



Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
Email: eabinfo@gov.bc.ca

DECISION NO. 2017-EMA-010(b)

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

BETWEEN:	Gibsons Alliance of Business and Community Society and Marcia Timbres	APPELLANTS/ APPLICANTS
AND:	Director, <i>Environmental Management Act</i>	RESPONDENT
AND:	The George Gibsons Development Ltd.	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
DATE:	Conducted by way of written submissions concluding on November 21, 2017	
APPEARING:	For the Appellants/Applicants: William J. Andrews, Counsel For the Respondent: Stephanie Lacusta, Counsel For the Third Party: Paul R. Cassidy, Counsel	

STAY APPLICATION

[1] On July 24, 2017, the Gibsons Alliance of Business and Community Society and Marcia Timbres (collectively, the "Appellants") filed an appeal in relation to certain parts of a July 12, 2017 letter (the "July Letter") issued by Vince Hanemayer, for the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the "Ministry")¹. The July Letter was issued to The George Gibsons Development Ltd. (the "Developer"), and pertains to the Developer's site investigation and remediation plan for a contaminated site located in Gibsons, BC.

[2] In a decision dated October 24, 2017 (Decision No 2017-EMA-010(a)) (the "Jurisdiction Decision"), the Board determined that the appealed portions of the July Letter constitute an appealable "decision" under section 99(c) of the *Environmental Management Act* (the "Act").

[3] The Appellants requested a stay of the appealed decision, pending the Board's final decision on the merits of the appeal. The hearing of the stay application was conducted in writing.

¹ The Ministry of Environment is now the Ministry of Environment and Climate Change Strategy.

BACKGROUND

[4] The contaminated site consists of five parcels of land located at 377, 385, 397, and 407 Gower Point Road and 689 Winn Road (collectively, the "Site") in Gibsons, BC. The Site was originally developed in the 1950s for residential and commercial purposes. Around that time, a marine repair shop was built on the east side of the Site, north of Winn Road, and a fuel storage compound with underground storage tanks and fuel lines was located towards the northwest of the Site.

[5] The Developer owns the four parcels on Gower Point Road. The parcel on Winn Road is jointly owned by Klaus and Monika Fuerniss. The Developer seeks to redevelop the Site. Two Crown-owned foreshore lots have been contaminated by the migration of contaminants from the Site. The Developer hired Keystone Environmental Ltd. ("Keystone") to prepare a site profile, conduct site investigations, and prepare a remediation plan for the Site.

[6] In a letter dated December 14, 2016, the Director acknowledged receipt of a satisfactorily completed site profile pertaining to the Site, and advised that a detailed site investigation for the Site was required to be submitted within one year of the letter's date.

[7] On March 20, 2017, Keystone submitted a Site Risk Classification Report for the Site to the Ministry.

[8] In a letter dated June 15, 2017, the Director advised that, based on the Site Risk Classification Report, "high risk conditions" were present on a Crown-owned foreshore lot which was contaminated by migration of substances from the Site, and the Developer was required to send a "Notification of Likely or Actual Migration" to the affected property owner.

[9] The Director's June 15, 2017 letter also referred to the Ministry's Protocol 12, which specifies the conditions for classifying contaminated sites as "high risk", and the reporting and reclassification requirements for high risk sites. The letter stated that the Developer was required to submit, within 30 days, a summary of remedial methods and schedule for remediation of high risk conditions, and a summary of site conditions for all investigated media (soil, groundwater, etc.). The letter stated as follows regarding the reporting requirements in Protocol 12 for high risk sites:

In accordance with the reporting requirements in Table 2 of Protocol 12, the following documents are currently outstanding and are required for submission within 30 days of the date of this letter:

- Summary of remedial methods and schedule for remediation of high risk conditions; and
- Summary of Site Conditions (including current tables and figures representing current site conditions for all investigated media ...).

...

Please ensure that your response includes all parcels noted above.

Please be advised that should remediation not proceed in a manner and schedule satisfactory to the director, additional legal requirements may be imposed under the Act.

Persons undertaking site investigations and remediation at contaminated sites in British Columbia are required to do so in accordance with the requirements of the Act, including regulations ..., protocols and procedures. ...

