



Environmental Appeal Board

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DECISION NOS. 2016-EMA-107(a) to 2016-EMA-119(a)

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

- BETWEEN:** Nickomekl Enhancement Society, Semiahmoo Fish and Game Club, Little Campbell Hatchery, Little Campbell Watershed Society, Frank Mueggenburg, IronGait Ventures Inc., Randy Ryzak, Pritpal Sandhu, Gabriel Farms Ltd., Carl and Inge Thielemann, Sonja Kroecher, East Kensington Elementary P.A.C., and Loblaws Ltd. **APPLICANTS/
APPELLANTS**
- AND:** Patricia Rush **APPELLANT**
- AND:** District Director, *Environmental Management Act* **RESPONDENT**
- AND:** Ebco Metal Finishing L.P. **THIRD PARTY**
- BEFORE:** A Panel of the Environmental Appeal Board
Alan Andison, Chair
- DATE:** Conducted by way of written submissions
concluding on May 25, 2015
- APPEARING:** For the Applicants/Appellants:
Nickomekl Enhancement Society: Jim Armstrong
Semiahmoo Fish and Game Club: Ron Meadley
Little Campbell Hatchery: Ron Meadley
Little Campbell Watershed Society: Phillip Milligan
Frank Mueggenburg: Frank Mueggenburg
IronGait Ventures Inc.: Dianne Orringe and Frank Mueggenburg
Randy Ryzak: Randy Ryzak
Pritpal Sandhu: Pritpal Sandhu
Gabriel Farms Ltd.: Shari Tompe
Carl and Inge Thielemann: Terry McNeice
Sonja Kroecher: Sonja Kroecher
East Kensington Elementary P.A.C.: Sonja Kroecher
Loblaws Ltd.: Gary Letcher and Andrea Akelaitis, Counsel
- For the Appellant Patricia Rush: Patricia Rush
- For the Respondent: Jaron Fergusson, Counsel
- For the Third Party: Edwin Eppich and Heather Renton

STAY DECISIONS

APPLICATIONS

[1] On March 1, 2016, Ray Robb, District Director (the "District Director") for the Greater Vancouver Regional District ("Metro Vancouver"), issued approval GVU1079 (the "Approval") to Ebco Metal Finishing L.P. ("Ebco"). The Approval, which 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 (the "Bylaw"), authorizes Ebco to discharge contaminants to the air from a galvanizing operation located in Surrey, BC.

[2] Fourteen Appellants filed appeals against the Approval. In their Notices of Appeal, thirteen of the Appellants applied for a stay of the Approval. 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.

[3] This decision addresses the applications for a stay. The applications were conducted by way of written submissions.

BACKGROUND

The Approval

[4] The Approval is valid for nine months, from March 1, 2016 to November 30, 2016, and applies to "existing or planned works" at Ebco's galvanizing plant in Surrey. The Approval authorizes the discharge of air contaminants from emission sources at Ebco's galvanizing plant located in Surrey.

[5] According to Ebco's submissions, it has operated a galvanizing plant at a location in Richmond for about 30 years, but that plant is beyond its operating life. Emissions from the Richmond plant are regulated by a permit. In April, Ebco began transferring its galvanizing operations to the new plant in Surrey, with full operation of the Surrey plant planned for May.

[6] The Approval identifies the Surrey plant's emission sources as "sources 1a, 1b, 2, and 3". The Approval describes emission sources 1a and 1b as a galvanizing dip pan enclosure that discharges through a baghouse, with a 6.7 metre high stack. The Approval states that a bag leak detector is to be installed in the baghouse by May 30, 2016. For sources 1a and 1b, the Approval sets the following maximums:

- maximum emission flow rate: 142 m³/min
- maximum annual operating hours: 4400 hrs/yr
- maximum emission quality:
 1. 7 mg/m³ Zinc
 2. 20 mg/m³ Particulate Matter
 3. 10% Opacity. Based on six minute average.
 4. Odorous Air Contaminant(s): None past the plant boundary such that pollution occurs.

5. Particulate: None past the plant boundary such that pollution occurs.

[7] Emission source 2 is described in the Approval as a galvanizing kettle heater discharging through a vent(s), with four burners that use natural gas and a 14.9 metre high stack. For source 2, the Approval sets the following maximums:

- maximum emission flow rate: 102 m³/min
- maximum annual operating hours: 8760 hrs/yr
- maximum primary burner input firing rate: 6.318 GJ/hr
- maximum emission quality:

1. Particulate: None past the plant boundary such that pollution occurs.

[8] Emission source 3 is described in the Approval as a “degrease tank, pickling tank, flux tank, and general room air discharging through 8 roof vents.” The works and procedures at source 3 include an 11.6 metre high stack, and the application of chemical mist suppressant to pickling tanks to prevent sulphuric acid misting. For source 3, the Approval sets the following maximums:

- maximum emission flow rate: 1825 m³/min
- maximum annual operating hours: 8760 hrs/yr
- maximum emission quantity:
 1. 0.024 t/year Sulphuric Acid
- maximum emission quality:
 1. 10% Opacity.
 2. Odorous Air Contaminant(s): None past the plant boundary such that pollution occurs.
 3. Particulate: None past the plant boundary such that pollution occurs.

[9] The Approval also contains a number of monitoring and reporting requirements. For example, at page 8 of the Approval, Ebco is required to submit to the Director, for review and approval, a plan for testing the discharge rate and concentration of certain substances from the stack at emissions sources 1a and 1b. That plan must be submitted 30 days before the proposed stack testing, and a written report detailing the stack testing is to be submitted by May 31, 2016. Similarly, at page 10 of the Approval, Ebco is required to submit, by May 31, 2016, a written report completed by a qualified professional estimating the sulphuric acid emissions from source 3. Further to that requirement, Ebco was required to provide to the Director, for review and approval, a report detailing the methodology for that stack testing of source 3, by March 31, 2016.

