



Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

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

APPEAL NO. 2003-WAS-021(a)

In the matter of appeals under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c. 482.

BETWEEN:	Myrus James on behalf of the Penelakut First Nations Elders	APPLICANT
AND:	Regional Waste Manager	RESPONDENT
AND:	Sablefin Hatcheries Ltd. Donna Martin on behalf of Salt Spring Island Residents for Responsible Land Use Eric Wickham	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on January 19, 2004	
APPEARING:	For the Applicant: Renee Racette, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Party: Wm. Rory Lambert, Counsel	

STAY DECISION

APPLICATION

Myrus James (on behalf of the Penelakut First Nation Elders), Donna Martin (on behalf of the Salt Spring Island Residents for Responsible Land Use), and Eric Wickham filed separate appeals against the September 15, 2003 decision of R. Alexander, the Regional Waste Manager (the "Regional Manager") to issue approval AE-17356 (the "Approval") to Sablefin Hatcheries Ltd. ("Sablefin"). The Approval authorizes Sablefin to discharge effluent to the land from a land-based marine fish hatchery located on Salt Spring Island, British Columbia, during the period from September 15, 2003 to December 15, 2004.

On December 1, 2003, Mr. James requested a stay of the Approval pending a decision on the merits of the appeal.

The stay application was conducted by way of written submissions.

BACKGROUND

Walker Hook is a tombolo spit located on the northeastern side of Saltspring Island, adjacent to Trincomali Channel. A tombolo is a strip of land joining a small offshore island to the shore of a larger land mass, in this case Saltspring Island. To the north of Walker Hook are eelgrass beds, mud flats, and a salt marsh.

Sablefin is in the process of establishing a commercial hatchery for sablefish, also known as black cod, in the area of Walker Hook. Sablefin intends to produce juvenile sablefish or "fingerlings" for sale to fish farms. The hatchery is located entirely on land, which Sablefin has leased from a private landowner. Salt water for the hatchery is to be supplied by a production well located on Walker Hook. Water flows into the production well from an aquifer that is recharged by marine water. Waste water from the hatchery is to be pumped through a filter before being discharged into two injection wells located on Walker Hook.

Walker Hook contains a large shell midden, and there is evidence that the area was traditionally used by aboriginal people. Walker Hook is called Syuhe'mun in the Hul'qumi'num language, which is the traditional language of the Penelakut First Nation Elders.

In early 2003, Sablefin hired Lowen Hydrogeology Consulting to conduct a hydrogeological assessment of the proposed system for pumping sea water from, and injecting effluent into, wells to be drilled in Walker Hook. A report dated July 2003 and titled, "Hydrogeologic Assessment of Pumping and Injection Well System at Walker Hook" was prepared for Sablefin by Dennis Lowen (the "Lowen Report").

On March 12, 2003, Sablefin applied for the Approval, for the purpose of discharging waste water from the hatchery into the injection wells on Walker Hook. In its application for the Approval, Sablefin states that the characteristics of the effluent shall be equivalent to, or better than: 20 milligrams per litre ("mg/L") of total suspended solids ("TSS"), temperature of 8 to 12 degrees Celsius ("°C"), pH of 7.5 to 7.9, and a fecal coliform content of zero. The application also indicates that the effluent is to be treated with a filter, and solids will be directed into settling tanks for subsequent removal to a certified waste discharge site.

Between April and June 2003, Sablefin hired Drillwell Enterprises Ltd. to construct a production well, injection wells, and test wells on Walker Hook. Before construction of the wells began, Sablefin obtained a Site Alteration Permit under the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187. During the course of construction, human remains were discovered in the midden. Consequently, Sablefin obtained an amended permit to address the handling and management of First Nations remains and artifacts.

In July 2003, the production well and one injection well were pump tested by Wellmaster Pumps and Water systems Ltd., to determine the water supply capacity of the production well and the capacity of the injection wells for effluent intake.

On September 15, 2003, the Regional Manager issued the Approval pursuant to section 11 of the *Waste Management Act* (the "*Act*"). Section 11(1) of the *Act* provides that a "manager may approve the introduction of waste into the environment... for a period of up to 15 months without issuing a permit." The Approval allows Sablefin to discharge effluent from the fish hatchery into the two injection wells located on Walker Hook, for a 15-month period commencing on September 15, 2003.