[underlining added]

[10] On June 21, 2017, a "Notification of Likely or Actual Migration" was completed on behalf of the Developer. The Notification includes a list of 16 substances in sediment that have migrated, or likely have migrated, from 689 Winn Road to two Crown-owned foreshore lots. Those substances include: metals such as arsenic, copper, lead, mercury, and zinc; tributyltin; and various hydrocarbons. In the past, tributyltin was used in the paint applied to boat hulls to prevent the growth of marine organisms.

[11] On June 29, 2017, Keystone submitted a Detailed Site Investigation (dated October 2016), a Remedial Plan (dated June 29, 2017), and a Summary of Site Condition (dated June 29, 2017) to the Ministry on behalf of the Developer.

[12] According to the Detailed Site Investigation, preliminary site investigations were done in 2003 and 2004, and further soil and sediment sampling was conducted in 2012. A detailed site investigation was conducted from December 2015 through October 2016, focusing on three areas of concern: the former fuel storage area, the former marine repair shop, and an area near creosote-treated wharf pilings. Five areas of soil and sediment contamination were identified on the Site, with contamination extending into the Crown foreshore, where concentrations of contaminants exceed the residential land use standards for soil, and exceed the quality criteria for typical marine sediments (SedQC_{TS}), based on the *Contaminated Sites Regulation*. Specifically, metals were found in the soils and sediment in the area surrounding the former marine repair shop (Area A). Tributyltin was found in surficial sediment in the foreshore and intertidal area near the former marine repair shop (Area B). Hydrocarbons were found in the soil in the vicinity of the former fuel storage area (Area C) and the former marine repair shop (Area D). Polycyclic aromatic hydrocarbons were found in sediment beneath a wharf and walkway to marina floats (Area E).

[13] At page 7, the Detailed Site Investigation notes that an aquifer used for drinking water lies directly beneath the Site, and nine drinking water wells are located within 500 metres of the Site. At page 31, the Detailed Site Investigation states that samples from groundwater monitoring wells contained no exceedances of the groundwater standards in the *Contaminated Sites Regulation*. At page 33, it concludes that the soil and sediment contamination has not affected groundwater beneath the Site. At page 32, it recommends that the aquifer's confining layer should be protected from disturbance during remediation and construction activities.

[14] The Remedial Plan proposes an excavation and removal strategy to remediate the soils and sediments that exceed the applicable *Contaminated Sites Regulation* standards, as well as the high risk conditions in sediments. According to

the Remedial Plan, excavations are expected to be too shallow to impact the underlying aquifer. The Remedial Plan states at pages 5 and 6 that sediment remediation was planned to coincide with low tides in July and August 2017 "to the extent practical providing development permits are issued by the Town of Gibsons in time", and upland soil remediation was planned to be conducted as part of the geotechnical site preparation before constructing buildings on the Site.

[15] On July 12, 2017, the Director issued the July Letter, which was addressed to the Developer and to the attention of Mr. Fuerniss, with a copy sent to the Town of Gibsons. The July Letter states, in part, as follows:

After a review of the documents referenced above [the Detailed Site Investigation, Remedial Plan, and Summary of Site Condition], the ministry is supportive of the plan and schedule for the investigation and remediation of high risk conditions at the site and affected off-site parcels. The ministry understands that the remedial plan includes excavation and off-site disposal of contaminated soil and sediments.

Sites with high risk conditions require high standards of care and responsiveness in investigation and remediation and warrant involvement of the ministry to ensure that appropriate and timely action takes places. To that end, and pursuant to section 54(3)(d) of the *Environmental Management Act* (Act) you are hereby required to do the following:

1. Maintain up-to-date records of monitoring, inspections and maintenance of any works. The records shall be available for inspection by the director;
2. Submit a report signed by an Approved Professional to the director for review. The report shall include the following:
 - a. A summary of remedial activities undertaken during the reporting period;
 - b. Assessment of overall remediation progress, including evaluation in comparison to the proposed remediation schedule;
 - c. Evaluation of the performance of any risk management or treatment works; and
 - d. Supporting documentation (e.g. analytical reports, tables and figures, records of inspection, maintenance of treatment works, etc.)

Reports shall be submitted quarterly commencing on 29 September, 2017 until high risk conditions have been remediated.

The above requirements shall apply until such time as the director has determined that the site is no longer high risk ..., or other requirements are imposed by the director pursuant to section 48, section 53, section 54 or some other authority under the Act.

Application may be made for site risk reclassification at any time during the independent remediation process. ...

