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DECISION NO. 2018-EMA-021(a) [Group File: 2018-EMA-G02]

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

BETWEEN:	GFL Environmental Inc.	**APPLICANT (APPELLANT)**
AND:	District Director, *Environmental Management Act*	**RESPONDENT**
AND:	Michael Dumancic, Nathalie McGee, Meaghan Lyall, Margaret & Foster Richardson, Wendy Betts, David Frame, Carol Ann La Croix, Joss Rowlands, Dylan Kruger, George Harvie, Shelley Lee, Barry Mah, Trish Steinwand, Harry Dhaliwal, Joan Hislop, Douglas Burgham, Jennifer Burgham, Douglas McDougall, and Michael W. Betts	**THIRD PARTIES**
AND:	City of Delta	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on December 4, 2018	

APPEARING:	For the Applicant:	Gary A. Letcher, Counsel Andrea Akelaitis, Counsel Micah Clark, Counsel
	For the Respondent:	Gregory Nash, Counsel Alex Little, Counsel
	For the Third Parties:	Self represented
	For the City of Delta:	No submissions

STAY APPLICATION

[1] On August 1, 2018, Ray Robb, District Director (the "District Director") for the Metro Vancouver Regional District ("Metro Vancouver")[1], issued air quality

[1] Metro Vancouver was previously the "Greater Vancouver Regional District". Its name was changed by Order in Council No. 023, Approved and Ordered January 30, 2017.

management permit GVA1090 (the "Permit") to Enviro-Smart Organics Ltd., which is now GFL Environmental Inc. ("GFL")[2]. The Permit, which was issued under both the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*") and the Greater Vancouver Regional District *Air Quality Management Bylaw No. 1082*, *2008*, authorizes GFL to discharge air contaminants to the air from its aerobic composting operation in Delta, BC.

[2] GFL appealed various terms and conditions in the Permit and applied for a stay of two specific categories of those terms pending a hearing and decision on the merits of its appeal. It describes the categories of Permit terms at issue in this stay application as follows:

a) Contradictory and inappropriate Permit terms with respect to aeration; and

b) Permit terms restricting monthly volumes of compostable materials that may be received at the Delta Facility, which restrictions are inconsistent with the Delta Facility's Licence (defined below) and which prevent the Delta Facility from meeting its contractual commitments in seasons with high volumes of green yard waste.

[3] GFL submits that compliance with these Permit terms will not reduce, and likely will increase, the odours from the operation and serve no positive purpose. It further argues that these terms are in conflict with other Permit terms requiring best operating practices.

[4] The District Director is a party to the appeal and opposes the stay application.

[5] In addition to GFL's appeal of its Permit, the Board received 19 separate appeals filed by local residents against the Permit. The appellants in those appeals have been made Third Parties in GFL's appeal. Except for Dylan Kruger, George Harvie, Harry Dhaliwal, Joan Hislop and Douglas McDougall, all of the Third Parties provided submissions on this stay application. The content of their submissions is substantially identical. The Third Parties all oppose the application. They also provided a variety of attachments to their submissions and personal impact statements.

[6] The City of Delta has also been added as a Third Party to GFL's appeal. It did not make submissions on this application for a stay.

[7] A 15-day hearing commencing in June of 2019 has been scheduled to hear all 20 appeals.

[8] This stay application has been conducted by way of written submissions.

[2] On January 1, 2018, Enviro-Smart Organics Ltd. was amalgamated into GFL. For the purposes of this Decision, only GFL will be referenced even if, at the time, it was Enviro-Smart's operation.

RELEVANT LEGISLATION AND CASE LAW

[9] 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. Section 25 states:

> **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.

[10] 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.

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

BACKGROUND

The Facility

[12] GFL operates a turf and composting operation on 29 acres of farmland specifically zoned by the Corporation of Delta for composting operations ("the Facility"). The total property is approximately 57.4 hectares.

[13] The Facility has been licensed to operate as a composting facility for a number of years, but the volume received on site in the early days was significantly less than its current volume of approximately 150,000 tonnes of compost material per year.

[14] The initial stage of the composting process at the Facility is carried out "using the aerobic pile method, within two large, free-span covered buildings" (i.e., not enclosed). Organic waste feedstock is piled onto the building's concrete floor. An excavator or other means is subsequently used to turn the windrows as needed to optimize the primary composting process.

[15] The first building was constructed in 2007. Primary composting and reduction of the organic waste biomass in this building is supported by a "fixed-in-place, positive pressure aeration system" that enhances the process.

[16] As municipal organic recycling within Metro Vancouver expanded and composting demands increased, a new building (building #2) was constructed in

2014 to accommodate 200,000 tonnes per annum of additional organic material. This is a "positive-negative aeration system primary composting building" which has an "advanced integrated system of compost aeration, odour/leachate capture, and biofilter technology."

[17] GFL, in its present corporate form, has carried on operations at the Facility since October of 2016.

[18] The Facility receives organic solid waste from Metro Vancouver and municipalities in the surrounding region for processing to produce compost, the majority of which is utilized for turf/sod farming at the Facility.

[19] The Facility holds a licence issued by the Greater Vancouver Sewerage and Drainage District to accept the following for composting: food waste, yard waste, soiled paper, packaged organic waste, as well as certain industrial organic wastes, certain agricultural organic wastes, and bulk liquids. Other materials may be specifically authorized in writing by the Solid Waste Manager for Metro Vancouver. The licence was originally issued in 2011. It was amended in 2016, in part to address Metro Vancouver's increased organics processing needs.

[20] The licence sets out "quantity limits" that apply to the Facility, "regardless of the state, condition, or form" of the compostable material:

- The maximum weight of Compostable Material that may be accepted at the Facility shall not exceed **1,298 tonnes per day**; and
- The annual average weight of Compostable Material that may be accepted at the Facility shall not exceed **411 tonnes per day**.

  [Emphasis in licence]

[21] There is no dispute that composting is an aerobic process, meaning that it occurs in the presence of oxygen. There is also no dispute that oxygen reduces the production of odorous air contaminants and, conversely, a depletion of oxygen can produce odours.