[10] In addition, at page 9 of the Approval, Ebco is required to submit a number of plans or reports to the Director. By July 29, 2016, Ebco must submit a report detailing the methodologies used to estimate emissions and conduct dispersion modelling for all of the emission sources at the plant, and discussing the impacts of the model results on human health and the environment. Prior to that, Ebco must submit a modelling plan to the District Director by April 30, 2016. Ebco must also provide a written report by September 30, 2016, prepared by a qualified

professional, that assesses the potential for the maximum predicted air contaminant concentrations and wet and dry deposition levels to adversely affect: human health; aquifers and groundwater; soil quality and agricultural productivity; plants, food crops, and “organic” status; farm animal health; and, fish habitat and health. On page 10 of the Approval, further informational reports regarding the inspection and maintenance of the baghouse, the plant’s raw materials and products, operating hours, and fuel use are required by August 31, 2016.

The appeals

[11] Between March 22 and 31, 2016, the Board received 14 appeals against the Approval. Appeals were filed by Patricia Rush, Nickomekl Enhancement Society, Semiahmoo Fish and Game Club, Little Campbell Hatchery, Little Campbell Watershed Society, Frank Mueggenburg, IronGait Ventures Inc. (“IronGait”), Randy Ryzak, Pritpal Sandhu, Gabriel Farms Ltd., Carl and Inge Thielemann, Sonja Kroecher, East Kensington Elementary Parents Advisory Committee (“P.A.C.”), and Loblaws Ltd. (“Loblaws”).

[12] Some of the Appellants filed joint Notices of Appeal. The Panel has summarized the grounds for appeal set out in the Notices of Appeal, as follows:

Ms. Rush:

- air emissions from the plant may adversely affect the health of humans, animals, and plants within a 5 km radius, and a spill from the plant could enter creeks and harm fish, plants, and groundwater.

Nickomekl Enhancement Society, Semiahmoo Fish and Game Club, Little Campbell Hatchery, and Little Campbell Watershed Society:

- air emissions from the plant, including zinc and sulphuric acid, will cause serious harm to fish, particularly salmon, in the vicinity of Erickson Creek within the Nickomekl watershed, and Twin Creeks which discharge into the Little Campbell River;
- the emissions and associated run-off may eliminate the hatchery programs conducted by the Nickomekl Enhancement Society and the Little Campbell Hatchery for the Nickomekl and Little Campbell watersheds, and may eliminate the salmon enhancement programs conducted by the organizations in the immediate vicinity of the Ebco plant;
- Metro Vancouver did not notify or consult with the Nickomekl Enhancement Society regarding its intent to authorize the emissions, and did not consider its legal obligations regarding stream protection under the Metro Vancouver Liquid Waste and Resource Management Plan; and
- the reporting requirements are inadequate because: the methodologies for sampling and analysis do not recognize that the emissions will become waterborne; the dispersion modeling requirements do not expressly require consideration of the effects on the aquatic environment; the report for determining adverse effects is not due until after the facility has been operating for several months; long-term effects on fisheries cannot be

assessed in this short time frame; and, the reporting requirements do not take into account acute effects such as mortality of fish and invertebrates that may be observed within this time frame.

Frank Mueggenburg, IronGait, Randy Ryzak, and Pritpal Sandhu

- these Appellants own and operate farms, horse training and breeding operations, and/or trout aquaculture operations on their properties, which are located less than 1 km from the galvanizing plant, and they are concerned about the effects of the air emissions on their health as well as adverse impacts on their horses, beehives, hay, fruit and vegetable crops, and/or trout;
- the District Director should have recused himself from this decision because, at a February 4, 2016 meeting, he disclosed that he had an association with another galvanizing plant operator, he downplayed the emissions of such a plant, and he stated that the agricultural community is one of the worst polluters in the Lower Mainland due to exhaust from tractors and equipment;
- in the March 11, 2016 edition of the Peace Arch News, the District Director downplayed the emissions from the plant, demonstrating bias;
- the use of a short-term approval is inappropriate because it prevents public scrutiny of the plant, the plant is not a short-term facility, and the Approval could be extended to June 30, 2017;
- the Approval does not properly account for all emission sources at the plant, or possible changes in the chemicals that may be used at the plant; and
- the reporting requirements are inadequate and do not consider what may happen when the air emissions land on the ground and mix with water, and there is no requirement to take baseline samples of soil and water.

Gabriel Farms Ltd.

- the Appellant's farm is located within 1 km of the Ebco plant, and produces pumpkins, pasture, and hay, and operates a pumpkin patch agro-tourism business that hosts 20,000 visitors in September to October;
- Twin Creeks runs through the farm, and the farm has six ponds which provide habitat to wildlife;
- the air emissions may adversely affect soil, surface water, aquatic life, well water, crops, and humans and animals that ingest the farm's crops;
- the air emissions may cause fewer customers to visit the farm due to the perceived threat to their health and safety; and
- the Approval should not have been issued without further environmental testing and studies, and consideration of further ways to reduce emissions.

Carl and Inge Thielemann

- these Appellants own and operate a certified organic farm, and they are concerned that the emissions will adversely affect their health and cause them to lose their organic status; and

- the galvanizing plant could adversely affect all farmland in the area.

Sonja Kroecher

- the air emissions may adversely affect food crops that the Appellant grows on her property, located just over 1 km away from the galvanizing plant;
- the galvanizing plant does not have a 24-hour monitoring system to warn of chemical leaks or spills, and it should be required to have such a system;
- the Approval should be revoked until all required studies and air modelling have been completed; and
- there should be independent soil and air sampling of the plant location, and an independent scientific environmental study to address the health and environmental risks of the emissions within 5 km of the galvanizing plant.

East Kensington Elementary P.A.C.

- East Kensington Elementary school is located less than 1 km away from the galvanizing plant, and the plant is adjacent to Erickson Creek which runs behind the school;
- the air emissions will adversely affect the health of staff and students at the school, who spend part of the school day outdoors, and may contaminate the school's vegetable garden and Erickson Creek;
- the school will no longer be able to open its windows to allow fresh air to come in, which will compromise students' health and the learning environment; and
- there is no 24-hour monitoring of the plant's emissions, and a chemical spill could harm children at the school.

Loblaws

- Loblaws operates a large food distribution facility located 500 metres downwind from the galvanizing plant, and the Approval prejudicially affects Loblaws' interests as an owner and operator the food distribution facility;
- the District Director failed to take a precautionary or technically rigorous approach in issuing the Approval, by failing to assess or adequately assess the environmental impacts of the air emissions, and failing to impose adequate conditions for the protection of the environment;
- the District Director's decision is not supported by evidence, or alternatively, is not supported by sufficient or reliable evidence, and he failed to provide sufficient reasons for his decision; and
- alternatively, the District Director erred in exercising his discretion by taking into account irrelevant factors.