It will not be a requirement of the site owner to obtain a ministry legal instrument (i.e. Certificate of Compliance, Approval in Principle of a remediation plan, etc.) once remediation has been completed in accordance with the accepted remedial plan and schedule. The ministry will continue to oversee site investigation, remediation and monitoring as long as the site remains classified as a high risk or risk-managed high risk site.

...

Decisions of a director may be appealed under Part 8 of the Act.

This decision is based on the most recent information provided to the ministry regarding the above-referenced site. ...

[underlining added]

[16] On July 24, 2017, the Appellants filed their Notice of Appeal. They submitted that the underlined statements above constitute an appealable decision to approve an independent remediation plan and to release a "freeze" on municipal approvals regarding the contaminated site. The Appellants also submitted that the July Letter provides no reasons why the Director supported the Remedial Plan, is silent regarding the tributyltin in sediments, and contains no indication that the Director turned his mind to whether the Remedial Plan satisfactorily addresses the tributyltin contamination. The Appellants' Notice of Appeal lists five reasons for appeal:

1. The Decision fails to address adequately or at all the known presence of toxic tributyl-tin (TBT) in sediments and suspected presence of TBT in soil at the subject site and the evidence of off-site migration of metals contamination into sediments from boat hull cleaning and painting.
2. The Decision purports to approve a remediation plan that does not adequately protect the environment and public health, including the Gibsons Aquifer.
3. The Decision letter does not provide adequate reasons for the decision, including without limitation why the Director concluded that the remedial plan is supported by the Ministry, whether the Director addressed TBT in sediments or considered this to be outside of the contaminated sites regime, and whether and why the decision is intended to "release" the "freeze" on municipal approvals.
4. The Decision violates the principles of fairness because GABC [Gibsons Alliance of Business and Community Society] was denied an opportunity to provide informed input prior to decision-making despite the Director being aware that GABC had long asked for such an opportunity and not telling GABC that such an opportunity would not be provided.
5. Other reasons for the appeal may be identified when the Director provides relevant documents to the Appellants that have been requested but not yet provided.

[17] In their Notice of Appeal, the Appellants requested a number of remedies. Among other things, they requested a stay of "the Decision", an order reversing

“the Decision”, an order that the Developer provide public consultation under section 52 of the *Act*, and an order sending the matter back to the Director with certain directions.

[18] In a letter dated July 25, 2017, the Board acknowledged receipt of the Notice of Appeal, and requested that the Director and the Developer advise whether they would consent to a voluntary stay. The Board also provided a schedule for the parties to provide submissions on the stay application, in the event that the Director and the Developer did not consent to a voluntary stay.

[19] In a letter dated July 28, 2017, the Director advised that he did not consent to a voluntary stay. In addition, the Director raised a preliminary issue of jurisdiction, arguing that the appealed parts of the July Letter did not constitute an appealable “decision” as defined in section 99 of the *Act*.

[20] By a letter dated August 1, 2017, the Board suspended the schedule for submissions on the stay application, and requested that the parties provide submissions on the preliminary issue of jurisdiction.

[21] On October 24, 2017, the Board issued the Jurisdiction Decision, in which it concluded that the appealed parts of the July Letter constitute “exercising a power” within the meaning of section 99(c) of the *Act*. The Board found that the Developer had requested that the Director “review the remediation” pursuant to section 54(4) of the *Act* when the Developer requested a Ministry review of the Remedial Plan and schedule, the Summary of Site Conditions, and the Detailed Site Investigation. After reviewing those documents, the Director concluded that he was supportive of the Remedial Plan and schedule, and that the documents satisfied outstanding reporting requirements in Protocol 12, which he had previously asked the Developer to comply with. The Board noted that Protocol 12 establishes substantive and procedural requirements for classification and reporting with respect to high risk contaminated sites, and is enforceable by the Director pursuant to section 64 of the *Act*.

[22] On that same date, the Board set a revised schedule for the parties to provide submissions on the stay application.

[23] The Appellants submit that, if a stay is denied, there will be irreparable harm to human health and the environment, and their appeal may become moot, whereas granting a stay will protect the status quo pending the outcome of the appeal. In support of their submissions, the Appellants provided a letter report dated November 3, 2017, from Dr. Andre Sobolewski, an environmental consultant. His evidence is discussed below.