The Approval contains a number of conditions. For example, the Approval states that the maximum authorized rate of effluent discharge is 619 cubic metres per day (" m^3/d "), and the TSS content in the discharge shall not exceed 10mg/L above the TSS content in the source water supply. The Approval also states that the authorized works are an effluent collection system, a 37 micron drum filter, an energy dissipation system, a production well, two injection wells, two ground water observation wells, and related appurtenances. Additionally, the Approval sets out requirements for monitoring, recording and reporting effluent discharge.

On October 14, 2003, Mr. James filed an appeal of the Approval on behalf of the Penelakut First Nation Elders.

On the same day, Ms. Martin filed an appeal of the Approval on behalf of the Salt Spring Island Residents for Responsible Land Use, and Mr. Wickham filed a separate appeal on his own behalf. In a letter dated October 24, 2003, Mr. Wickham advised the Board that he is a commercial sablefish fisherman, and is executive director of the Canadian Sablefish Association.

By a letter dated November 26, 2003, the Board advised the parties that the appeals were scheduled to be heard during the week of February 9 to 13, 2004.

On December 1, 2003, Mr. James applied for a stay of the Approval, pending the Board's decision on merits of the appeals.

In a letter dated December 12, 2003, counsel for the Regional Manager advised the Board that the Regional Manager takes no position on the stay application.

The Appellant, Ms. Martin made no submissions regarding the stay application. The Appellant, Mr. Wickham filed an affidavit in support of the stay application.

Sablefin requests that the Board deny the application for a stay.

ISSUE

The sole issue arising from this application is whether the Panel should grant a stay of the Approval, pending a decision on the merits of the appeals.

The authority of the Board to grant a stay in a *Waste Management Act* appeal is found in section 48 of that *Act*, which provides:

An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour 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.) applies to applications for stays before the Board. That test requires an applicant 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 favours granting the stay.

The onus is on Mr. James, as the Applicant, to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Serious Issue

In *RJR MacDonald*, the Court 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 Applicant submits that there are serious issues to be tried in this case. Specifically, the Applicant submits that Syuhe'mun (Walker Hook) is within the traditional territory of the Coast Salish people, including the Penelakut First Nation. The Applicant maintains that Syuhe'mun is a sacred burial ground for the Coast Salish peoples' ancestors, and while some human remains were removed when Sablefin was constructing the waste system that is authorized by the Approval, there may be more human remains on Syuhe'mun. The Applicant submits that the Approval allows Sablefin to discharge effluent into ancestral gravesites, which desecrates Syuhe'mun as a spiritual place and an ancestral burial ground, and causes emotional turmoil for the Penelakut First Nation Elders. The Applicant submits that once the site is contaminated, First Nations will no longer be able to use the site to practice their aboriginal rights. The Applicant further submits that the Penelakut First Nation was not properly consulted with regard to the Approval, and neither Sablefin nor the Ministry of Water, Land and Air Protection adequately inquired into or addressed the concerns of the Penelakut First Nation Elders.

The Applicant also maintains that the effluent discharge will adversely affect the health and economic sustainability of the Penelakut First Nation because they harvest shellfish near the discharge area, and those shellfish may become contaminated.

Finally, the Applicant maintains that the discharge of effluent as authorized under the Approval will have adverse effects on the environment, such as erosion of the tombolo.

Sablefin submits that there is no serious issue to be tried. Sablefin maintains that Walker Hook is not a burial ground, and the Penelakut First Nation had representatives at Walker Hook when it was surveyed by an archaeologist in 2003 and the wells and associated trenches were constructed. Sablefin submits that any withdrawal or discharge of water in the wells is below any area of cultural significance.

In addition, Sablefin submits that all questions raised by the Applicant in its stay application have been addressed through extensive consultation with First Nations representatives throughout the development process, and by compliance with the stringent requirements of various development, site alteration, and waste management authorizations that Sablefin has obtained. Sablefin also maintains that there will be no further disturbances at this site.

The Panel notes that the Applicant raises issues concerning whether the discharge of effluent in accordance with the Approval will infringe aboriginal rights that are claimed by the Applicant, and will have adverse effects on the environment and human health. In addition, the Applicant claims that there was inadequate consultation with aboriginal people, namely Penelakut First Nation Elders, before the Approval was issued.

The Panel finds that the Applicant has raised serious issues to be tried, which are neither frivolous, vexatious, nor pure questions of law.

Irreparable Harm

At this stage of the *RJR MacDonald* test, the Applicant must demonstrate that he and/or the Penelakut First Nations Elders will suffer irreparable harm if a stay is not granted. 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 applicant'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.

