical outcomes available from this application. In this appeal, the Appellant does not dispute that the *WSA* requires he obtain authorization prior to completing works in or about a stream. Rather, the Appellant

argues he ought to be allowed to engage in unauthorized works in or about a stream because of the risks associated with the Spring freshet.

[33] I understand the Respondent's submission to state that there is no serious issue to be tried by the Board because allowing a stay of the Order has no impact on the Appellant's legal rights or obligations. In other words, even if the Board granted a stay of the Order, the Appellant still is not authorized to engage in any works in or about a stream under the *WSA*. Therefore, an analysis of the merits of the appeal should be carried out to assess whether the application can ever succeed.

[34] A similar argument was raised and considered by the Board in *Wohlleben v. Assistant Regional Manager*, Decision No. 2017-WAT-014(a), April 16, 2018, at para. 54 [*Wohlleben*]:

> … In most cases, the first stage of the test (i.e., is there a serious issue to be tried) has a low threshold. Except in rare circumstances, [the first stage of the test for a stay application] is to be decided on an extremely limited review of the case on its merits. As a general rule, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry should proceed to the next stage.

[35] In *RJR-MacDonald*, the Court addressed this at paras. 50 thru 55, which read as follows:

> 50. 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.
>
> 51. Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. …
>
> …
>
> 54. The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.
>
> 55. The second exception to the … prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. … A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

[36] I find that this is an exceptional circumstance where I ought to conduct a review of the merits of the appeal because the result of this stay application may "in effect amount to a final determination of the action". I make this finding based on the fact the Appellant has no legal authority to proceed with the works in or about the streams even if his stay application and appeal are successful. In essence, the Appellant's appeal lacks the legal basis for the remedy being sought and therefore has little prospect of ever succeeding.

[38] In *Wohlleben*, the Board concluded that the facts of that case supported a conclusion that the appeal was "frivolous" as defined by the Board in *Klassen*, and the appellant failed to establish a serious issue to be tried. However, in *Wohlleben*, the Board reached this conclusion on the basis the appellant in that case had little prospect of ever succeeding. In that case, the appellant had appealed an order issued in 2017 requiring removal of a dam, after the water licence authorizing the dam was cancelled in an order issued in 2004. At para. 61 of *Wohlleben*, the Board stated:

> The Panel finds that, once the Licence was cancelled, Mr. Wohlleben no longer had any authority to maintain the Dam and works on the Crown foreshore, or to store or use water from Martin Brook. As the 2017 Order does not address or revisit the Licence cancellation - it only addresses removal of the now unauthorized Dam and the restoration of Martin Brook – the Board cannot reconsider the cancellation. No other grounds related specifically to the 2017 Order have been raised in Mr. Wohlleben's appeal.

[39] I find the Board's findings in *Wohlleben* are applicable to my analysis in this application, although not binding. Like the circumstances in *Wohlleben*, the remedy being sought by the appellant is not in the Board's jurisdiction. In *Wohlleben*, the appellant sought a remedy with respect to the 2004 order, which he had not appealed and for which the timeframe to appeal had passed. Given these facts, the Board noted in para. 58 that "the Board simply has no jurisdiction over the 2004 Order". This was the factual grounds on which the Board found that the appeal fell into one of the rare exceptions of not raising a serious issue to be tried. I accept and adopt similar reasoning in my findings below.

[40] In considering whether the Appellant has established a serious issue to be tried, I note the Order flows from the exercise of discretion by the Assistant Water Manager and is appealable to the Board under section 105(1) of the *WSA*. Additionally, I find that under section 105(6) of the *WSA*, the Board has the authority to:

> (a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,
>
> (b) confirm, reverse or vary the order being appealed, or
>
> (c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances.

[37] While the Respondent argues the exercise of the Assistant Water Manager's discretion should be considered "*de facto*, reasonable" and the stay application

denied on that basis alone, I find the Order falls squarely within the Board's jurisdiction as a matter that can be appealed. The Board does not end its analysis with whether an appealable decision was reasonable, but rather can "make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances."[3]

[38] I find that if the stay application was granted it would result in a final determination of the matter. In plain language, I find that while the Board has jurisdiction to hear this appeal of the Order, his appeal has little prospect of success because the only remedy available is the Appellant carrying forward with unauthorized works contrary to the *WSA*. Likewise, the Appellant's application for a stay also has only one remedy: the Appellant carrying forward with unauthorized works contrary to the *WSA*.

