



# Environmental Appeal Board

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## **APPEAL NO. 97-WAS-09(a)**

In the matter of an appeal to the Environmental Appeal Board under section 44 of the *Waste Management Act*, R.S.B.C., 1996, c. 482.

<b>BETWEEN:</b>	Gurmeet Brar	<b>APPELLANT</b>
<b>AND:</b>	Deputy Director of Waste Management	<b>RESPONDENT</b>
<b>AND:</b>	District of Invermere	<b>THIRD PARTY</b>

### **STAY ORDER**

#### **BACKGROUND**

The District of Invermere (the "District") operates a waste water treatment plant under a permit issued pursuant to the *Waste Management Act*. The permit allowed the District to discharge 1400 m<sup>3</sup>/day of effluent. The District applied for an amendment to its permit, and on January 10, 1997, the Regional Waste Manager issued the amended Permit PE-03094 (the "Amended Permit"). The Amended Permit allowed the District to discharge a maximum of 2275 m<sup>3</sup>/day with an annual average of 1850 m<sup>3</sup>/day of effluent from the municipal waste water treatment plant to the ground and to Toby Creek.

Mr. Gurmeet Brar, a retired chemical engineer and resident of Invermere, appealed the Amended Permit to the Deputy Director of Waste Management ("Deputy Director"). On August 1, 1997, the Deputy Director denied the appeal but added two further conditions to the Amended Permit. The Deputy Director required the District to design an alternate wastewater treatment system if any one of three conditions occurred. The District was also required to conduct a feasibility study to determine water reuse possibilities for any new subdivisions and developments connected to the District's treatment facility. On August 19, 1997, Mr. Brar appealed the Deputy Director's decision to the Environmental Appeal Board under section 44 of the *Waste Management Act* and requested a stay of the Deputy Director's August 1, 1997 decision.

Mr. Brar filed his written arguments in support of the stay by letters dated September 8, 1997 and September 22, 1997. Counsel for the District filed its submissions on September 22, 1997. By letter dated September 16, 1997 the Deputy Director stated that he took no position on the stay application. The Board's decision is based on these submissions; the March 20, 1997 stay decision of the Deputy Director, the August 1, 1997 appeal decision of the Deputy Director, and Mr. Brar's August 19, 1997 Notice of Appeal of the Deputy Director's decision.

## ISSUE

Section 48 of the *Waste Management Act* (the "Act") grants the Board the authority to order a stay. Section 48 states that:

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.

The sole issue in this application is whether the Board should exercise its discretion under section 48 of the *Waste Management Act* in favour of granting an interim stay against the August 1, 1997 decision of the Deputy Director.

## REVIEW OF SUBMISSIONS

### Appellant

By letters dated September 8 and September 22, Mr. Brar provided several reasons in support of his application for a stay against the Deputy Director's August 1, 1997 decision. Mr. Brar submits that the Deputy Director issued a stay against the Amended Permit prior to the appeal before him. His reason for granting the stay, was that the District had not demonstrated that the increased discharge under the amended permit was needed immediately. Mr. Brar submits that this continues to be the case. Mr. Brar also argues that the fact that the Deputy Director takes no position in regard to this stay application is an indication that he sees no risk of irreparable harm to the environment resulting from a stay.