[13] Some of the Appellants also raised concerns about the potential impact of the emissions on the value of their property. However, the Panel notes that in a previous decision involving appeals against a permit to discharge waste, the Board allowed an application to strike grounds for appeal that alleged adverse impacts on

property values: *Cobble Hill Holdings Ltd. v. Ronald Witherspoon et al*, Decision Nos. 2013-EMA-017(a), 019(a), 020(a) and 021(a), February 5, 2014, at paras. 116 to 121. In that case, the Board found that the provisions of the *Act* that provide for permits to discharge waste are focused on environmental concerns and protections, and the impact of authorized waste discharge on property values is not a relevant consideration in deciding an appeal of a permit.

The applications for a stay of the Approval

[14] In their Notices of Appeal, all of the Appellants except Ms. Rush applied for a stay of the Approval. The thirteen Appellants who applied for a stay are referred to in this decision as the "Applicants".

[15] Most of the Applicants request a stay pending a decision from the Board on the merits of the appeals. Loblaws requests an order for:

1. A stay of the Approval pending the earlier of the hearing and determination of the appeals;
2. Alternatively, a stay of the Approval to a date 14 business days following the date that Ebco submits to Metro Vancouver and the Appellants completed reporting requirements as set out in the Approval at page 9 as follows:
 - (a) For emission sources 01a, 01b, 02 and 03 as set out in the Approval, a written report detailing methodologies used to (a) determine emissions and (b) conduct dispersion modeling; summarizing maximum predicted concentrations and both wet and dry deposition level of particulate matter, zinc, nickel, chlorine, and sulphuric acid mist in tables and figures; and discussing the implications of the model results on human health and the environment. A minimum of two scenarios are to be modelled: normal operations and authorized emissions. A model plan based on the Metro Vancouver Dispersion Modeling Plan" template shall be submitted to the District Director by April 30, 2016. Proposed emissions to be modelled should be based either on stack test results or emission estimated prepared by a qualified professional; and
 - (b) For emission sources 01a, 01b, 02 and 03 as set out in the Approval, a written report completed by a qualified professional that assess the potential for the maximum predicted air contaminant concentrations in wet and dry deposition levels to adversely affect (including bioaccumulation and long term effects):
 - human health;
 - aquifers and groundwater;
 - soil quality and agricultural productivity;
 - plants, food crops, and "organic" status;
 - farm animal health; and
 - fish habitat health.

3. Loblaws shall have liberty, within 14 business days of receipt of the reports identified in paragraph 2 above, to apply to extend the stay, pending the hearing and determination of the appeals.

[16] The Board invited all parties to provide written submissions on the applications for a stay.

[17] In general, the Applicants submit that the appeals raise serious issues, and denying a stay of the Approval 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, farm animals, and crops located near the galvanizing plant. They submit that Ebco has provided insufficient evidence or information to support its claims that the Approval will cause no harm and that a stay will cause Ebco to suffer significant harm. The Applicants argue that the balance of convenience favours granting a stay. In addition, some of the Applicants submit that granting a stay would allow time, before the galvanizing plant is allowed to operate, for completion of the environmental studies and reports that are required by the Approval.

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

[19] Ebco opposes the stay applications. It submits that the appeals raise no serious issues, and the Applicants' interests will suffer no harm if a stay is denied. Ebco also submits that granting a stay would cause it, its customers, and its employees to suffer harm, and it may be forced out of business. Ebco submits that, if a stay is granted, the harm that would be suffered by it and its stakeholders outweighs any harm that the Applicants may suffer if a stay is denied.

ISSUE

[20] The sole issue arising from these applications is whether the Panel should grant a stay of the Approval, pending a decision from the Board on the merits of the appeals, or alternatively (as requested by Loblaws), 14 business days following Ebco's submission of the completed reporting requirements required at page 9 of the Approval.

RELEVANT LEGISLATION AND CASE LAW

[21] 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.

[22] 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.

[23] The onus is on the applicant(s) for a stay to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Whether the Panel should grant a stay of the approval pending a decision from the Board on the merits of the appeals, or alternatively, 14 business days following Ebco's submission of the completed reporting requirements required on page 9 of the Approval.

Serious Issue

[24] In *RJR MacDonald*, 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.

[25] 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

[26] In general, the Applicants submit that the appeals raise serious issues including whether the emissions authorized by the Approval will cause harm to human health and the environment, whether the potential harm posed by the emissions should be assessed before or after the discharge is authorized to occur, and whether the decision to issue the Approval is consistent with the Bylaw and section 15 of the *Act*. Some of the Applicants also submit that the District Director was biased and should have recused himself from deciding whether to issue the Approval.

[27] In addition, some of the Applicants, including Loblaws, argue that the District Director erred by requiring Ebco to submit the reports required on page 9 of the Approval after the Approval was issued, rather than before it was issued. Loblaws submits that the District Director's approach is contrary to the Board's previous findings that the *Act* requires decision-makers to take a cautious and technically rigorous approach, and decision-makers should analyze the potential harm that the waste discharge poses to human health and the environment before the waste discharge is authorized.

[28] Ebco argues that the appeals raise no serious issues. Ebco maintains that none of its employees have ever experienced deleterious health effects from exposure to the air in its Richmond galvanizing plant. In addition, Ebco submits that sulphuric acid emissions in the form of mists are controlled with additives that reduce sulphuric acid levels in the air at the source to less than 10% of the limits established by WorkSafe BC. Ebco maintains that it has operated in compliance with the permit for its Richmond plant for 15 years, as confirmed by emissions tests performed by third parties and submitted to Metro Vancouver. Ebco asserts that these tests are “a matter of public record”.

[29] Ebco also submits that the permit for its Richmond plant allows for less than half of the emissions that are allowed at other galvanizing plants in Metro Vancouver, and its Surrey plant is authorized to discharge essentially the same emissions as are authorized under the permit for its Richmond plant. Ebco maintains that tests performed by third parties and regularly submitted to Metro Vancouver show that particulate emissions from its Richmond plant are less than 10% of the permitted allowance, and zinc emissions are well below 1% of the permitted allowance, as measured at the stack (and not diluted some distance away from the source). Ebco further submits that ammonium chloride, which is the main particulate emission, and zinc are nutrients that plants utilize, and soils in the Lower Mainland have a zinc deficiency. Ebco maintains that the small amounts of those substances which are emitted from its plant will not harm soil, plants, water, or fisheries.