[39] I acknowledge that as a matter of law, if the Appellant was granted the stay of the Order and resumed illegal works the Respondent could issue charges under sections 106 or 107 of the *WSA*. However, this result is contrary to common sense and I find not the intended result of the legislature. I find there is little prospect of success on the merits in the Appellant's appeal because regardless of the outcome of the Order, the Appellant will remain unauthorized to carry out works under the *WSA*. In this case, the Order is a mechanism to enforce the requirement of obtaining authorization under section 11 of the *WSA*. The Appellant is currently in the process of seeking authorization under section 11 of the *WSA* and any decision flowing from that process may be appealed to the Board.

[40] I am persuaded this is an exceptional circumstance contemplated by the Court in *RJR-MacDonald* of there being no serious issue to be tried because the Appellant would be, even if he succeeded in obtaining a stay, unable to access the right to work in or about a stream through his appeal. For this reason, I conclude that the Appellant has failed to establish the first prong of the test from *RJR-MacDonald*.

Will the applicant for the stay likely suffer irreparable harm if the stay is refused?

[41] There have been conflicting decisions in the common law on whether, in considering an extraordinary application like a stay, the decision-maker should end the analysis once one of the three-part test in *RJR-MacDonald* fails.

[42] At paragraphs 12 and 13 of *Njoroge v. British Columbia (Human Rights Tribunal)* 2020 BCSC 1723, the Court described the application of the test from *RJR-MacDonald* as follows:

> The three factors are not to be treated like a checklist of separate watertight compartments, but instead are interrelated and strength in one part of the test can compensate for weakness in another: *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 346–47, [1987] 2 W.W.R. 331 (C.A.), aff'd [1991] 1 S.C.R. 62, 53 B.C.L.R. (2d) 189; *Cambie Surgeries*

[3] See section 103(3) of the *Environmental Management Act*.

> *Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 (Chambers) at para. 19.
>
> The fundamental question is whether granting the stay is just and equitable in the circumstances: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 25.

[43] In contrast, at paragraph 3 of *Canada (Public Works and Government Services) v. Musqueam First Nation*, 2008 FCA 214 (CanLII) the Court described the application of the test from *RJR-MacDonald* as follows:

> The three factors are conjunctive: failure to satisfy any one factor will lead to the denial of the interlocutory injunction. The onus is upon the applicant to satisfy each factor.

[44] As there are conflicting approaches to the application of the three-factor test in *RJR-MacDonald*, even though I could end my analysis here because the appellant failed to establish a serious issue to be tried, given the importance of this issue for the parties and in the event I incorrectly decided that the Appellant failed to establish there is a serious issue to be tried, I have proceeded with my analysis of the other two tests in *RJR-MacDonald*.

[45] At this stage of the *RJR-MacDonald* test, the applicant must demonstrate that his interests will suffer irreparable harm if a stay is not granted. As stated in *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 …; where one party will suffer permanent market loss or irrevocable damage to its business reputation …; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined ….

Summary of the Appellant's submissions

[46] The Appellant argues that his interests will suffer irreparable harm if the Order is not stayed. In particular, the Appellant argues that his ranch has already lost significant portions of soil and pastureland due to past flooding. The Appellant argues that without a stay, he will continue to suffer irreparable harm from ongoing loss of pastureland due to flooding, and the resulting financial loss related to impacts to the ranching business and damage to livestock, equipment, and buildings.

Summary of the Respondent's submissions

[47] The Respondent argues the loss of pastureland experienced by the Appellant is a result of "the natural riverine processes on these streams." The Respondent submits that "the two sites of unauthorized work … occurred within the broader Granby River floodplain" and irreparable harm cannot be experienced because of the natural riverine processes. The Respondent provides evidence of a restrictive

covenant related to the Appellant's land which appear to be provided to support the Respondent's position that the subject areas are within a floodplain.

[48] The Respondent submits that the unauthorized works the Appellant wishes to implement may not be effective in providing flood protection or erosion protection for the Appellant's property, especially if not properly carried out in accordance with an expertly designed, planned and supervised project (developed by an expert qualified to practise in BC and acceptable to a Ministry Engineer).

[49] Furthermore, the Respondent maintains that, based on discharge forecasts for the Granby River area and provincial snow survey and water supply information (which the Respondent provided), the Ministry is not anticipating that in 2021 there will be the severe freshet conditions of 2018 or the related flooding.

[50] The Respondent also submits that the unauthorized works will likely cause irreparable harm to the stream beds and channels of Volcanic Creek and the Granby River, fish habitat and aquatic ecosystems, and potentially to unidentified downstream riparian owners and water rights holders.

The Panel's analysis and findings

[51] I note at this point, the question I must decide is whether the Appellant has established he will suffer irreparable harm if the stay application is not granted. The Respondent's submissions regarding the potential for irreparable harm to Volcanic Creek and Granby River are not subject to consideration of my analysis at this stage. Balancing potential harm associated with allowing the stay application, including the risk of damage to the Granby River, Volcanic Creek, aquatic habitat, or the stream/river channels, will be undertaken only if I am satisfied that the Appellant faces a risk of irreparable harm if the stay application is denied.