[22] The Facility is currently an "open-air" operation. The operation is succinctly described in a July 25, 2017 memorandum by Envirochem Services Inc. as follows.

> The Enviro-Smart [GFL] operation includes two main compost buildings that provide cover and wind protected storage for the primary composting operations. Both buildings use floor aeration systems, but building #1 can only positively aerate the compost windrows (air blown through the pile from the bottom) while building #2 can positively and negatively aerate (air drawn through the pile from the top) the compost windrows depending on the chosen program.
>
> Building #2 processes approximately 65% of the infeed compost material and is equipped with individually computer controlled and biofiltration emission control technology. Air is drawn through the composting windrows and then passed through the biofiltration system … The compost exhaust air stream entering the filter is both warm and

> moist, maintaining optimal conditions for microbial growth in the biofilter media.
>
> Building #1 composts the remaining infeed (35%), which is equipped with a positive floor aeration system (uses the same blower system) that control the composting of each area individually. On an as needed basis, a biofilter layer of compost screenings is added to the top of the primary compost pile.

[23] The memorandum goes on to note that only the "active phase" of the composting process takes place in the buildings (approximately 21 days). It is then moved for "long term curing" out in the yard windrow areas.

The Permit

[24] The District Director swore an affidavit on November 27, 2018, in response to this application. In it, he provided much of the background to the issuance of the Permit, as well as his responses to the application and to the affidavit of Mr. King.

[25] In August of 2017, GFL applied for a permit to authorize "the discharge of air emissions" from the composting Facility. A description of the composting operation and the emission sources were identified as part of the application.

[26] According to the District Director, the permit application underwent "extensive consultation with GFL, a consideration of expressions of public concerns about the Facility, and recommendations from Metro Vancouver staff". In the spring of 2018, Metro Vancouver provided GFL with draft permits for comment. In response, GFL provided the District Director with a five-page set of "Proposed Criteria" for an air discharge permit that would allow GFL "to continue operating our composting business in the interim while we move forward in a timely manner towards fully enclosing our operations." In the cover letter to the Proposed Criteria, GFL states:

> Please consider this covering letter and attachment as a formal proposal for permit conditions for an interim permit as well as commitments with respect to timelines of implementation and deliverables.

[27] In addition, in July of 2018, GFL provided the District Director with an Odour Management Plan prepared by Envirochem Services Inc.

[28] On August 1, 2018, the District Director issued the Permit. The Permit is effective for a term of five years, set to expire on September 30, 2023. It is 43 pages and contains prescriptive and detailed operating requirements, requirements for design and engineering plan approvals, and 97 submission requirements, including those for 13 plans and 15 types of ongoing performance/progress reports.

[29] GFL's stated intention is to upgrade the Facility. It has committed to constructing a new fully enclosed composting facility by February 28, 2020, subject to the necessary government approvals to construct and operate the new facility on an expedited basis. GFL states that the new enclosed facility is designed to include

advanced odour abatement equipment; however, in the interim, odour reduction measures "have been and will continue to be applied by GFL at the current operation."

GFL's Appeal

[30] GFL filed its Notice of Appeal with the Board on August 29, 2018. It appeals various terms and conditions in the Permit on the grounds that the District Director erred and exceeded his jurisdiction by including "unduly prescriptive and unnecessary requirements" which are:

- not advisable for the protection of the environment;
- fail to consider the principles of sustainability;
- fail to give rise to material benefit;
- will add unnecessary cost; and
- may, and likely will, delay the GFL odour-abatement upgrade program at the Facility.

[31] GFL asks the Board to vary the Permit to address the numerous issues identified in its Notice of Appeal.

The stay application

[32] GFL does not seek a stay of all of the terms and conditions that it has appealed. Rather, it applies for a stay of two categories of Permit terms, which may be generally described as:

a) terms restricting positive aeration; and

b) terms restricting monthly volumes.

[33] With respect to category "a", GFL seeks a stay of the following provisions in the Permit that impact the aeration of the compost windrows on the basis that this will increase the production of odorous substances, including methane and ammonia:

For emission source ES04A (on page 7 of the Permit), GFL seeks a stay of the following term:

> *Positive aeration of the CASP [covered aerated status pile] is authorized only during compost pile construction (loading) between 7:00 a.m. and 6:00 p.m. Positive aeration must only occur in a maximum of four (4) of sixteen (16) aeration zones at any time.*

For emission sources ES03, ES04A and ES04B (on pages 6, 7 and 8 of the Permit), GFL seeks a stay of the term stating:

Piles must not be turned during primary composting.

For emission sources ES05 (on page 10 of the Permit), GFL seeks a stay of the term stating:

> *The Permittee must not turn the material in the aging/curing compost area more frequently than once a month.*

[34] In an affidavit sworn on November 8, 2018 by Brian King, P.Eng., Director of GFL and the Project Manager for the Facility upgrades, Mr. King describes the location of the above-noted emissions sources at paragraph 22 as follows:

> ES03 = primary composting building #1
>
> ES04A = primary composting in building #2
>
> ES04B = primary composting in building #2
>
> ES05 = aging and curing area

[35] In this same affidavit, Mr. King describes the impact of these aeration terms on the compositing operation as follows:

> 13. The Permit restrictions on GFL's ability to achieve positive aeration will cause, and already have caused, oxygen depletion in the composting process such that representative oxygen levels in the primary processing compost windrows at the Facility are significantly below the industry recognized 10% representative oxygen levels. Not only could this produce odours but it conflicts with other Permit requirements stipulating that best operating practices must be used.
>
> 14. Similarly, the Permit provisions for emission sources ES03, ES04A, ES04B and ES05 that restricts turning the windrows inhibits oxygen and could contribute to odours.