The Applicant submits that the discharge of effluent under the Approval will permanently destroy the historic, aesthetic, and spiritual qualities of Syuhe'mun, and will prevent First Nations people from using the site for spiritual practices, thereby depriving them of their aboriginal rights. The Applicant argues that the discharge of effluent, which contains dissolved nutrients and other substances, to a sacred site such as this is an affront to First Nations culture and history, and there is no way to clean the effluent from the gravesites and restore the spiritual sacredness of the site once it has been desecrated.

Additionally, the Applicant submits that the injection and removal of water from the wells may erode Syuhe'mun, which is made of sand, and may cause human remains to be unearthed. The Applicant submits that the rate of erosion caused by the pumping is unknown due to the lack of an environmental impact assessment.

Furthermore, the Applicant argues that the effluent discharge will adversely affect the health and economic sustainability of members of the Penekalut First Nation, because the effluent may pollute shellfish that are harvested and consumed by them.

In support of his submissions, the Applicant provided two affidavits by August Sylvester, a Penelakut First Nation Elder, dated November 27, 2003 and January 19, 2004. Mr. Sylvester discusses the connection that the Coast Salish people have with Syuhe'mun, and explains the importance of maintaining the integrity of Syuhe'mun as a burial site. The Applicant also provided excerpts from a publication containing general information about Coast Salish burial practices.

In his affidavit dated November 27, 2003, Mr. Sylvester states that a Coast Salish village was once located at Syuhe'mun, and he recalls that, as a boy, his family would stop at Syuhe'mun to camp or trade goods during fishing expeditions. Mr. Sylvester states that Syuhe'mun hosts a graveyard in which many of his ancestors are buried. Mr. Sylvester states that using an ancestral burial ground as a waste treatment site is disrespectful and is contrary to his peoples' beliefs. In particular, Mr. Sylvester attests:

16. ... the use of the ancestral burial ground as a sewage treatment site is very hurtful to our people. It is counter to all our beliefs. There are rules to follow at gravesites. For example, you are not allowed to even spit on that ground. On that ground you do not drag your feet or kick rocks. If you had to dig in that ground you have to first put on a handkerchief, red ochre and pray. This is pursuant to our laws on how to treat all graveyards...
17. ... I believe the Hatchery ought to have known that this site was a First Nations burial ground because of the large amount of clam midden present. I am outraged that the digging did not stop once human remains were unearthed.

In his affidavit dated January 19, 2004, Mr. Sylvester further states:

19. It does not matter how deep the well is. Sablefin has desecrated a gravesite, a large gravesite. They are pumping waste into the ground where the ones of our ancestors lie. How can they measure the distance between their sewage and the way our culture honours our ancestors in metres?
20. We are also deeply concerned about the damage that may result to *Syuhe'mun* by the water eroding the earth below the site.

The Applicant also referred to an affidavit dated January 16, 2004, by the Appellant Mr. Wickham. Mr. Wickham attests that the eelgrass beds at Walker Hook are a vital and delicate resource, which is used for spawning by herring and other fish. He states that an environmental impact assessment would have demonstrated the sensitivity of the eelgrass beds as evidence of potential harm that could be caused by Sablefin's operations. He also states that the Lowen Report cannot be relied upon to assess potential environmental damage to the area, because that Report was prepared to discern whether there is sufficient water at the site and whether it can be pumped out.

Sablefin submits that the site is not a burial ground, and was designated as a shell midden based on an archaeological survey conducted in 1974. However, Sablefin acknowledges that some human remains were exhumed from the midden at Walker Hook, in the presence of First Nations representatives and in accordance with a Site Alteration Permit, when the wells and associated trenches were constructed. Sablefin maintains that the development work ceased when human remains were found, and commenced only after careful removal and reburial of the remains in the presence of First Nations representatives.

Sablefin submits that the facilities for withdrawal of sea water and injection of effluent have already been constructed at Walker Hook, and there is no future risk of damage to First Nations interests as a result of the hatchery operations. Specifically, Sablefin submits that the midden has a depth of four feet from the ground surface, while the injection wells range in depth from 35 to 40 feet below the ground surface and the depth to water in the wells ranges from 8.8 feet to 10.7 feet. Sablefin maintains that no antibiotics and minimal chemicals are used in the hatchery, and the effluent percolates through the sand and is washed away by the daily movement of tidal water. Sablefin submits, therefore, that there is no possibility of the effluent affecting the midden.

Additionally, Sablefin submits that the Lowen Report indicates that the hatchery operations should have no negative impacts on water quality. All contaminants will be at safe levels when they enter the receiving environment, and water table mounding below the wells will be at acceptable levels with no impact on erosion.