[24] The Director takes no position on the stay application. The Director submits that the Appellants incorrectly assume that a stay would halt remediation at the Site. The Director maintains that the appealed decision does not allow independent remediation of the Site; rather, it is a decision that the Remedial Plan and schedule are satisfactory, and the documents met the outstanding reporting requirements of Protocol 12. Furthermore, a stay would not affect the record-keeping and reporting requirements imposed in the July Letter, or the Director’s regulatory oversight of any independent remediation at the Site.

[25] The Developer submits that the Appellants have failed to establish that the appeal raises a serious issue, and failed to provide credible evidence of irreparable harm as it relates to the Remedial Plan. The Developer submits that the balance of convenience favours denying a stay. In support of its submissions, the Developer provided an affidavit sworn by Michael Geraghty, a Professional Geoscientist and Senior Technical Manager with Keystone. Mr. Geraghty signed, and attached his professional seal to, the Remedial Plan. His evidence is discussed below.

ISSUE

[26] The sole issue to be decided is whether the Panel should grant a stay of the appealed decision, pending the Board's final decision on the merits of the appeal.

RELEVANT LEGISLATION AND CASE LAW

[27] 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.

[28] When considering an application for a stay, the Board applies the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.); 1 S.C.R. 311 [*RJR-MacDonald*]. 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.

[29] The onus is on the Appellants, as the applicants 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 appealed decision, pending the Board's final decision on the merits of the appeal.

Serious Issue

[30] 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.

[31] 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 Appellants' submissions

[32] The Appellants submit that the appealed decision is the Director's response, in the July Letter, that the Remedial Plan and schedule are satisfactory. The Appellants submit that, according to the Jurisdiction Decision, the appealed decision was made pursuant to the Director's statutory powers under both section 54(4) of the *Act* to conduct a "review of the remediation" in response to the Developer's application for a Ministry review of the Remedial Plan and schedule, as well as other documents, and section 64(4) of the *Act* to enforce the substantive requirements in Protocol 12.

[33] The Appellants submit that the appeal raises serious issues. Specifically, the appealed decision contains no reason(s) why the Director supports the Remedial Plan, and no indication that the Director turned his mind to whether the Remedial Plan satisfactorily addresses the tributyltin contamination or adequately protects the aquifer below the Site.

The Director's submissions

[34] The Director did not directly address whether the appeal raises a serious issue. However, the Director provided submissions on the nature of the decision under appeal, and the effects of stay, if granted.

[35] The Director submits that the appealed decision, as found in the Jurisdiction Decision, was a decision to review certain documents to determine whether they met the outstanding reporting requirements of Protocol 12, and whether the proposed Remedial Plan and schedule were satisfactory. The appealed decision did not allow independent remediation at the Site. In fact, section 54(1) of the *Act* provides that a responsible person may carry out independent remediation in accordance with the regulations; no decision of a director is required as a prerequisite to independent remediation. The Director submits, therefore, that a stay of the appealed decision, if granted, would not prevent the Developer from carrying out independent remediation of the Site.

[36] In addition, the Director submits that the July Letter imposed certain requirements on the Developer pursuant to section 54(4)(d) of the *Act* in relation to maintaining records and submitting quarterly reports until the high risk conditions at the Site have been remediated. However, those requirements were not appealed by the Appellants. The Director submits, therefore, that a stay of the appealed decision would not affect the Developer's obligation to comply with those requirements. Furthermore, the Director submits that a stay of the appealed decision would not interfere with the Director's regulatory oversight of any independent remediation that may occur at the Site, or the Director's ability to impose future requirements under the *Act* if warranted.

[37] The Director submits that, properly construed, a stay of the appealed decision would have the effect of suspending the Director's review and determination that the Developer's documents met the outstanding reporting requirements of Protocol 12, and that the Remedial Plan and schedule are satisfactory. A stay would not affect the Developer's ability to carry out independent remediation at the Site, or the Director's ability to regulate any such remediation.

The Developer's submissions

[38] The Developer submits that the appeal does not raise a serious issue. The Developer submits that the appealed decision has no legal impact, and there is nothing to stay. Specifically, the Developer submits that it has not sought an approval in principle nor has it given notice of independent remediation. The Developer maintains that it was not seeking an approval or any other outcome by submitting the Remedial Plan to the Director. Moreover, the Director has no statutory authority to allow independent remediation to be carried out; rather, a person may simply undertake independent remediation by notifying the Director in accordance with the *Act*. The Developer argues, therefore, that the Director's statement in the July Letter that he supports the Remedial Plan, and any reasons he had for that statement, are irrelevant.