[52] I note that the Respondent has submitted opinion evidence regarding the potential impacts to the stream and river channels and impacts to fish ecosystems and habitat, which could potentially be considered expert evidence.

[53] The Board's Practice and Procedure Manual, and Rule 25, address notice of expert evidence. At page 39, the Board's Practice and Procedure Manual states:

> If a party wants to submit an expert report at the hearing, and/or have an expert testify at the hearing without a report, this must be planned well in advance of the hearing. Anyone wishing to submit expert evidence must provide "notice" of that evidence almost three months before the hearing is scheduled to start.
>
> However, Rule 25(12) also allows parties to agree to different dates provided that the new dates do not impact the scheduled commencement of the hearing. The purpose of this notice is to give the other parties sufficient time to review and consider the opinions and facts upon which the opinion is based, to determine whether they need to retain their own expert to provide reply evidence, and to prepare questions to ask at the hearing. …

[54] As a result, I find that the Respondent has not provided the Appellant and the Board with adequate advance notice that it intended to rely on expert opinion evidence in relation to the stay application. However, in this case, this breach of

fairness has no impact on my analysis of whether the Appellant has established it will likely suffer irreparable harm nor was this evidence relied on in reaching my decision.

[55] Turning to the question I must decide at this stage of the *RJR-MacDonald* test, I am not persuaded that the Appellant has established that his interests will likely suffer irreparable harm if the stay is denied. I note in this respect that the Appellant did not provide a final reply to the Respondent's submissions, other than to state he did not have time to respond. The Appellant did not request additional time to make a final reply to the Respondent's submissions. Therefore, I have proceeded to decide the application based on the submissions that were provided.

[56] The Appellant referenced past losses from flooding, including the estimated loss of the equivalent of 600 dump truck loads of soil and sediment. However, the Appellant provided no evidence establishing his claim regarding these losses. In addition, as I found in determining the first part of the *RJR-MacDonald* test, the Appellant is in no better position whether the stay is granted or denied. He will remain without legal authorization to do the remedial works in and about a stream under the *WSA*. The Appellant has the burden of proof in this application and has not provided sufficient or persuasive evidence of financial loss that will likely result if the stay application is not granted.

[57] In conclusion, for the reasons provided above, I find that the Appellant has not established that his interests will likely suffer irreparable harm if the stay application is denied and the Order remains in effect until his appeal is decided by the Board.

Where Does the Balance of Convenience Lie?

[58] The third part of the *RJR-MacDonald* test involves determining which party will suffer the greatest harm from either granting or denying the stay application. The Appellant did not make any specific submissions on the balance of convenience test under *RJR-MacDonald* but I infer that his argument is the balance of convenience favours him because of the likely impact of ongoing flooding. On this point, I note the Appellant provided some photographs he claims are of his excavator being flooded.

[59] While the Appellant provided what appears to be new evidence in his final reply which is generally contrary to the Board's Practices and Procedures and raised an issue of whether the Respondent should be provided with an opportunity to respond to the new evidence. However, given my decision in this application is the remedy sought by the Respondent I find it unnecessary to provide a further opportunity for the Respondent to reply.

[60] The Respondent submits:

> The balance of convenience requires the denial of the stay application, in order that changes in and about a stream, contrary to WSA, do not continue without lawful authority. Also, to allow for the change approval application process to continue in the ordinary course to allow for properly informed decision making.

> The continuation of the Stop Work Order serves to avoid any potential for damage from the unauthorized works to Volcanic Creek and Granby River, their stream channels (bed and banks) and their aquatic environments, as well as to riparian and other property.
>
> This objective can only be achieved if the Stop Work Order is not stayed and the Appellant proceeds to provide the information requested with respect to his change approval application. More critically, under the current legislative framework, a change approval is required in the circumstances for changes in and about a stream to proceed under s.11 of WSA.

[61] I find the Respondent's submission persuasive and I agree the balance of convenience favours denying the stay application. In reaching this finding I only had to consider and evaluate whether the balance of convenience favoured denying the stay application and did not involve examining or weighing the evidence submitted by the Respondent around the effect of whether the stay of the order would result in irreparable harm. I reached my decision, with confidence, based on the legal argument that the objective of denying the stay application is to ensure the proper authorization process is fulfilled.

[62] I find the Appellant is unable to obtain the remedy he seeks, specifically the legal right to engage in works in and about the streams, regardless of the outcome of the stay application. This is because the Order was issued due to works being undertaken without proper authority under section 11 of the *WSA*.

DECISION

[61] For the reasons provided above, the Appellant's application for a stay is denied.

"David Bird"

David Bird, Vice Chair
Environmental Appeal Board

June 25, 2021