In support of its submissions, Sablefin provided a copy of the Lowen Report, a report dated January 9, 2004 by Ian R. Wilson, Chief Archaeologist with I.R. Wilson Consultants Ltd., and an affidavit dated December 11, 2003 by Dr. Gidon Minkoff, who is a Director of Sablefin.

In *RJR-MacDonald*, the Court stated:

'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... a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

The Panel notes that the affidavit of Mr. Sylvester indicates that the construction of the wells and associated works may have offended the Applicant's spiritual and cultural values, and may have caused irreparable harm to the gravesites that were disturbed. However, the Panel notes that granting a stay would not remedy or repair any irreparable harm that may have already occurred as a result of disturbing the midden and human remains during construction. A stay would only prevent the operation of the works that are in place, namely, the discharge of effluent as authorized under the Approval, until the Board decides the merits of the appeals.

With regard to the issue of whether a stay should be granted to stop the effluent discharge until the appeals are decided, the Panel finds that the Applicant has not established that the discharge will cause irreparable harm to human health or the environment if a stay is denied. The Panel finds that the Applicant has provided insufficient evidence to counter the conclusions at page 13 of the Lowen Report that "All potential contaminants will be at safe levels upon entering the receiving environment", "The discharge water quality will be acceptable for any marine life and discharge will not occur within the local clam beds but in deeper ocean water", and "Water table mounding will be at acceptable levels with no impact on soil stability or erosion." While Mr. Wickham expresses concern about the lack of an environmental impact assessment and the inadequacy of the Lowen Report, the Applicant offers no evidence to show that the above conclusions in the Lowen Report are wrong, or that there will be irreparable harm to human health or the environment if a stay is denied.

In addition, the Panel finds that the Applicant has not adduced sufficient evidence to establish that the discharge of effluent in accordance with the Approval will cause irreparable harm to cultural deposits at the site if a stay is denied. At page 3 of Mr. Wilson's report, he states that "Given that human remains have already been recovered from the site, it is very likely that more human remains are present." However, Mr. Wilson states at page 1 that "the cultural deposits at the *Syuhe'mun* (Walker Hook) site are... not considered deep as deposits were found to a depth of only 80 cm [approximately 2 feet and 8 inches] below surface in archaeological excavation near wellhead 2, which is near the center of the site." While Mr. Wilson's evidence indicates that more human remains are likely to be present at the site, the Lowen Report indicates that the water levels in the injection wells will remain below the depth at which cultural deposits were found.

In any event, the onus is on the Applicant to establish that the discharge of effluent for the duration of the stay will result in irreparable harm to his interests. The Panel finds that the Applicant's evidence does not establish that the effluent will contact cultural deposits at the site, or that the effluent discharge will have any adverse physical effects on cultural deposits.

Furthermore, Mr. Sylvester's affidavits indicate that the effluent discharge offends the cultural and spiritual beliefs of the Penelakut First Nation Elders. The Panel finds that this is a question that should properly be resolved at the hearing on the merits of the appeal, where further evidence may clarify the extent of the sacred

land and the nature of the Penelakut First Nation Elders' concerns. This is a question that cannot be decided during this preliminary application process.

For these reasons, the Panel concludes that the Applicant has not established that he or the Penelakut First Nation Elders will suffer irreparable harm if a stay is denied.

Balance of Convenience

This branch of the test requires the Panel to determine whether greater harm will result from the granting of, or refusal to grant the stay applications.

Sablefin submits that it will suffer irreparable harm if a stay is granted. In a submission dated December 12, 2003, Sablefin advises that it has 100 brood stock in water at the hatchery, which were conditioned at the Pacific Biological Station in Nanaimo, B.C., for two years in order to prepare the fish for life in captivity, before being brought to the hatchery. Sablefin maintains that this conditioning process cost \$370,000, and the fish have been studied extensively by a team of scientific experts. Sablefin submits that a stay would result in the death of the fish, loss of the \$370,000 invested in studying the fish, and the loss of all scientific data gathered to date. Sablefin submits that a further 100 brood stock worth \$12,000 were to be delivered to the hatchery on December 12, 2003, and those fish would also die if a stay is granted. Sablefin maintains that it would then have to begin the 2-year conditioning process again.

Sablefin also submits that the brood stock will begin spawning in January and the fingerlings have an anticipated market value of \$400,000, which would be lost if a stay is granted. Furthermore, Sablefin submits that it has hired and trained local residents to operate the hatchery, and those people will lose their jobs if a stay is granted.