The Panel's findings

[30] In arguing that the appeals raise no serious issues, Ebco relies on its history of emission testing and compliance with a permit that authorizes emissions from its Richmond plant. However, Ebco provided no copies of that permit, the emission testing results from its Richmond plant, or any other documents which would support and verify those submissions. Ebco also provided no specific details that would allow a quantitative comparison between the emissions at the Richmond plant compared to the Surrey plant.

[31] The Panel notes that it is a party's responsibility to provide evidence in support of its submissions; it is not up to the Board to search for information or evidence that is referred to by a party. Moreover, the issues in this stay application relate to the authorized emissions from the Surrey plant, and not the emissions from the Richmond plant. There is currently insufficient information before the Panel to determine whether Ebco's permit and the history of emissions testing from the Richmond plant have any relevance to the Approval and the emissions from the Surrey plant. Consequently, the Panel finds that Ebco has provided insufficient information for the Panel to conclude that the appeals raise no serious issues.

[32] The Panel has also reviewed the Applicants' submissions and the grounds for appeal, and the Panel finds that the appeals raise serious issues. The appeals raise the issue of whether the District Director had adequate information about the potential impacts of the emissions from the Surrey plant before he issued the Approval, and whether the District Director erred in exercising his discretion under the Bylaw and section 15 of the *Act*. The appeals also raise issues regarding the

potential harm that the emissions may pose to human health and the environment in the vicinity of the Surrey galvanizing plant. Further, the Panel finds that the appeals raise an issue regarding whether the District Director was biased.

[33] In summary, as stated by the Supreme Court of Canada in *RJR MacDonald*, the inquiry at this stage of the three-part test generally should proceed to the next stage unless the case is frivolous or vexatious, or is a pure question of law. The Panel finds that the issues raised by these appeals are not frivolous or vexatious, and are not pure questions of law. The appeals raise serious issues and arguable issues of fact. Consequently, the Panel will proceed to consider the next stage of the *RJR MacDonald* test.

Irreparable Harm

[34] At this stage of the *RJR MacDonald* test, the Applicants must demonstrate that their interests will suffer irreparable harm if a stay is denied. As stated in *RJR MacDonald*, at p. 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the Association's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

...

'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....

The Parties' submissions

[35] Collectively, the Applicants and Ms. Rush submit that, if a stay is denied, they will suffer irreparable harm including harm to their health or their family's health, harm to the health of school children, harm to the viability of their farm operations, and/or harm to the environment including soil, water, fish, animals, and crops located near the Surrey galvanizing plant. Their specific submissions in this regard are summarized below.

[36] Ms. Rush submits that refusing a stay could cause irreparable harm, as her family has a sensitivity to "acid air", and they moved to their current location to alleviate respiratory ailments they experienced when living in pulp mill communities. She also submits that, if a stay is denied, her family will have had no chance to express their concerns before the galvanizing plant starts to operate.

[37] In a joint submission, the Nickomekl Enhancement Society, Semiahmoo Fish and Game Club, Little Campbell Hatchery, and Little Campbell Watershed Society submit that denying a stay will result in irreparable harm due to the discharge of:

- particulate matter into the receiving environment including Erickson Creek, which originates adjacent to Ebco's Surrey plant and discharges into the Nickomekl River;
- zinc into the receiving environment, Erickson Creek, and storm water runoff from Ebco's property into the Nickomekl River watershed and Twin Creek, a tributary of the Little Campbell river watershed; and,
- chemicals that are used in the galvanizing process which have not been fully identified or addressed by a spill contingency plan as part of the Approval process.

[38] The Nickomekl Enhancement Society, Semiahmoo Fish and Game Club, Little Campbell Hatchery, and Little Campbell Watershed Society also submit that the introduction of zinc into the receiving waters of Erickson Creek will likely cause irreparable harm to salmon that inhabit the lower reaches of the Creek for approximately 25% of their life cycle (egg to smolt), as zinc has been "scientifically proven" to cause serious harm to fish including mortality, which cannot be remedied. As a result, the Nickomekl Enhancement Society will be unable to provide fish habitat for approximately 10% of its annual release of Coho salmon fry, and will be unable to participate in a federal salmon enhancement program at a level that provides viable salmon returns in Erickson Creek. In addition, they submit that the contaminants will cause irreparable harm to the ability of the Little Campbell Hatchery to rear salmon and trout, and it is likely that the Little Campbell Hatchery and the Semiahmoo Fish and Game Club will cease to operate the salmon enhancement programs that they have been providing for over 50 years. They submit that these organizations provide approximately 100,000 to 500,000 salmon fry and smolts in Erickson Creek and Twin Creeks.

[39] Frank Mueggenburg submits that the emissions from Ebco's Surrey plant will negatively affect the health of rainbow trout, which are raised on his farm, as studies indicate that zinc and chemicals in particulates cause acute toxicity and mortality to rainbow trout. Mr. Mueggenburg also submits that irrigated crops will be adversely affected by heavy metal uptake from groundwater on the farm, and there will be irreparable harm to his reputation for delivering premium farm products, which will destroy the financial base of the farm. In support of his submissions, Mr. Mueggenburg provided four photographs of the Surrey plant that were taken on May 4, 2016. The photographs show smoky grey/blue emissions in the air close to the plant building. In one case, the smoky emissions appear to emanate from a stack or metal chimney, and in the other case the emissions appear to be venting from under an open roof at one end of the building. He states that he believes these emissions to be from sources "03 and 04" and are "raw and unchecked in any way".

[40] IronGait submits that the emissions will cause irreparable harm to the health of performance horses that are bred, raised and trained on its property. It submits that mares are scheduled to be bred in May, and nickel emissions threaten mares'

ability to conceive as well as causing respiratory distress in foals. IronGait also submit that zinc intake is devastating to growing foals, as it can cause harm to cartilage. IronGait maintains that heavy metal intake may cause the horse breeding program to close, and horse training has been put on hold until air quality tests are conducted. Without the ability to provide the best horse care, customers who board horses will leave, horses that were intended to be sold cannot be sold, the business will suffer losses, and the costs to breed and raise horses will be lost. IronGait argues that, without the ability to conduct its breeding and training program and provide the best horse care, as it has done for 20 years, it faces a complete loss of business.