[39] In response to the Appellants' argument that the appealed decision contains no indication that the Director turned his mind to whether the Remedial Plan satisfactorily addresses the tributyltin contamination or adequately protects the aquifer, the Developer submits that Mr. Geraghty's evidence establishes that these are not serious issues. The Developer maintains that his evidence confirms that any issues relating to tributyltin contamination must be resolved before a certificate of compliance is issued, all remedial work will be monitored by qualified geotechnical engineers using well-established excavation methods, and the Town of Gibsons approved a development permit after reviewing the Detailed Site Investigation.

The Appellants' reply submissions

[40] In reply, the Appellants submit that a stay would suspend the Director's support for the Remedial Plan and schedule, and as a result the Developer could only implement the Remedial Plan without assurance that the Ministry considers the Plan appropriate and that a certificate of compliance would be issued upon completion of the remediation.

[41] The Appellants reiterate that the absence of any reasons in the July Letter for the Director's statement supporting the Remedial Plan and schedule, or any indication that the Director turned his mind to whether the Remedial Plan adequately addresses the tributyltin contamination or adequately protects the aquifer, are serious issues to be decided. The issue in the appeal is whether the Director turned his mind to those things before making the appealed decision, and not what Mr. Geraghty's evidence may, or may not, say after the Director made the appealed decision.

The Panel's findings

[42] The Panel notes that according to *RJR-MacDonald*, the threshold to satisfy the first stage of the test is a low one. Unless the appeal is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed to the next stage.

[43] When considering the question of whether the appeal raises a serious issue, it is important to understand the nature of the decision under appeal. According to the Board's Jurisdiction Decision, the appealed decision was made pursuant to the Director's powers under section 54(4) of the *Act* to conduct a "review of the remediation" with regard to certain documents including the Remedial Plan and schedule, and under section 64(4) of the *Act* to enforce the substantive requirements in Protocol 12 with respect to high risk sites. It is clear that the appealed decision did not authorize independent remediation at the Site, and indeed, section 54 of the *Act* does not require a responsible person to obtain a director's approval before carrying out independent remediation. The Appellants concede that independent remediation does not require advance approval from a director, and a stay in this case would not stop the Developer from carrying out independent remediation at the Site, although the Appellants argue that a stay would affect the likelihood that independent remediation will proceed before the appeal is decided.

[44] Thus, the Panel finds that a stay, if granted, would suspend the Director's decision supporting the proposed Remedial Plan and schedule, and his conclusion that the Remedial Plan and schedule along with the Summary of Site Conditions met the outstanding requirements of Protocol 12, pending the Board's final decision on the merits of the appeal. A stay would not interfere with the Developer's ability to carry out, or the Director's oversight of, independent remediation at the Site. In addition, a stay would not apply to the record-keeping and reporting requirements imposed in the July Letter pursuant to section 54(4)(d) of the *Act*, as those requirements were not appealed by the Appellants.

[45] Nevertheless, the Panel finds that the appeal raises serious issues for the Board to decide. The Panel has reviewed the Appellants' grounds for appeal and submissions on the stay application. The Appellants are particularly concerned with the risks to the aquifer and the environment arising from the remediation proposed in the Remedial Plan. They allege that the July Letter contains no reasons for the Director's statement that the Remedial Plan and schedule are satisfactory, and no indication that the Director turned his mind to whether the Remedial Plan satisfactorily addresses the tributyltin contamination or adequately protects the aquifer. The questions of whether and, if so, to what extent, the Director had a duty to provide reasons for his decision and to show that he considered those matters raises issues of law and fact, and engage the principles of procedural fairness. On its face, the fact that the Developer relies on technical evidence from Mr. Geraghty to dispute the seriousness of the issues raised by the Appellants shows that the appeal raises questions of fact that may require the Board to assess conflicting technical evidence. Such issues are neither frivolous nor vexatious, and are not pure questions of law. Consequently, the Panel will proceed to consider the next stage of the *RJR-MacDonald* test.