[36] With respect to the category "b" terms restricting monthly volumes, GFL asks for paragraph 4 of the Permit titled "Monthly Quantity of Material Received" to be stayed. Paragraph 4 states as follows:

> Until March 1, 2020, the maximum monthly quantity of compostable material received (including de-packaging) must not exceed the following:
>
> During May, June, July, August, September, and October = 13,000 tonnes/month
>
> During November, December, January, February, March, and April = 12,000 tonnes/month

[37] GFL submits that these quantity restrictions are arbitrary and are contrary to the flexible approach to the quantity limits set out in the licence (1,298 tonnes per day, with an *annual average* weight not exceeding 411 tonnes per day). It submits that flexibility is necessary to allow the Facility to deal with seasonal variations in the amount of compostable material supplied to the Facility. It states that, for a number of months, the Facility receives less than the Permitted amounts (January, February, March, July and December); however, in April, May, June, August, September, October and November, the average actual monthly tonnages are greater than the Permitted 12,000 or 13,000 tonnes per month (affidavit of Mr. King, at paragraph 23). The differences in amounts received occurs as a result of

increases in yard waste at certain times of the year (e.g., leaf fall), and greater amounts of green waste/yard waste (spring gardening/yard cleanup season).

[38] As an alternative to its request for a full stay of paragraph 4 of the Permit regarding volumes, GFL suggests a modified version. Specifically, for emission sources one through 10 (Facility wide emissions), GFL seeks a stay of the Permit quantity provisions for the months of November 2018 and April, May and June of 2019.

Responses to the application

[39] The District Director submits that the stay application is without merit and that it ought to be denied. He submits that the terms of the Permit were included for the protection of the environment, based on all of the relevant information available to him as well as his professional knowledge and experience.

[40] The District Director submits that the application is supported only by bare assertions of fact and speculation: not by any actual evidence of real or potential harm. Further, he submits that some of the provisions that GFL now seeks to have stayed were set out in its "Proposed Criteria" document.

[41] The Third Parties submit that the stay should not be granted. In general, they submit that granting a stay of the specified terms may increase the odour emissions in the community and cause them harm. The Third Parties set out the pre-Permit history of the Facility, including their history of odour complaints. They submit that the community has been impacted by ongoing air contaminants from the Facility for many years but, in their view, the odours increased after GFL took over the Facility in 2016. They maintain that this is evidence that GFL has not implemented best operating practices at the Facility. Further, they believe that GFL may not be complying with its Permit or with the regulation made under the *Agricultural Land Commission Act*, and relevant zoning bylaws.

[42] The Third Parties state that the ongoing odour discharge from the Facility has impacted, and continues to impact, their enjoyment of home, property, outdoor activities. They also state that the odour affects their health. Accordingly, the Third Parties submit that any financial or operational harm suffered by GFL if a stay is denied does not outweigh the continued harm that they will suffer if the stay is granted.

ISSUE

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

> Whether the Panel should grant a stay of the two categories of Permit terms pending a decision from the Board on the merits of the appeal.

DISCUSSION AND ANALYSIS

Whether the Panel should grant a stay of the two categories of Permit terms pending a decision from the Board on the merits of the appeal.

[44] As a preliminary matter, the Panel notes that the Third Parties have alleged that the Facility is not in compliance with Delta's zoning bylaw, as it is not in compliance with the regulations under the *Agricultural Land Commission Act*. As a result, they maintain that GFL is not acting consistent with its public commitment to operate in compliance with permits and government regulations.

[45] There are also concerns raised regarding the location of the composted material (outdoors), rainfall, moisture content and management of the compost.

[46] While these arguments and submissions may be relevant to the Third Parties' appeals on the merits, the particular points being made are not relevant to the 3-part test applied on this application. Moreover, matters of compliance with the *Agricultural Land Commission Act,* its regulations, and zoning bylaws, are not within the jurisdiction of this Board.

Serious Issue

[47] 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.

[48] 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

[49] GFL submits that its appeal raises serious issues to be tried. The District Director does not disagree and the Third Parties appear to agree with this assertion.

The Panel's findings

[50] The Panel has reviewed GFL's Notice of Appeal and agrees that there are serious questions to be tried.

Irreparable Harm

[51] At this stage of the *RJR-MacDonald* test, the Applicant, GFL, must demonstrate that its interests will likely suffer irreparable harm if a stay is denied. As stated in *RJR-MacDonald* at page 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 Applicant's submissions

[52] GFL submits that, if a stay is refused, it will suffer irreparable harm because the Permit terms restricting monthly volumes of material to 12,000 and 13,000 could impact its contractual obligations to supply customers. This, it argues, can have immediate negative financial consequences for GFL and may also lead to the loss of those customers in the future.

[53] Regarding the aeration terms, GFL submits that its reputation may be negatively impacted if a stay is refused. It submits that, compliance with the inappropriate aeration procedures is likely to produce odours, which can impact GFL's reputation and undermine support for sustainable composting.

[54] Further, GFL submits that odours caused by the Permit terms at issue may well result in Permit noncompliance. This type of harm, it submits, is "not susceptible or is difficult to quantify in damages."

[55] GFL notes that the Court in *RJR-MacDonald* made it clear that "irreparable" refers to the nature of the harm suffered rather than its magnitude. It also notes that the Board has previously recognized that, even if the loss suffered by the applicant is minimal or insignificant, such losses may be evidence of irreparable harm as long as the losses cannot be cured.

[56] GFL further notes that BC Courts have held that an applicant for a stay may establish irreparable harm if there is "some doubt" or "some measure of uncertainty" that the losses it would suffer by a refusal of a stay could be recovered at the time of a decision on the merits. For instance, in *Port Alberni (City) v. Catalyst Paper Corp.*, 2010 BCSC 402 [*Catalyst*], Catalyst Paper Corp. appealed a tax bylaw on the grounds that it was *ultra vires* the City. Court found at paragraph 29 that there was "some measure of uncertainty" about whether Catalyst could recover the taxes it paid to Port Alberni if successful in its appeal. It held that "[a]n inability to recover these monies would give rise to harm that is irreparable in nature."