[41] Randy Ryzak submits that the health of horses grazing on his farm will be jeopardized by zinc, nickel and particulates that they breathe, eat, and drink. In addition, he submits that trees, groundwater and crops on his property will be harmed by the galvanizing plant's emissions, and there is no known cleanup for these chemicals. Mr. Ryzak submits that a customer who had reserved Mr. Ryzak's first hay crop this season has already rejected the hay, and his farm's reputation may be harmed when this becomes known. Mr. Ryzak submits that he will incur costs to test his hay for zinc and particulate, and he may still be unable to sell his hay. His crops may fail, causing losses, and he may incur further costs to find new customers and transport his hay further afield.

[42] Pritpal Sandhu submits that the plant's emissions containing zinc, nickel and particulates will compromise the health of his family, who spend many hours working in their fields, and his berry and vegetable crops. He submits that the uptake of pollutants by blueberry plants is very quick and the harm will be permanent. The longer the galvanizing plant operates, the more contaminants will be deposited on the fields. He will incur the cost of testing his products before they can be sold, and the crops may be a complete loss if they do not pass testing.

[43] Gabriel Farms Ltd. submits that the emissions will result in fear and a negative perception about the air quality and crops at the farm, such that the public will not visit the farm, which could destroy the business because it relies on farm visits for all of its income. It submits that some customers are already expressing concern, and some teachers are questioning whether they will take students to the farm this fall. The farm has also incurred added expenses for soil and water sampling.

[44] Carl and Inge Thielemann submit that the emissions will harm their health and threatens their business as a producer of certified organic hay. They submit that Mrs. Thielemann has lung damage and other health issues, and she has been diagnosed with a high sensitivity to chemicals. In addition, they advise that only one customer buys their hay, and they are concerned about losing this customer as a result of the emissions from the galvanizing plant. They are concerned that they may lose their organic status and go out of business.

[45] Sonja Kroecker submits that she is concerned about the effects of the emissions on her health and her family's health, and on food crops she grows at her property located just over 1 km away from the galvanizing plant. She submits that she will suffer irreparable harm if a stay is denied, due to contamination of water,

soil and food crops on her property, and due to possible health effects of the emissions. She submits that her food crops may not grow, may be poor quality, or may be carcinogenic. She is also concerned that she may suffer headaches, respiratory problems, or other illnesses as a result of airborne zinc, sulphur and particulates.

[46] The East Kensington Elementary P.A.C. submits that, if a stay is denied, students and teachers at the school will suffer irreparable harm due to exposure to zinc vapour, sulphuric acid, and particulates in the air. It submits that the school is located less than 1 km away from the galvanizing plant, and the wind usually blows from the plant towards the school. East Kensington Elementary P.A.C. also submits that these chemicals may cause nausea, flu-like symptoms, respiratory problems, and other health problems, and scientific data indicates that children are more susceptible to toxic chemical exposure than adults. Children could become ill while playing and exercising outdoors on the school grounds. Also, some children at the school have asthma and other health conditions that put them at higher risk of becoming ill or suffering serious health complications from exposure to the emissions. East Kensington Elementary P.A.C. submits that fewer families will want to live in the area, and fewer children will attend the school, as a result of the emissions.

[47] Loblaws submits that it is "self-evident on the face of the Approval that there is a real possibility of irreparable harm." Specifically, Loblaws argues that it is self-evident, based on the conditions in the Approval requiring Ebco to submit reports assessing the potential impacts of the emissions, that there is a reasonable possibility of harm to receptors, and that the adverse effects to be assessed may give rise to irreparable harm. Loblaws submits that the other Applicants' submissions provide additional evidence of irreparable harm.

[48] In general, Ebco submits that the emissions from its Surrey plant will cause no harm to human health or the environment. Ebco's submissions in that regard are summarized above, under the heading "Serious Issue". Ebco submits that there should be no concern that harm, let alone irreparable harm, will occur if a stay is denied.

[49] In reply, the Applicants generally submit that Ebco has provided no studies or scientific information to support its assertions that the emissions will cause no harm to human health or the environment. They also submit that the landscape and land uses around Ebco's Richmond plant are very different from those around the Surrey plant, and the emissions at the Richmond location should not be used as a basis for drawing conclusions about the emissions at the Surrey location.

Panel's findings

[50] At this stage of the *RJR MacDonald* test, the question is whether any of the Applicants have demonstrated that their interests will likely suffer irreparable harm if a stay is denied and the Approval will remain in effect, pending a final decision from the Board on the merits of appeals. As stated in *RJR MacDonald*, "irreparable" harm is harm that either cannot be quantified in monetary terms or cannot be cured, and includes a permanent loss of natural resources, an Applicant being put

out of business, or an Applicant suffering permanent market loss or irrevocable damage to its business reputation.

[51] The *RJR MacDonald* test requires the Applicants to demonstrate good and sufficient reasons why a stay should be granted. At the “irreparable harm” stage of the three-part test, 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.

[52] The authorized emissions that are of primary concern to the Applicants are zinc (authorized maximum concentration of 7 mg/m³), sulphuric acid (authorized maximum quantity of 0.024 t/year), and particulates (authorized maximum concentration of 20 mg/m³). The Applicants assert that these contaminants cause health problems in humans, horses, and fish, and cause harm to soil, water, and crops. Some of the Applicants also assert that denying a stay will cause their farm businesses to lose customers, and they will suffer harm to their business reputations and may eventually go out of business.

[53] Overall, the Panel finds that, whereas Ebco failed to provide adequate information or evidence to support its claim that the emissions will cause no harm to humans or the environment, the Applicants’ claims regarding irreparable harm share the same inadequacy.

[54] Specifically, the Panel rejects Loblaws’ submission that the reporting conditions at page 9 in the Approval, on their face, establish a likelihood of irreparable harm. Those reporting conditions require Ebco to provide reports detailing the air dispersion modelling it will perform, and the results of that modelling. Those reports will provide information about the predicted concentrations of the emissions as they disperse, and whether the emissions are likely (or unlikely) to cause harm to human health or the environment. The fact that dispersion modelling is required does not, in itself, establish that the emissions are likely to cause irreparable harm to the Applicants’ interests.