Irreparable Harm

[46] At this stage of the *RJR MacDonald* test, the Appellants must demonstrate that their interests will likely 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 Appellants' submissions

[47] The Appellants submit that, if a stay is denied and the Remedial Plan is implemented, there will be a risk of irreparable harm to the environment and human health because: (1) the Remedial Plan does not adequately address the tributyltin contamination due to the lack of standards in the *Contaminated Sites Regulation* for tributyltin contamination in sediment (as opposed to soil), yet the Developer intends to apply for a certificate of compliance after remediating to numerical standards; and (2) the depth of excavation necessary to remove the contaminated soil and sediment, as proposed in the Remedial Plan, may cut into the confining layer protecting the aquifer under the Site.

[48] The Appellants submit that implementing the Remedial Plan poses a significant risk of puncturing and permanently damaging the aquifer, and a risk that tributyltin may be inadequately remediated and dispersed. The Appellants submit that a permanent loss of natural resources constitutes irreparable harm according to the *RJR-MacDonald* test.

[49] In support of those submissions, the Appellants refer to the evidence of Dr. Sobolewski, who has a PhD in biology and 28 years of experience as an environmental consultant, with expertise in assessing the impacts of industrial developments and the cleanup of pollutants.

The Director's submissions

[50] The Director did not directly address this stage of the test. However, as discussed above, the Director submits that a stay would not stop the Developer

from conducting independent remediation of the Site, and would not prevent the Director from exercising regulatory oversight over such remediation.

The Developer's submissions

[51] The Developer submits that the Appellants have failed to establish that they will suffer irreparable harm if a stay is denied. The Developer submits that numerical standards for tributyltin in soil came into effect with recent amendments to the *Contaminated Sites Regulation*, and a standard already existed for tributyltin in water. Although there are no standards for tributyltin in sediment, the common industry standard (i.e., the "Puget Sound Dredged Disposal Analysis" standard) will be used in this case. The Developer maintains that tributyltin contamination in sediment will be remediated against the common industry standard, and any issues with tributyltin in soil, sediment, or water will be addressed before applying for a certificate of compliance.

[52] In addition, the Developer challenges the Appellants' claim that the Remedial Plan poses a significant risk of puncturing and permanently damaging the aquifer. The Developer argues that the excavation of the contaminated soils and sediments will be too shallow to impact the aquifer. The Developer also submits that the excavation will be conducted in accordance with engineering principles under the direction of a qualified geotechnical engineer and hydrologist.

[53] In support of those submissions, the Developer relies on Mr. Geraghty's evidence. The Developer also challenges the relevance of Dr. Sobolewski's expertise in the present case.

The Appellants' reply submissions

[54] In reply, the Appellants argue that a stay would suspend the Director's support for the Remedial Plan, which would reduce the likelihood of it being implemented and the likelihood of remediation causing irreparable harm pending the outcome of the appeal. The Appellants also submits that a stay would protect the status quo as it was prior to the appealed decision. The situation would revert to that expressed in the Director's June 15, 2017 letter, which stated that the high risk site "warrant[s] involvement of the ministry to ensure that appropriate and timely action takes place" and that "should remediation not proceed in a manner and schedule satisfactory to the director, additional legal requirements may be imposed under the Act."

[55] Conversely, the Appellants maintain that denying a stay, and allowing the Director's support for the Remedial Plan to remain in effect, would motivate the Developer to complete the remediation before the appeal is concluded. The Appellant maintains that this may render the appeal moot, and any resulting dispersion of tributyltin in sediment or harm to the aquifer would not be remediable by financial damages. The Appellants further submit that it is neither possible nor necessary for them to prove that implementing the Remedial Plan would cause environmental harm, as the issue concerns risk and risk management.

The Panel's findings

[56] At this stage of the *RJR MacDonald* test, the question is whether the Appellants have demonstrated that their interests will likely suffer irreparable harm if a stay is denied and the appealed decision remains in force pending the Board's final decision on the merits of the appeal. 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.

[57] Although an applicant need not conclusively prove that their interests will suffer irreparable harm if a stay is denied, a stay is an extraordinary remedy and the applicant must provide sufficient evidence to establish that its 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.

[58] The Panel finds that if a stay is granted, it would suspend, pending the outcome of the appeal, the Director's statement of support for the Remedial Plan and schedule, and his conclusion that the documents submitted to the Ministry met the outstanding requirements of Protocol 12. A stay would not stop the Developer from carrying out independent remediation of the Site, which does not require prior approval from a director. Although the Developer has not indicated exactly when it intends to proceed with the proposed Remedial Plan and, it has the option of doing so regardless of whether a stay is in place. In this sense, a stay would not suspend the risk of irreparable harm alleged by the Appellants; namely, the risk that the aquifer may be harmed during excavation of contaminated soil and sediment, and the risk that tributyltin contamination is inadequately remediated and becomes dispersed.