Mr. Brar refers to a January 9, 1997 technical report prepared by the Ministry of Environment Lands and Parks to support his argument that there is no compelling urgency to expand the District's sewer facility and that there is preparatory work such as field testing, data collection and model verification that can proceed regardless of the granting of a stay. He also refers to the technical report to argue that maintenance and replacement work to the facility, such as to the headworks, aeration basins, barminutor, blowers, flow meters, and hydraulics, can still be undertaken since this work is unrelated to the Amended Permit. He submits that this maintenance and replacement work has been necessary for several years, and the fact that this has not occurred has resulted in poor quality discharge into Toby Creek. He claims that the lack of maintenance and replacement work is also a reason for problems in the facility's collection system and for increases in effluent volume, partly resulting from excessive dilution. He asserts that his appeal and stay application do not affect any of this needed work; only the Rapid Infiltration Beds (RIBs) expansion are affected. Mr. Brar submits that the expanded volume of the system is also not required immediately since the District has commenced water reduction initiatives and water metering. He states that the District has previously claimed that these initiatives would reduce the quantity of waste volumes by 26% and that with the completion of the maintenance and replacement work, waste volumes could be further reduced. Mr. Brar believes that the current permitted volume of 1400 m<sup>3</sup>/day of effluent should be sufficient for a population of 4000+ people. The District's current population is approximately 2600 people.

Mr. Brar submits that refusing the stay would result in the proliferated use and expansion of the RIBs causing even more contamination of ground water and a waste of public funds if the appeal is ultimately successful and the District is denied the expansion. He asserts that the expanded use of the RIBs would render the appeal meaningless. He submits that a stay would not postpone or scale back needed work on the system since the necessary maintenance and replacement work could proceed without the need for permit amendments. Mr. Brar further submits that the District's argument, that there will be irreparable harm to the environment from effluent discharge if a stay is granted, is not valid since improvements in the quantity and quality of effluent would occur with the proper maintenance and replacement work.

Finally, Mr. Brar submits that the District's argument that a stay would result in a development and investment freeze in the District is without support as a substantial lot inventory remains unsold and is capable of development. He points to the rezoning of a high-density development project which exempted the District from providing sewer and water services. Mr. Brar contends that this project prompted the permit amendment application in the first place. Since the rezoning now means that the District's sewer system will not service this project, he submits that there is no urgency to expand the system's capacity to handle this development.

#### Respondent

In his letter dated September 16, 1997, the Deputy Director stated that he took no position on the stay request.

#### Third Party

The District opposes the stay application. The District submits that any further delay in the design and implementation of the permitted works will continue to exacerbate the impact on the local receiving environment. It argues that delays will likely cause irreparable harm because the District cannot effectively dispose of the quantity of effluent generated by the community, and it is having to discharge effluent into Toby Creek in order to operate the plant safely. The District asserts that it is exceeding its pre-amendment discharge volume of 1400 m<sup>3</sup>/day and that a stay of the permit will expose the District to potential charges and other orders under the *Waste Management Act*. The District provided the Board with correspondence to the District from the Ministry of Environment, Lands and Parks dating back to December 1994 documenting non-compliance with the existing permit.

In terms of the District's ability to reduce the volume of effluent, the District claims that its conservation measures will at best reduce discharge volumes by 15 % and that average growth will replace this volume in short order; the 15 % reduction would only provide the time needed to construct the new facility.

The District submits that a stay would likely result in a development freeze within the District since it is likely that no new subdivisions would be approved and the District would not be able to accept additional sewage flows. Finally, the District

submits that a stay would expose the District to increased capital costs due to repairs that would have to be carried out in a more expensive piece-meal manner.

## DISCUSSION

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) (unreported), 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. In that case, the Board held that the test for granting a stay requires an applicant to demonstrate the following:

1. there is a serious issue to be tried;
2. that irreparable harm will result if the stay is not granted;
3. that the balance of convenience favours granting the stay.

As Sara Blake notes in her book *Administrative Law in Canada*, Butterworths, 1997 (2nd edition) at page 135, the usual common law principles apply to tribunals which must assess the "balance of convenience and irreparable harm to the parties."

### Serious Issue

The first factor of the test that must be considered is whether there is a serious question to be tried. In *RJR MacDonald*, Justices Sopinka and Cory state that unless the case is frivolous or vexatious or is a pure question of law, as a general rule, the inquiry should proceed onto the next stage of the test.

In this case, the Board finds that Mr. Brar raises issues which are neither frivolous nor vexatious. The Board is satisfied that serious issues exist.