[55] Some of the Applicants submit that scientific studies support their claims that the emissions will cause irreparable harm to human health and the environment. However, none of the Applicants cited any specific scientific study to support their assertions regarding irreparable harm. For example, some of the Applicants assert that zinc is “scientifically proven” to cause serious harm to fish and horses, but the Applicants provided no specific information from a scientific or veterinary source to support those claims. Similarly, some of the Applicants assert that the emissions will cause or exacerbate respiratory and other health problems in humans, but they provided no specific information such as a scientific study or a letter from a medical professional to support these claims. Moreover, the Applicants have not identified the concentrations or levels at which these substances may cause adverse effects on crops, fish, animals, or humans.

[56] The Panel has considered the photographs provided by Mr. Mueggenburg, which show grey/blue smoky emissions in the air close to the Surrey plant building. One of the emissions sources appears to be a stack or metal chimney, and the other appears to be venting from under an open roof at one end of the building. However, the content of those emissions is unknown to the Panel. It is also unknown to the Panel whether the emissions travelled beyond the boundary of Ebco's property, or whether emissions of this nature occurred on other days besides May 4, 2016. As such, there is insufficient information for the Panel to determine whether these emissions are likely to cause irreparable harm to the Applicants' interests.

[57] In addition, the Panel finds that the Applicants provided insufficient information to support their claims that denying a stay will likely cause their farm operations to suffer permanent harm to their reputation, and/or cease to operate. For example, although one Applicant submits that the emissions may affect their organic farm status, the Applicant provided no details about the levels of particulates, zinc, or sulphuric acid in air, soil, water or crops which would cause a loss of organic status. Presumably, the Applicants claiming that they could lose their organic status have some knowledge of the requirements for organic status, and the levels of specific substances that would cause a loss of organic status. In addition, although one Applicant submits that a customer has already rejected a hay crop because of concerns about the emissions, the Panel notes that a stay, if it was granted, would not reverse any emissions or loss of customers that already occurred. Similarly, while some of the Applicants assert that the emissions will cause hatchery operations and salmon enhancement programs downstream from the galvanizing plant to cease, and that Fisheries and Oceans Canada studies have found that zinc is toxic to salmon, they cited no specific studies and provided no information about the concentration or level of zinc that causes harm to salmon.

[58] The Panel finds that, if a stay is denied but the appeals are ultimately successful, some of the Applicants may experience additional costs and a temporary loss of some customers between now and when the appeals are decided. For example, some of the Applicants may incur costs to test their crops in response to customers' concerns about the impacts of the emissions. Some of the Applicants may also incur costs and inconvenience if some customers choose not to buy their products or services based on concerns about the emissions, even if those concerns are currently based on perceptions rather than evidence of harm. However, the Panel finds that there is no evidence that such costs are likely to result in a permanent loss of business or harm to business reputation, between now and when the Board issues a final decision on the merits of the appeals. The Panel finds that, without more evidence or information, the Applicants' concerns about the emissions causing a permanent loss of business or irreparable harm to their business reputations are speculative. Furthermore, if a stay is denied but the appeals are successful and the Approval is reversed, the emissions will cease at that time and their impacts will be limited.

[59] Moreover, if the Board ultimately finds, following a hearing on the merits of the appeals, that the emissions will cause no harm to human health and the environment, the health and safety of the Applicants' products will be vindicated,

and any loss of customers or harm to the Applicants' business reputation is likely to be temporary.

[60] In these circumstances, the Panel finds that the Applicants have provided insufficient evidence or information to establish that their interests are likely to suffer irreparable harm unless a stay is granted.

Balance of Convenience

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

The parties' submissions

[62] In general, the Applicants and Ms. Rush submit that the balance of convenience favours granting a stay. They submit that their interests will suffer irreparable harm if a stay is denied, and this harm outweighs any harm that Ebco will suffer if a stay is granted. Many of the Applicants' submissions regarding irreparable harm, which the Panel has summarized above, overlap with their submissions on the balance of convenience.

[63] In particular, the Nickomekl Enhancement Society, Semiahmoo Fish and Game Club, Little Campbell Hatchery, and Little Campbell Watershed Society submit that Ebco has not conducted environmental monitoring or impact studies regarding the effects of the emissions from the Surrey plant, and therefore, Ebco cannot claim that the emissions will not cause serious harm to fish and aquatic habitat. They further submit that allowing Ebco to continue operating without completing these studies may be allowing irreparable harm to the receiving environment which will eliminate hatchery operations and salmon enhancement programs that these Applicants have provided for many decades.

[64] Mr. Mueggenburg submits that granting a stay will allow him to "salvage" his crops and trout this year, and will allow time for Ebco to complete their "due diligence" regarding the community surrounding the Surrey plant. In contrast, denying a stay would allow incremental harm and destruction of the environment and his farm operations.

[65] IronGait submits that, if a stay is denied, IronGait's loss of its horse breeding, training, and boarding business is greater than the loss Ebco would suffer if a stay is granted. It submits that Ebco's plant was built at its own risk, and its operation can be moved or improved, whereas IronGait's operation cannot. A stay would result in Ebco completing studies that should have already been done.

[66] Mr. Ryzak's submissions are summarized above under the heading, "Irreparable Harm".

[67] Mr. Sandhu submits that denying a stay will cause him to incur the added costs of testing his berry crops before they can be sold, and public perceptions about the farms' proximity to the galvanizing plant could affect sales even if the berries pass testing.

[68] Gabriel Farms Ltd.'s submissions are summarized above under the heading, "Irreparable Harm".

[69] Mr. and Mrs. Thielemann's submissions are also summarized above under the heading, "Irreparable Harm".

[70] Ms. Kroecheer submits that, if a stay is denied, she will suffer greater harm than Ebco would suffer if a stay is granted, as her family will no longer be able to grow fruit or vegetables on their property for consumption due to concerns about contamination, and her health may be adversely affected by the air contaminants.

[71] The East Kensington Elementary P.A.C. submits that the harm to children at the school, if a stay is denied, far outweighs any harm to Ebco's financial interests.