[57] In the present case, GFL submits that there is demonstrated irreparable harm, both financial and reputational. In the alternative, even if there is some

doubt that the costs that GFL would incur without a stay could be recovered, it still has established irreparable harm.

[58] Finally, GFL submits that the Board has previously recognized that an applicant may suffer irreparable harm if its appeal would be rendered moot by a refusal of the stay. (*Nak'azdli Band Council v. Deputy Administrator, Pesticide Control Act* (Decision No. 2003-PES-011(a), September 26, 2003).

[59] In summary, GFL argues that the loss of customers, the costs of dealing with breaches of contract, and the harm to its reputation with its customers and the community, could not be recovered or remedied. Further its appeal of these two categories would become moot for the period until the appeal is heard and decided.

[60] In support of its assertions, GFL relies upon Mr. King's affidavit sworn on November 8, 2018 (referred to in the Background to this decision).

The Respondent's submissions

[61] The District Director submits that GFL has failed to meet the onus under this branch of the test. It refers to the Board's stay decision in *Harvest Fraser Richmond Organics Ltd. v. District Director, Environmental Management Act*, (Decision No. 2016-EMA-175(a), April 4, 2017) [*Harvest*] – a case involving another compost operation permitted by Metro Vancouver - where the Panel confirmed as follows:

> 55. 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. [District Director's emphasis]

[62] In that case, the Panel found that Harvest's claim that its reputation and commercial relationships would be damaged simply by being subject to "the Sniff Test" (for odour assessment), and the uncertainty around the Sniff Test, was speculative as no evidence was provided in support. The Board also found that the onus was on Harvest to establish that irreparable harm to its interests was "more likely than not (as opposed to being possible), unless a stay is granted." The District Director notes that similar findings were made in another case involving a compost operation: *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, (2017-EMA-004(b), June 20, 2017). In that case the Board found as follows:

> 78. Specifically, the Panel finds that Revolution has failed to provide any evidence to support its claim that posting the EPN [Environmental Protection Notice] in the language acceptable to the Director would cause harm to Revolution's reputation. Neither is there any evidence that Revolution would suffer any business loss if the notice were posted. For example, Revolution has not identified any contracts

> which will be lost or business obligations which it will be unable to meet if the EPN is posted in the language acceptable to the Director. [District Director's emphasis]

[63] The District Director submits that these findings equally apply in the present case: there is no evidence of contracts, actual volume of waste received on a monthly basis (historical and projected) from food waste and from green waste, or any other information or particulars to support its bare assertions that restrictions on volumes of materials "could impact" its contractual obligations to supply customers, which "can have" immediate negative financial consequences, and which "may" lead to the future loss of those customers.

[64] Nor does GFL provide any evidence linking the Permit terms at issue to "inappropriate aeration procedures". Moreover, he notes that many of the terms at issue were proposed by GFL.

[65] The District Director submits that GFL has failed to prove that it will suffer any harm, let alone irreparable harm, if the Panel refuses to stay the two categories of Permit terms pending a decision on the merits of its appeal.

[66] Regarding GFL's reliance on *Catalyst*, the District Director notes that, unlike the *Catalyst* case, GFL has not identified any specific event or circumstance, supported by evidence, showing that it will actually incur costs or, if it does, whether it will be able to recover such costs.

[67] Further, the District Director submits that GFL has not shown how its appeal will become moot – how its rights to a full hearing will be effectively denied - if a stay is not granted.

The Third Parties' submissions

[68] The Third Parties submit that GFL will not suffer irreparable harm if a stay is denied. Although they agree that maintaining oxygen in the composting and curing process is important to reducing odour emissions, the Third Parties submit that GFL has focused its submission on the need to supply adequate oxygen through *positive aeration*, whereas its primary composting technology includes providing adequate oxygen through both positive and negative aeration (building #2). In their view, there is no basis for GFL's claim that the subject terms restrict its ability to achieve positive aeration and will, therefore, cause reputational and business harm by reason of resulting odours.

[69] The Third Parties also take issue with GFL's assertions that "the Permit terms sought to be stayed will not reduce, and likely will increase, odour from the Delta Facility and serve no positive purpose" as well as its assertion that the terms at issue are in conflict with other Permit terms requiring "best operating practices". They submit that the evidence is to the contrary.

[70] The Third Parties state that, between the period when GFL purchased the Facility and the Permit was issued, odours in the community actually increased. Although GFL claims to use "best operating practices", and argues that the Permit is inconsistent with those practices, the fact that they noticed that the odour was

worse after GFL took over suggests that best operating practices were not being used. Therefore, the Permit terms should not be stayed.

[71] The Third Parties also take issue with GFL's claim that the impact of the disputed terms on GFL's ability to achieve positive aeration "will cause, and already have caused, oxygen depletion in the composting process such that representative oxygen levels in the primary processing compost windrows at the Facility are significantly below the industry recognized 10% representative oxygen levels." They state:

- Their experience as neighbours is that the odour emission increased after GFL purchased the Facility in 2016;
- GFL did not provide any evidence indicating that the material in the primary composting windrows were at or above 10% before they received the Permit; and
- Given that the Permit does not restrict supplying adequate oxygen through negative aeration as per the design of the Facility, why can't GFL ensure adequate oxygen during primary composting?

[72] The Third Parties also submit that the best operating practices for covered aerated status pile ("CASP") systems, such as the one operated by GFL, includes the addition of a cover on top of the pile "to prevent fugitive odour release caused by convection, heat rise and wind." This is a practice advocated in a brochure from Harvest Power titled "Composting".

[73] The Third Parties specifically addressed the Permit aeration terms sought to be stayed. The first one relates to emission source ES04A (building #2), which states:

> *Positive aeration of the CASP [covered aerated status pile] is authorized only during compost pile construction (loading) between 7:00 a.m. and 6:00 p.m. Positive aeration must only occur in a maximum of four (4) of sixteen (16) aeration zones at any time.*

[74] The Third Parties' submit that the CASP composting system at the Facility in this building includes both positive (source ES04A) and negative aeration, where the air is then emitted through the biofilter (Source ES04B). While they agree that GFL is correct that positive aeration must only occur in a maximum of four of 16 aeration zones at any time, they submit that it is misleading because "supplying sufficient oxygen through negative aeration and discharge through the biofilter as per the design of the [Facility] is not restricted in any way."