### Irreparable Harm

The Appellant submits that if the stay is not granted that irreparable harm will occur to the ground water because of the increased volume of discharge and increased use of rapid infiltration beds. He further submits that the District would suffer irreparable harm should it go to the expense of investing in the new works and then have the Board overturn the permit.

The District submits that irreparable harm will occur to the environment if the stay is allowed as the District will continue to discharge effluent into Toby Creek in order to safely operate the existing plant. This will result in harm to the surface water, increased ammonia levels and groundwater contamination. The District also submits that it will suffer economic harm by following a "piecemeal" repair and maintenance program instead of a full re-development of the works. The local economy will also suffer as development will be held up because of the inability of the District to accept any increased sewage flows. Finally, the District submits that it is exposed to harm as it could be charged for non-compliance with the existing permit.

The Board has reviewed these submissions and has concluded that the substantial increase in discharge of sewage to the environment as is contemplated by the amended permit could cause irreparable harm to the environment. Without having had the benefit of full argument on the merits of the appeal the Board cannot conclude otherwise. The Board is further not convinced that the discharges that the District have been making to the environment under the existing permit since at least 1994 in contravention of the existing permit, will only now cause irreparable harm to the environment. Further, maintenance and replacement work which can proceed without the need for permit amendments would help improve the quantity and quality of effluent.

The Board further considers that the economic loss that the District could face if it completes the works under the amended permit and subsequently has the permit over turned outweigh any losses it might experience carrying out piecemeal maintenance and repairs.

Additionally, the Board is not convinced that any short term impact that the stay will have on the local economy because it might interfere with potential development in the area will result in irreparable harm. The Board believes that any serious developments will await the decision of the Board. The Board also notes that the local economy has endured under the existing permit for some years now and it would be surprising if a stay would now cause a moratorium on all activities in the area.

Finally, the Board does not accept that the harm faced by the District of potentially being charged for failing to comply with the terms of a valid permit constitutes irreparable harm. Such an argument would undermine the entire enforcement scheme under environmental legislation.

#### Balance of Convenience

The Board finds that, like the Deputy Director who granted a stay before his appeal, the District has not sufficiently demonstrated that a denial of the stay is necessary because increases in effluent volume are needed immediately. Although the District argues that further delays in the design and construction of the permitted works will exacerbate the impacts on the environment due to effluent discharges into Toby Creek, the District has not demonstrated why other maintenance and replacement work, which is not related to the permit, could not proceed. The Board finds that the District could begin to perform maintenance and replacement work on the facility to improve the quality and to reduce the quantity of effluent, thus limiting the likelihood of discharges into Toby Creek. The Board also finds that the continuation of the District's water reduction initiatives will help limit waste volumes and the possibility of discharges into the Creek. With the water conservation initiatives and the maintenance and replacement work on the other parts of the system, the Board concludes that the need for discharges into Toby Creek will be diminished. The possibility of any environmental harm resulting from the granting a stay, will be much less if these measures are followed. Consequently, it is likely that the District's exposure to charges or other orders for exceeding its pre-amendment permit volumes will also be reduced if it follows these measures.

The Board is not convinced that capital repairs, maintenance and replacement work would be more fiscally irresponsible than beginning construction of the RIBs and other works contemplated in the Amended Permit when the appeal could ultimately require those works to be discontinued. Rather than piecemeal maintenance and replacement work being a waste of public funds, constructing works that are dependent on a valid permit and commenced before a legal review of the permit has been completed is probably a greater risk of public funds. For the above reasons, it is the opinion of this Board that on a balance of convenience the risk to the environment if the stay is not granted, far outweighs the harm to the District if the stay is granted.

**DECISION**

The Board grants an interim stay of Amended Permit PE-03094 as approved by the Deputy Director's August 1, 1997 decision pending the final decision of the Board.

Toby Vigod, Chair  
Environmental Appeal Board

October 17, 1997