[72] Loblaws submits that the balance of convenience favours granting a stay. Loblaws submits that Ebco has been approved to emit air contaminants without any assessment at all as to their impacts on the environment. Loblaws further submits that, while it may be the case that Ebco has not yet commenced operations under the Approval, this fact is not known by Loblaws. If Ebco has not yet commenced operations, then the effect of a stay would be to postpone commencement. Alternatively, if Ebco has commenced operations, then the situation is more egregious because Ebco is emitting contaminants without assessing the harm caused by those emissions.

[73] Ebco submits that the balance of convenience favours denying a stay, as the harm that Ebco and its stakeholders would suffer, if a stay is granted, far outweighs any harm claimed by the Applicants. Ebco submits that it serves 500 regular customers, most of whom are on the Lower Mainland, who fabricate steel products. Ebco submits that a stay would force it to shut down its Surrey plant, which would have a catastrophic impact on its business, and it would incur losses and expenses in the millions of dollars after a delay of only a few weeks. Ebco maintains that a stay for the period of the Approval would likely imperil its business from operating at all in the future, and would also cause significant harm to its employees and customers. Ebco submits that 50 to 60 employees would be laid off due to a stay of the Approval, and many of its customers would have to ship their steel products to Alberta for galvanizing.

[74] In reply to Ebco's submissions, the Applicants generally submit that Ebco has failed to establish that the balance of convenience favours denying a stay. They also submit that Ebco's submissions display a dismissive attitude towards the effects of the emissions on human health and the environment. They argue that Ebco has provided no evidence to support its claims regarding the financial impacts of a stay, or the environmental impacts of the emissions.

[75] In particular, Mr. Mueggenburg submits that Ebco is exaggerating the harm that it would suffer if a stay is granted. He submits that Ebco's Richmond plant would be able to continue its galvanizing operations, supply its customers, and employ its staff. He acknowledges that Ebco may suffer some harm if a stay is granted, in that the Surrey plant has a larger capacity than the Richmond plant, and Ebco could incur some costs and lose market credibility. However, he submits that any harm to Ebco is minimal and "self-inflicted" by its failure to conduct the

appropriate studies, follow the regulatory process, and obtain a multi-year permit rather than a short-term approval.

[76] IronGait submits that one industry should not, simply because it is larger and contributes more to the economy, have rights over smaller businesses such as IronGait's. One industry should not be permitted to operate at the expense of another. Furthermore, IronGait submits that Ebco's claim that the Richmond plant needs to be urgently replaced is speculative, and Ebco took a financial risk if it made commitments to customers based on an assumption that the Surrey plant would be operating by late April.

[77] Ms. Kroecker submits that there is likely to be no irreparable harm suffered by Ebco if a stay is granted. She submits that the harm to her air quality, health, and ability to grow food crops far outweighs Ebco's financial interests. She submits that Ebco may suffer no harm if a stay is granted, because Ebco has a second plant in Richmond and valuable assets.

[78] Loblaw's submits that Ebco has provided no detailed or reliable evidence to support its contention that it would suffer business losses if a stay is granted, and Ebco has not explained why it did not assess the impacts of the emissions before it began to emit contaminants. Loblaw's argues that Ebco has created the circumstances which it claims will imperil its business interests, and Ebco should not be entitled to rely on harm of its own making. In addition, Loblaw's provided affidavit evidence that its counsel has been informed by Metro Vancouver that, as of May 10, 2016, Ebco has not provided the modelling plan which was to be submitted to the District Director by April 30, 2016 in accordance with the conditions on page 9 of Approval, and two other plans are also overdue. Loblaw's notes that, as such, Ebco has not complied with the terms of the Approval. Loblaw's submits that a stay should be ordered until such time as the air dispersion modelling and adverse impact assessment reports required in the Approval are satisfactorily completed.

[79] In surreply, Ebco submits that the test plans for the stack tests were submitted to Metro Vancouver on May 18, 2016, and the first "report" is not due until May 31, 2016. Ebco advises that it has taken longer than expected to source quotations for the work specified in the approval, and this has taken place at the same time as the plant move. Ebco also advises that emission source 3 has been a "significant obstacle." Ebco decided to carry out stack testing for source 3, but source 3 has no physical stack. Following a site inspection meeting on May 17, 2016, Ebco has developed a design to build a temporary stack over the roof fan. In addition, Ebco advises that one of the stacks to be tested for emission source 1 could not be moved from Richmond to Surrey until the week of May 9, and now that it has been moved Ebco can set sampling dates based on the availability of the stack testing contractor.

[80] Further, Ebco advises that the dispersion model plan has been delayed because Ebco has "no previous emission data of any kind available for sulphuric acid," but Ebco has engaged an environmental consultant for this and will submit the plan to Metro Vancouver "as soon as possible." The environmental consultant has "tentatively" booked June 14 to 16, 2016 as their "earliest possible sampling

dates" and Ebco will "confirm if it is possible to have all the construction/arrangements in place by this date." Ebco submits that the report detailing methodologies to be used for dispersion modelling is not due until July 29, 2016 and will be based on emission limits and/or stack test results.

The Panel's findings

[81] Under the heading, "Irreparable Harm", the Panel has already found that the Applicants have failed to establish that their interests are likely to suffer irreparable harm if a stay is denied. However, the Panel has also found that, if a stay is denied, some of the Applicants may experience additional costs and a temporary loss of some customers between now and when the appeals are decided. For example, some of the Applicants may incur costs to test their crops in response to customers' concerns about the impacts of the emissions. The Panel has found that some of the Applicants may also incur costs and inconvenience if some customers choose not to buy their products or services based on concerns about the emissions, although those impacts are likely to be temporary if the Board finds, following a hearing on the merits of the appeals, that the emissions will cause no harm to human health and the environment. Furthermore, if a stay is denied but the appeals are successful and the Approval is reversed, the emissions will cease at that time and their impacts will be limited.

[82] Conversely, if a stay is granted, the Panel finds that Ebco is likely to suffer some inconvenience and additional costs. Although Ebco has failed to provide evidence confirming its assertions of harm, it is clear that a stay would result in Ebco's investment in the Surrey plant sitting idle while the stay is in effect. Ebco would likely incur costs and inconvenience due to the delay in commencing (if not yet started), or the suspension of (if already started), its operations at the Surrey plant. However, the Panel finds that any inconvenience or added costs which Ebco may incur as a result of a stay would not cause Ebco to be unable to continue to operate at all, as it appears that Ebco may be able to continue operating its Richmond galvanizing plant, which still has a valid air emissions permit. The Panel finds that there is insufficient evidence to conclude that, if a stay is in effect for a relatively short period of time, Ebco would have to cease its galvanizing operations, lay off its employees, or go out of business.