[75] In addition, although it is true that the aeration is restricted because positive aeration of the CASP is authorized only during compost pile construction (loading) between 7 am and 6 pm, they note that there is no restriction on supplying "sufficient oxygen through negative aeration." Further, they state that "positive aeration of a partially completed CASP is not a best operating practice, in that a partially completed CASP may not have the biofilter layer to capture fugitive emissions" as described earlier.

[76] The second aeration term sought to be stayed relates to emission sources ES03 (building #1), ES04A and ES04B (building #2), which states:

> *Piles must not be turned during primary composting.*

[77] The Third Parties submit that a CASP, by definition, is "static" and therefore not turned. They submit that turning an aerated static windrow pile during primary composting will "likely create additional odour and therefore is not a best management practice."

[78] The third aeration term sought to be stayed related to emission source ES05 (outdoor aging and curing area), which states:

> *The Permittee must not turn the material in the aging/curing compost area more frequently than once a month.*

[79] The Third Parties submit that turning these piles at any time results in an odour event and, therefore, must be done minimally as required by the Permit term. If moisture in these outdoor piles is GFL's concerns, they submit that it ought to have addressed this as part of its best management practices before the fall and winter when rainfall is higher. They maintain that it is common knowledge that outdoor piles often have a moisture content of 60% or greater.

[80] For all of these reasons, they submit that GFL's claim that these Permit terms may increase odour and cause it harm if it has to comply with them (i.e., if the terms are not stayed), should not be accepted.

[81] Regarding monthly volumes, the Third Parties submit that these terms should not be stayed as GFL has not met the requirements of the licence, the Permit, and Metro Vancouver's air quality bylaw regarding emission of "air contaminants", among other things.

[82] In an unsolicited sur-reply by the Third Party, Ms. Betts, she notes that GFL has already irreparably harmed its reputation in the community by not previously taking sufficient action – or undertaking best practices – to prevent air contaminants (i.e., odour) from being emitted into the community. In their view, there is no positive reputation to be harmed by compliance with the Permit terms.

The Applicant's reply

[83] GFL submits that, contrary to the District Director's and the Third Parties' assertions, it has provided evidence of irreparable harm. It further argues that that, to establish irreparable harm, the burden of proof is "doubt as to the adequacy of damages": it is not required to be "clear proof" of harm.

[84] GFL submits that Mr. King's November 8, 2018 affidavit provides specific evidence of the irreparable financial and reputational harm that GFL will suffer if a stay is not granted. Mr. King states that the subject terms will restrict GFL's ability to achieve positive aeration which has caused, and will continue to cause, oxygen depletion which contributes to odours.

[85] Further, although GFL agrees that it submitted some of these terms in its Proposed Criteria before the Permit was issued, it notes that the District Director

added a new term in the Permit requiring placement of a bio-cover on emission sources in building #2 "that has caused significant issues for GFL with respect to the Permit restrictions on positive aeration." GFL submits that this "after the fact" introduction of the bio-cover term has created a problem: it significantly impedes the introduction of air into compost piles with negative aeration. As a result, the Permit terms sought to be stayed will cause, and have caused, oxygen depletion, and thus, the irreparable harm that it claims.

[86] In specific response to the District Director's affidavit, GFL provided a second affidavit sworn by Mr. King on December 4, 2018. In that affidavit, Mr. King states:

> 4. … it is important to note that the Permit, for Emission Source 03, Emission Source 04A, Emission Source 04B, and Emission Source 05 requires a bio-cover to be placed on top of the compost piles in each of those Emission Source areas. … A bio-cover acts like an *in-situ* bio-filter during positive aeration reducing odours from the compost piles. However, during negative aeration, the bio-cover impedes the introduction of air into the compost piles and thereby impedes aeration because the bio-cover adds additional static head loss to the system. In terms of reducing the potential for odour impacts, positive aeration, together with a bio-cover, works to reduce odours. However, the combination of negative aeration and a bio-cover simply do not effectively work together as a bio-cover actually impedes effective aeration.
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> …
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> 6. … Oxygen levels are measured by GFL on a regular basis and if oxygen levels are below 12% positive aeration should be applied to increase the oxygen levels. … Oxygen levels in the piles measured for the months of September, October and November show oxygen levels consistently below 10% for Building #2 (Emission Sources 04A and 04B).
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> 7. … Mr. Robb fails to address the connection between adequate oxygen levels in the compost piles and turning. Adequate oxygen levels in the compost piles can be achieved with either the application of adequate positive aeration (or in the case of negative aeration with no bio-cover in place) or with adequate turning of the piles which will introduce oxygen by agitation of the compost material, or by a combination of both the application of positive aeration and turning. This Permit restricts both positive aeration and turning and at the same time requires the placement of a bio-cover. These three conditions have a detrimental effect on the ability of GFL to achieve adequate oxygen levels in the piles so as to minimize odours. In other words, the restrictions on positive aeration and the requirement for a bio-cover impedes oxygen (fresh air) being introduced into the compost piles through the application of negative aeration. If positive aeration is restricted, then GFL must be permitted to promote adequate oxygen levels in the piles through turning.

> 8. … it is now apparent, after several months of operations by GFL under the Permit, that pile turning for Emission Source 03 (Building#1) represents good operating practices to ensure that compaction does not occur in the compost pile which would impede effective aeration. Aeration is most effective when air can freely move through the compost pile. Turning the pile can help the compost pile regain its optimal porosity by breaking apart the compacted areas thus leading to effective aeration. GFL seeks a Stay of the Permit terms restricting pile turning for Emission Source 03 to have the flexibility to turn the piles, when required, to maintain or achieve appropriate compost pile porosity and material density.
>
> …

[87] For the above reasons, GFL submits that the aeration terms will cause reputational and business harm to GFL, and reduce public support for composting.