[59] Furthermore, the Panel finds that there is insufficient evidence to conclude that there is a likelihood of irreparable harm to human health and the environment unless a stay is granted. There is already conflicting technical evidence from the Appellants and the Developer regarding whether carrying out remediation as proposed in the Remedial Plan poses a risk of damaging the aquifer or causing tributyltin to be dispersed or inadequately remediated, such that there would be permanent harm to the aquifer or the environment. The Panel finds that this conflicting technical evidence, if it is relevant to the appeal, would be more appropriately considered in the context of a full hearing of the merits of the appeal, rather than in the context of a preliminary stay application.

[60] Although the Appellants assert that a stay would reduce the risk of irreparable harm by discouraging the Developer from proceeding with the Remedial Plan pending the outcome of the appeal, the Panel finds that this assertion is speculative. First, this assertion assumes that irreparable harm is likely to arise from carrying out the Remedial Plan, but the Panel has already found that there is conflicting technical evidence on that point. Second, it also assumes that a stay would deter the Developer from proceeding with the Remedial Plan before the appeal is concluded, as it may reduce the likelihood of the Developer receiving a certificate of compliance once remediation is completed. However, the Panel finds that there is no evidence or information to support such an assumption. A director's

approval is not a prerequisite for carrying out independent remediation, nor is it a prerequisite for the issuance of a certificate of compliance upon completion of independent remediation. For these reasons, the Panel concludes that it is unlikely that a stay would act as a disincentive to the Developer with regard to proceeding with the Remedial Plan.

[61] In addition, the Panel finds that neither denying nor granting a stay will, in itself, determine whether the appeal becomes moot before being decided by the Board. As stated above, the presence or absence of a stay is not determinative of whether the Developer carries out the Remedial Plan. Moreover, even if the Remedial Plan is carried out before the appeal concludes, the issues raised by the Appellants regarding procedural fairness and a lack of reasons for the appealed decision would not necessarily be moot.

[62] For all of the reasons provided above, the Panel finds that the Appellants have failed to establish that their interests are likely to suffer irreparable harm unless a stay is granted. However, the Panel cautions that these findings are only made for the limited purpose of deciding the preliminary stay application. These findings have no bearing on the merits of the appeal, which will be decided after a full hearing of the parties' evidence and submissions.

Balance of Convenience

[63] 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 application.

The Appellants' submissions

[64] The Appellants submit that the balance of convenience favours granting a stay, as it would protect the status quo pending the outcome of the appeal.

The Director's submissions

[65] The Director did not address this stage of the test.

The Developer's submissions

[66] The Developer submits that the balance of convenience favours denying a stay, as the Appellants have provided no compelling evidence that denying a stay will result in harm to the Appellants or the environment.

The Appellants' reply submissions

[67] In reply, the Appellants submit that the Developer has not argued or provided evidence that granting a stay would harm the Developer's interests.

The Panel's findings

[68] There is also no evidence that granting a stay would adversely affect the Developer's interests.

[69] However, there is also insufficient evidence to conclude that denying a stay would have any significant adverse effect on the Appellants' interests. The Panel has already found that the Appellants failed to establish that their interests are likely to suffer irreparable harm if a stay is denied. The Panel has found that even if a stay is granted, it would not stop the Developer from carrying out the Remedial Plan before the appeal concludes, and it would not prevent the risk of irreparable harm alleged by the Appellants. In addition, the Panel has found that it is speculative to assert that a stay would reduce the likelihood of the Developer proceeding with remediation as proposed in the Remedial Plan and schedule, or reduce any associated risk of harm to the aquifer or the environment.

[70] As stated above, a stay is an extraordinary remedy, and the Appellants, as the applicants for a stay, have the burden of establishing why a stay should be granted. The Panel finds that the Appellants have not met this burden.

[71] In these circumstances, the Panel finds that the balance of convenience weighs in favour of denying a stay, pending the outcome of the appeal.

DECISION

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

[73] For the reasons provided above, the application for a stay is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

December 5, 2017