Sablefin submits that its business is not one that can be readily halted and re-convened at a later date, and a stay would effectively terminate the business.

With regard to the Applicant's interests, Sablefin submits that there is no risk of future damage to First Nations interests as a result of the hatchery's operations. In this regard, it reiterates its submissions on the issue of irreparable harm to the Applicant's interests.

In summary, Sablefin submits that it will suffer harm in the form of financial losses, lost scientific data, and potential termination of the business if a stay is granted, while the Applicant will suffer no harm if a stay is denied.

In support of those submissions, Sablefin referred to the Lowen Report and the affidavit of Dr. Minkoff. In particular, Dr. Minkoff states as follows at page 2 of his affidavit:

5. ... the fish cannot be returned to the biological station, as they are dismantling their marine fish aquaculture program and there is no other facility available that can house these fish.
8. The hatchery is now in the process of commissioning its mechanical systems, cultivating zooplankton and training its work force. All this in anticipation of initiating production in January 2004. Should the hatchery be required to close down, it will not produce fish in January 2004. As a result the work force will be laid off...
9. Furthermore, if the hatchery closes then it would take another full year before production could be initiated. The company would have no cash flow and would not be able to resume operations.

The Applicant submits that the balance of convenience favours granting a stay. The Applicant acknowledges that a stay may cause Sablefin's operations to be delayed or cause Sablefin to have to find an alternative filtration system. However, the Applicant submits that Sablefin provides little evidentiary support for its assertion that a stay would destroy its operations and its brood stock could not be relocated.

With regard to its own interests, the Applicant submits that the effluent discharge will degrade a sacred site, destroy a Coast Salish burial ground and village site, and cause the Penelakut First Nation Elders to lose an important part of their lifestyle. The Applicant also maintains that the injection of waste into Syuhe'mun will prevent the Coast Salish people from practicing their aboriginal rights, such as harvesting food and supplies in the area.

In support of those submissions, the Applicant referred to the affidavits of Mr. Sylvester and Mr. Wickham. In particular, Mr. Wickham attests that a stay would not result in the death of Sablefin's brood stock, the loss of the \$370,000 invested to study those fish, or the loss of any scientific data. Rather, a stay would require Sablefin to relocate their brood stock to one of several possible alternative facilities. Mr. Wickham states that the fish could be returned to the Pacific Biological Station, which has not dismantled its marine fish aquaculture program, or to facilities in Cedar and West Vancouver, B.C. He also suggests that the fish could be accommodated in numerous ocean locations, including approximately 40 fish farms that have permits for sablefish.

In addition, Mr. Wickham attests that the \$370,000 that Sablefin claims it would lose was primarily provided by the government for a 2-year research project at the Pacific Biological Station. He also states that sablefish do not spawn on their own in captivity, as the spawn must be milked from the fish or surgically removed. Therefore, this process could be done at alternative facilities.

In balancing the respective harms that may flow from granting or denying a stay, the Panel has already concluded that the Applicant will not suffer irreparable harm, as defined in *RJR-MacDonald*, if a stay is denied. The Panel has already noted that granting a stay would not remedy any harm that may have resulted from construction of the works. In addition, the Panel has already found the Applicant

has not established that there will be irreparable harm to his interests or those of the Penelakut First Nation Elders if a stay is denied. The Panel has also noted that any additional questions raised by the evidence are most appropriately addressed at the hearing of the merits of the appeals.

Conversely, the Panel finds that Sablefin will suffer financial losses if a stay is granted. If a stay is granted, there is no assurance that Sablefin will be able to relocate its brood stock. If the brood stock dies, scientific data obtained to date may be lost, and future data will be lost. As a result, some of the money invested by Sablefin and others in researching and developing the brood stock will be lost. Further, even if Sablefin is able to relocate the brood stock, the relocation costs would likely be unrecoverable for Sablefin.

In addition, the Panel accepts Dr. Minkoff's evidence that, if the hatchery closes, it would take a full year before production could be initiated, and the company would have no cash flow to support the resumption of operations.

For these reasons, the Panel finds that the potential harm to the interests of Sablefin outweighs any potential harm to the interests of the Applicant. Accordingly, the Panel finds that the balance of convenience weighs in favour of denying a stay of the Approval.

DECISION

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

For the reasons stated above, the application for a stay is denied.

Alan Andison, Chair
Environmental Appeal Board

January 29, 2004