[88] Regarding monthly volume, GFL replies that Mr. King's first affidavit provides evidence that GFL has contracts with Metro Vancouver municipal customers and commercial customers, which reflect their demands to deliver compostable materials to the Facility corresponding to seasonal variations: there is more green (leaf and yard) organics in the fall and spring months. Mr. King's evidence is that these contract demands likely cannot be met under the monthly limits in the Permit, thus resulting in irreparable financial and reputational damage to GFL. It submits however, that a stay of the volume restrictions will not leave a vacuum. It will continue to comply with the volume restrictions in the licence.

[89] In Mr. King's second affidavit, he reiterates that "Proper processing is the material issue with respect to odour, not volume" (paragraph 12).

The Panel's findings

[90] At this stage of the *RJR-MacDonald* test, the Panel must determine whether the Applicant has demonstrated that it is likely to suffer irreparable harm if a stay is denied. According to *RJR-MacDonald, "*irreparable harm" is harm that either cannot be quantified monetarily or cannot be cured, and includes non-compensable harm to human health, a permanent loss of natural resources, an applicant suffering permanent business loss, or an applicant suffering permanent market loss or irrevocable damage to its business reputation.

[91] In support of its application, GFL relied upon the affidavit of Mr. King. As noted earlier, Mr. King is a Director of GFL, and is the Project Manager for the Facility upgrades. Mr. King is a professional engineer registered in three provinces, including BC. He has over 10 years of experience working in the composting industry and has been involved in all aspects of composting operations at a number of composting facilities in Canada. Mr. King explained how the disputed terms of the Permit may affect odour control and operations at the Facility, and how this may result in harm. However, rather than supporting the assertions of harm with specific evidence of contracts at stake, etc. his affidavit contains arguments and assertions of what ought to be, and why the permitting terms are unrealistic, arbitrary, "do not make sense", and "serve no good purpose". While such

arguments are appropriate when considering the merits of the issues under appeal, they are not "evidence" and, therefore, are not particularly helpful to an analysis of irreparable harm and the balancing of harms.

[92] As stated by the Board in *Harvest*, an applicant need not conclusively prove that their interests will suffer irreparable harm if a stay is denied. However, 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.

[93] In his affidavit, Mr. King states that GFL has commercial contracts and Metro Vancouver municipal contracts under which GFL "has to accept compostable waste". However, Mr. King did not provide any specific information regarding the nature of GFL's contracts, any deadlines or penalties that apply, or any specifics regarding the volume of compostable material that GFL is required to accept under each contract. Nor did he provide any month-by-month volume data from past years that would show the seasonal variations identified as an issue. Such data would provide some indication of the extent to which GFL would be in "non-compliance" with its contracts if the stay is not granted. This type of evidence/information is important for the Panel to properly assess GFL's claim of financial impact from, in particular, the monthly volume restrictions. As it stands, there is only sworn evidence that contracts to accept compostable materials exist; nothing more.

[94] The Panel understands and accepts that the volumes of green waste delivered to the Facility will be affected by the season. The Panel also appreciates that green waste does not create the same type of odour issues as food waste. However, the absence of information on the volumes required to be accepted by GFL under contract makes it impossible to evaluate the extent of the harm claimed by GFL, and whether it can be considered "irreparable".

[95] In his first affidavit, Mr. King also states that the Permit has already caused oxygen depletion in the composting process so that oxygen levels are "significantly below" the recognized oxygen level of 10% and that, if the Permit terms affect GFL's ability to achieve positive aeration on a continuing basis, it will take significantly longer to produce a quality compost product and result in irreparable harm to GFL. However, Mr. King does not provide any information on when these oxygen depletions were first observed, how long it has been occurring (did it also occur prior to the Permit), where these depletions are occurring in the Facility (e.g., which building), how long they last, or how much time this lack of oxygen would add to the completion of the composting process. As a result, the merit of this claim cannot be assessed, and the claim of irreparable harm appears to be purely speculation.

[96] The Panel further notes that many of the aeration terms were incorporated into the Permit at the request of GFL. This suggests that GFL expected these provisions to be consistent with best operating practices. However, Mr. King states in his second affidavit that he proposed these terms *before* there was any requirement/suggestion of a bio-cover. He explained his concerns with the bio-cover and its impact on effective composting and reduction of odour. The District

Director did not have an opportunity to reply to this new affidavit evidence, so the Panel does not have the benefit of his response.

[97] For the purposes of this application, the Panel accepts Mr. King's evidence that GFL's Proposed Criteria did not contemplate the bio-cover. However, this does not change the Panel's finding regarding irreparable harm regarding the aeration terms. The Permit has been in effect for a few months and yet no data was provided to the Panel that supports a finding that the aeration terms are causing, or are likely to cause "irreparable" harm to GFL if a stay is denied. If, in fact, the Permit terms result in increased odour, the greatest harm will be suffered by the general public. However, harm to the public is not the question to be addressed at this stage of the *RJR-MacDonald* test.

[98] GFL has also claimed that its business reputation will be harmed as a result of its failure to fulfil its contractual terms or because of increased odour. Regarding the former, this is impossible to gauge because of the lack of information regarding its contracts. It is also somewhat difficult to accept because the months that GFL next expects increased volumes is in the spring of 2019; specifically April, May, June. Prior to that time, GFL could notify the other parties to these contracts about the volume issue in the Permit. The hearing is scheduled for June of 2019.