[83] Based on the considerations above, the Panel finds that the balance of convenience is not clearly tipped in favour of either the Applicants' interests or Ebco's interests. However, in weighing the balance of convenience under the *RJR MacDonald* test, the interests of the public may also be taken into account. According to *RJR MacDonald*, when the purposes of the relevant legislation promote public interests, which may include protection of the environment or human health, it is generally presumed that the legislation has such an effect. As stated in *RJR MacDonald*:

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These

public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

...

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

[underlining added]

[84] In *RJR MacDonald*, the applicants had challenged the constitutionality of legislation that regulated cigarette packaging, and they sought a stay of the legislation on the basis that it would cause the applicants to incur major expense in altering their cigarette packaging and those expenses would be irrecoverable should the legislation be found unconstitutional. The Supreme Court of Canada held that the government passed the legislation with the intention of protecting public health and furthering the public good. In contrast, the only possible public interest in the continued application of the former packaging requirements was that the price of cigarettes for smokers would not increase. The Court held that any such price increase would not be excessive and did not carry much weight when balanced against the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

[85] In the present case, sections 6(1) through (4) of the *Act* generally prohibit the introduction of waste into the environment, but section 6(5) of the *Act* allows the disposal of waste in compliance with a valid permit or approval, among other things. Section 15 of the *Act* states that a director may issue an approval "subject to requirements for the protection of the environment that the director considers advisable". Together, sections 6 and 15 of the *Act* indicate that one of the objectives of the *Act* itself is the protection of the "environment". Section 1 of the *Act* defines "environment" to mean "air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed". Therefore, in deciding a preliminary application for a stay of an approval based on the *RJR MacDonald* test, there is a general presumption that the waste discharge authorized by the approval is subject to requirements that provide adequate protection for the "environment" as broadly defined in the *Act*.

[86] However, in the present case, the Approval contains requirements for Ebco to submit to the District Director numerous plans and reports which will provide information about the predicted dispersion of the emissions and the potential effects of the emissions on the environment including human health. On its face, this indicates that, before the District Director issued the Approval, he did not have

information about the predicted dispersion of the emissions and the potential effects of the emissions on the environment including human health. Moreover, Ebco acknowledges that it has not provided the District Director with the dispersion modelling plan which was to be submitted by April 30, 2016, in accordance with a requirement on page 9 of the Approval. Ebco also acknowledges that it has "no previous emission data of any kind available for sulphuric acid." Thus, not only has Ebco provided no scientific or technical information to the Board in support its claim that the emissions will cause no harm to the environment or human health, the evidence before the Panel indicates that, so far, Ebco has provided little information to the District Director in that regard. In these circumstances, the Panel cannot assume that the Approval, on its face, provides for adequate protection of human health and the environment, or that allowing Ebco's Surrey plant to continue emitting air contaminants pending the completion of the reports required on page 9 of the Approval would not pose an unreasonable risk of harm to human health and the environment. Denying a stay would result in Ebco continuing to emit contaminants which currently have unknown dispersion characteristics and unknown effects on human health and the environment.

[87] Given that the Panel cannot assume that the Approval, on its face, provides adequate protection for the environment and human health consistent with the public interest objectives of the *Act*, the Panel finds that the balance of convenience weighs in favour of granting a short stay of the Approval pending Ebco's submission, to the District Director's satisfaction, of the following reports and/or plans that are required on page 9 of the Approval, as follows:

- (a) For emission sources 01a, 01b, 02 and 03 as set out in the Approval, a written report detailing methodologies used to (a) determine emissions and (b) conduct dispersion modeling; summarizing maximum predicted concentrations and both wet and dry deposition level of particulate matter, zinc, nickel, chlorine, and sulphuric acid mist in tables and figures; and discussing the implications of the model results on human health and the environment. A minimum of two scenarios are to be modelled: normal operations and authorized emissions.

[The Approval requires this report to be submitted to the District Director by July 29, 2016.]

A model plan based on the Metro Vancouver Dispersion Modeling Plan" template shall be submitted to the District Director. Proposed emissions to be modelled should be based either on stack test results or emission estimated prepared by a qualified professional.

[The Approval required this plan to be submitted to the District Director by April 30, 2016.]

- (b) For emission sources 01a, 01b, 02 and 03 as set out in the Approval, a written report completed by a qualified professional that assess the potential for the maximum predicted air contaminant concentrations in wet and dry deposition levels to adversely affect (including bioaccumulation and long term effects):

- human health;
- aquifers and groundwater;
- soil quality and agricultural productivity;
- plants, food crops, and “organic” status;
- farm animal health; and
- fish habitat health.

[The Approval requires this report to be submitted to the District Director by September 30, 2016.]

[88] Given that this stay is intended to allow Ebco to complete the reporting requirements in the Approval, and that Ebco must conduct some stack testing to do so, the Panel further directs that Ebco is authorized to discharge air contaminants to the air in accordance with the Approval for the purposes of completing the reporting requirements set out in the Approval. Subject to that exception, the stay will prevent the emission of air contaminants until such time as there is sufficient information to support an assumption that the Approval provides adequate protection for human health and the environment.

[89] For all of these reasons, the Panel finds that, if a stay is denied, the potential harm to the Applicants’ interests together with the public interests that are promoted by the *Act*, outweighs the potential harm to Ebco if a stay is granted. In these circumstances, the Panel finds that the balance of convenience weighs in favour of granting a stay of the Approval, until such time as the reports and/or plans described above are completed to the District Director’s satisfaction. Once that information has been completed to the District Director’s satisfaction, the District Director must advise the Board and the parties, and the Board will then rescind the stay. At that time, the Applicants are at liberty to re-apply for a stay.

DECISION

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

[91] For the reasons stated above, the applications for a stay are granted pending Ebco’s completion, to the District Director’s satisfaction, of the reports and/or plans that are required on page 9 of the Approval as described above. The stay is subject to the Panel’s direction, above, that Ebco is authorized to discharge air contaminants to the air in accordance with the Approval for the purposes of completing the reporting requirements set out in the Approval.

“Alan Andison”

Alan Andison, Chair
Environmental Appeal Board

May 26, 2016