[99] Regarding GFL's submission that its business reputation will be harmed as a result of increased odour in the community, the Panel finds this concern to be without merit but not for the usual reason. The Panel has reviewed the personal impact statements submitted by the Third Parties. Of note, GFL has been operating the Facility since 2016, presumably employing the best operating practices that it has repeatedly referred to in its submissions and affidavit evidence. However, there is no clear indication from any of the Third Parties that the odour has worsened – or changed in any material manner - since the Permit took effect in August. Of note, there is evidence that the odour worsened after GFL took over operations in 2016. This is supported by the District Director's affidavit evidence in which he states that Metro Vancouver received 510 public complaints about the Facility in 2017 and 1040 public complaints in 2018, prior to the August 1st Permit. Even without Ms. Bett's sur-reply, it is apparent to the Panel that GFL's reputation in the community, as it pertains to odour control, has already been harmed. Even if the Permit requirements increase odour, such additional odour could not reasonably be said to constitute "irreparable harm" given the current situation.

[100] The Panel finds that, with no evidence from GFL to support its concern that refusal of a stay of the two categories of Permit terms could reasonably result in a financial loss that may not be recoverable, a loss of customers, harm to its business reputation and/or reputation in the community, the Panel is unable to find that it may suffer irreparable harm.

[101] For all of the reasons provided above, the Panel finds that GFL has provided insufficient evidence or information to establish that its interests are likely to suffer irreparable harm unless a stay is granted.

Balance of Convenience

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

The Applicant's submissions

[103] In general, GFL submits that the factors that are relevant to this balance of convenience favours a stay. It maintains that this is not a case where a stay of paragraph 4 (monthly volumes) will cause serious harm to Metro Vancouver, to the Third Parties, or the public interest. Nor, it submits, will a stay of the aeration restrictions increase odours. Rather, GFL argues that the opposite is true. GFL submits that a stay of the two categories of Permit terms will actually benefit both sides in the balance of convenience.

[104] GFL submits that a stay of the terms restricting aeration will allow GFL to better manage and prevent odours. With respect to volumes, a stay of the monthly volume restrictions for some months will not result in odour, will be consistent with the terms of the licence, and will facilitate the needs of seasonal green waste diversion. As an additional benefit, it submits that a stay of these terms will avoid irreparable harm to GFL and thus support the upgrade to the Facility.

[105] In addition, GFL submits that if a stay is refused and it has to comply with the two categories of Permit terms, its appeal of them is rendered moot until its appeal is heard and decided. It submits that this tips the balance of convenience in favour of a stay because one of the objectives of this balancing is to preserve rights, not simply to prevent harm. In support, GFL cites *Global Securities Corp. v. British Columbia (Securities Commission)* (1997), 95 B.C.A.C. 230 [*Global Securities*], and the Board's decision in *Canadian Pacific Railway Co. v. Engineer under the Water Act*, (Decision No. 2010-WAT-014(a), August 30, 2010). GFL further submits there is no risk to the public interest or the environment if a stay is granted while the appeal is heard and decided.

[106] With respect to the monthly volume restrictions, GFL clarifies that, even if a stay is granted, it will comply with the licence: it simply seeks a stay to "effectively redistribute the quantity of materials that are received" to be in compliance with the licence quantity limits of 1,298 tonnes as a daily maximum, and 411 tonnes as a daily annual average limit.

[107] Finally, GFL submits that if a stay is not granted, the Permit terms will create operating conditions that make it more difficult to manager odours, and will erode support for Metro Vancouver's organic diversion initiative. It submits that it is in the public interest for this initiative to be advanced, and that the upgrades to the Facility not be hampered or prejudiced by the negative financial and reputational consequences to GFL. It submits that the balance of convenience supports granting the requested stay.

The Respondent's submissions

[108] The District Director submits that the balance of convenience weighs in favour of denying a stay. He states that he included the terms at issue in the Permit because, based on all of the relevant information and his professional knowledge and expertise, these terms were required to protect the environment. The District Director's experience and qualifications are set out in his affidavit. In it, he states that he has a Master's degree in Environmental Engineering from the University of British Columbia and a Bachelor of Applied Science degree in Chemical Engineering. Prior to his appointment as District Director with Metro Vancouver, the District Director worked with the then BC Ministry of Environment. He has over 25 years regulating odour in BC.

[109] The District Director submits that the terms at issue in this application are, *prima facie*, in the public interest. In his affidavit, the District Director explained the process that he undertook prior to issuing the Permit. Part of that process was notification and consultation on the Permit application. He states that there was "considerable public interest in, and expressions of public concern about the Facility and the Permit Application." Specifically, Metro Vancouver received more than 170 written comments from approximately 134 unique commenters. Of those, only one was in support of the application. Of note, expressions of public concern included concern about "foul, noxious, sour and acrid odours and the negative effects of the Facility operations on air quality, health, property values and the use of residential properties."

[110] The District Director notes that odour issues predate the issuance of the Permit: for example, in 2017, Metro Vancouver received 510 public complaints about the Facility, and between January 1 and August 1, 2018, Metro Vancouver received 1040 public complaints about the Facility. After the Permit was issued on August 1st, Metro Vancouver received 479 further public complaints about the Facility.

[111] The District Director states that, under *RJR-MacDonald*, the public interest is a valid consideration in the balance of convenience branch of the test. He notes that this has been accepted by the Board in other stay applications such as *Howe Sound Pulp and Paper Ltd. v. Director, Environmental Management Act*, (Decision No. 2008-EMA-001(a), March 7, 2008) [*Howe Sound*], and in *Harvest*, *supra*. In *Howe Sound*, the Board states:

> 83. … and solely for the purpose of deciding this stay application, the Panel accepts that the amendments are *prima facie* in the public interest.
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> 84. The Panel finds that HSPP [Howe Sound] has not demonstrated any irreparable harm if a stay is denied. HSPP has showed that denying a stay may have a financial impact on HSPP's operating costs. However, the Panel finds that the potential costs to HSPP, if a stay is denied, do not outweigh the public interest in the continued application of the Director's amendments for the potential protection of the environment and human health. [District Director's emphasis]

[112] In *Harvest*, the Panel found that the potential harm to the public interest outweighed the potential harm to the company and held:

> 91. When members of the public suffer from diminished quality of life and adverse health effects as a result of odours, the enforcement response should be timely so that the effects on the public's health and quality of life can be minimized. Compared to a prosecution process, the Sniff Test provides a more timely response, notwithstanding the issues raised by Harvest regarding the merits of the Sniff Test. [District Director's emphasis]

[113] Regarding the terms restricting the turning of material during primary composting (pile turning at ES03, ES04A, ES04B, and ES05), the District Director states that these were included in the Permit because primary composting is the stage that tends to generate the discharge of higher levels of odorous air contaminants. When composting materials are "turned", there is a greater potential for the release of odorous air contaminants and, therefore, a greater potential for an adverse impact on the community. For similar reasons, the District Director included the Permit term that restricts turning composting material in the aging/curing compost area. Moreover, he explains that, as the aging/curing piles are closer to the community than any other process area on site, the risk of an adverse impact on the community increases.

[114] For these reasons, the stay of the aeration category of Permit terms should be denied. The District Director submits that, if a stay is granted, GFL could proceed with aeration processes which, in his view, increase the discharge of odorous air contaminants into the environment.

[115] Regarding monthly volumes, the District Director explains that they were included because, in his experience, there is a correlation between the volume of organic material received and processed each month by a composting facility, particularly volumes of food waste, and resulting odour: increased volumes of waste result in an increase in odorous air contaminants.

[116] The District Director states that that the tonnage limits were added to the Permit in order to reduce the discharge of odorous air contaminants into the environment and that, staying them prior to a decision on GFL's appeal would not be in the public interest.

The Third Parties' submissions

[117] The Third Parties submit that the harm that they will suffer from a stay of these Permit terms far outweighs any harm to GFL if a stay is denied. They submit that, if the Board grants a stay, the emissions from the Facility will continue to negatively impact their health and the environment. They submit that, if GFL truly wants to reduce odours in the wet autumn and winter months, it could simply reduce intake from its sources, rather than seek a stay of the Permit terms.

[118] The Third Parties note that, prior to increases in the volume of compostable material received by the Facility in or about 2013, there were few recorded odour complaints. They submit that the Permit terms are already too high and submit

that the volume should, in fact, be significantly reduced until GFL's upgrades are completed.

The Applicant's reply

[119] In reply, GFL submits that the District Director's position "wrongly assumes" the public interest solely favours his exercise of power in issuing the Permit. It states that the Supreme Court of Canada has made it clear in *RJR-MacDonald* at paragraph 65 that "the government does not have a monopoly on the public interest"; therefore, any party may demonstrate a compelling public interest in support of its position.

[120] In this case, GFL states that a stay is in the public interest. It reiterates that the Permit terms restricting aeration will restrict oxygen levels and will likely create odours if they are not stayed. Moreover, the monthly volume restrictions in the Permit, if not stayed, will limit GFL's ability to meet the needs of the region's seasonal green (leaf and yard) waste diversion. It submits that an order staying the monthly volume restrictions would not result in any odour, but would allow GFL to meet its contractual obligations and help it meet the goal of keeping organic materials out of landfills. Further, GFL submits that it is in the public interest to ensure that the planned upgrades proceed to a fully enclosed Facility.

[121] Contrary to the District Director's assertions, GFL submits that the evidence reveals there is no risk of harm to the public interest or the environment by granting the requested stay until the appeal can be heard (June 2019) and decided.

The Panel's findings

[122] The Panel finds that the balance of convenience favours denying a stay of both categories of Permit terms at issue. A stay is an extraordinary remedy and the test for granting a stay has not been met.

[123] Despite GFL's concerns that the disputed aeration terms will increase odour, there is no evidence that this is occurring, or will occur. Moreover, if there is an increase in odour that is attributable to the Permit terms before the appeal on the merits is heard and decided, the District Director has authority under the legislation to amend the Permit to address the problem.

[124] There is similarly no evidence before the Panel to support a finding that the monthly volume restrictions are causing, or will likely cause, GFL irreparable harm. However, as with the aeration terms, if there is evidence of harm in the future, the District Director may amend the Permit.

[125] The Panel finds that, on balance, and for the limited purposes of this application, the Permit terms at issue were included to protect the environment (including public health) by a District Director with a great deal of experience regulating air emissions. Without evidence of irreparable harm to GFL, the Panel is not prepared to stay these protections without the benefit of full evidence. The Third Parties' personal accounts of their experiences with air emissions in the community before the Permit was issued, and their submissions on the impact of a

stay of the two categories of Permit terms, further tip the scale in favour of denying the stay application.

[126] The Panel has considered GFL's argument that compliance with the Permit terms will render its appeal of those terms moot until its appeal is heard and decided. The Panel has reviewed the cases that GFL relied on in support of this argument and finds that they do not support a stay; the circumstances in those cases are very different to the present situation. Further, compliance with the two categories of Permit terms does not prevent GFL from pursuing any of its grounds for appeal or from obtaining an appropriate remedy from the Board.

[127] In addition, the Panel is not convinced that staying the permitted conditions for the limited time that will pass before there is a final decision on the merits of the appeal will have any significant effect on the operations of the Facility.

[128] The Panel notes that GFL is taking its air emissions and odour issues seriously and is planning a significant upgrade to enclose the Facility. This is obviously to be encouraged. Eliminating this stream of waste from landfills is important for many reasons. However, despite GFL's attempt to use the upgrade as a reason to grant this application, the Panel is not persuaded by that argument as it is too remote. The success or failure of this endeavor cannot be reasonably tied to this application to stay the two categories of terms in the Permit. There is simply no evidentiary basis for it.

[129] In conclusion, the Panel finds that the two categories of Permit terms at issue were included by the District Director to protect the environment (and public health) and are, *prima facie*, in the public interest. The Panel finds that, on balance, the risk of increased odour in the community if the terms are stayed pending a decision on the merits outweighs any financial harm or reputational harm that GFL may experience from refusal of the stay.

[130] Accordingly, the Panel finds that the balance of convenience favours denying the stay.

DECISION

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

[132] For the reasons provided above, the applications for a stay of the two categories of terms in the Permit are denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

December 10, 2018