



Environmental Appeal Board

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DECISION NO. EAB-EMA-22-A008(a)

In the matter of an appeal under the *Environmental Management Act*, SBC 2003, c. 53

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|-------------------|--|-------------------|
| BETWEEN: | Richmond Steel Recycling Ltd. | APPELLANT |
| AND: | Director, <i>Environmental Management Act</i> | RESPONDENT |
| BEFORE: | A Panel of the Environmental Appeal Board Darrell Le Houillier, Panel Chair | |
| DATE: | Conducted by way of written submissions concluding on July 15, 2022 | |
| APPEARING: | For the Appellant: Karl Gustafson, Counsel | |
| | For the Respondent: Ashley Caron, Counsel Shaun Ramdin, Counsel | |

DECISION ON STAY APPLICATION

INTRODUCTION

[1] Richmond Steel Recycling Ltd. ("RSR") operates a metal recycling facility (the "Facility") in Richmond, British Columbia. On April 28, 2022, Daniel Bings, a delegate of the Director, *Environmental Management Act* (the "Director"), in the Ministry of Environment and Climate Change Strategy (the "Ministry"), issued Pollution Abatement Order 111135 (the "Order"). The Order imposes a range of requirements on RSR. Among other things, the Order requires RSR to immediately cease all waste discharges from the Facility.

[2] In addition to serving as a delegate of the Director, Mr. Bings is a Compliance Operations Manager (the "Manager") with the Ministry.

[3] RSR appealed the Order. One of the remedies RSR requested from the Environmental Appeal Board (the "Board") is a temporary stay of certain requirements in the Order, pending the Board's final decision on the merits of the appeal. The Director opposes RSR's application.

[4] This preliminary decision addresses RSR's stay application.

BACKGROUND

[5] The Facility is located on Mitchell Island, which lies in the Fraser River (the "River"). RSR's business is to recover recyclable metals from a variety of materials and send the leftover material to landfills for disposal.

[6] According to Harbinder Dhillon, President of RSR, RSR's operations "significantly reduce the quantity of goods and materials (including the contaminating substances contained therein) which would otherwise be disposed of in landfills across the province or left to degrade elsewhere." Mr. Dhillon says that RSR recovers roughly 80% of materials from end-of-life automobiles. Mr. Dhillon also says that RSR's operations reduce energy use, carbon dioxide emissions, and mining impacts by diverting material for recycling, reducing the need for new material.

[7] Historically, rainwater at the Facility was collected and passed through an oil/water separator, grit chamber, and bioswale. The stormwater then ran into a drainage ditch (the "Ditch"), which discharged into the River.

[8] On December 12, 2019, a day with particularly heavy rainfall, stormwater was observed bypassing those works and flowing directly into the River. Representatives from Environment Canada attended and took samples of the stormwater, which revealed various contaminants above British Columbia's Water Quality Guidelines (the "Guidelines").

[9] The Guidelines are policy documents created by the Ministry and provide water quality standards for various water values: aquatic life, agriculture, drinking water sources, recreation and aesthetics, and wildlife. The Guidelines are based on similar values from other jurisdictions, scientific literature, and "general conditions in British Columbia." They set maximum values for acceptable concentrations on contaminants in water. The Guidelines are updated or revised from time to time.

[10] The Guidelines include long-term average (chronic) guidelines and short-term average (acute) guidelines. This approach allows long-term water quality standards, averaged over a longer timeframe, which allows variation above and below that average, so long as those variations do not exceed the acute standard. According to the Director, the acute guidelines should never be exceeded, to protect the most sensitive species and life stages in aquatic environments.

[11] A laboratory analysis of the water samples taken on December 12, 2019 showed levels of aluminum, copper, zinc, polychlorinated biphenyl ("PCBs"), naphthalene, benz(a)anthracenes, and pyrene that exceeded the Guidelines. Specifically, the following exceedances were identified:

1. dissolved aluminum (0.11 milligrams per liter [mg/L] at the bioswale and 0.12 mg/L on the shore/dock, compared to a chronic Guideline level of 0.05 mg/L and an acute Guideline level of 0.1 mg/L);
2. dissolved copper (estimated at 0.45 mg/L at the bioswale and 0.01 mg/L at the shore/dock, compared to a chronic Guideline level ranging from 0.00298

to 0.00594 mg/L and an acute Guideline level ranging from 0.0179 to 0.0348 mg/L);

3. total zinc (2.46 mg/L at the bioswale and 14.6 mg/L at the shore/dock, compared to a chronic Guideline level of 0.063 mg/L and an acute Guideline level of 0.0375 mg/L);
4. total PCBs (10.1 micrograms per litre [$\mu\text{g/L}$] at the bioswale and 20.8 $\mu\text{g/L}$ at the shore/dock, compared to a Guideline value of 0.005 $\mu\text{g/L}$);
5. naphthalene (4.97 $\mu\text{g/L}$ at the bioswale, compared to a Guideline value of 1 $\mu\text{g/L}$);
6. benz(a)anthracenes (0.44 $\mu\text{g/L}$ at the bioswale and 0.49 at the shore/dock, compared to a chronic Guideline value of 0.1 $\mu\text{g/L}$); and
7. pyrene (0.7 $\mu\text{g/L}$ at the bioswale and 1.14 $\mu\text{g/L}$ at the shore/dock, compared to a chronic Guideline value of 0.02 $\mu\text{g/L}$).

[12] Testing on December 12, 2019 also revealed the presence of fluoranthene at levels above the Guideline value for phototoxic variants, but below the Guideline value for non-phototoxic variants. It is unspecified whether the fluoranthene discovered at the Facility was phototoxic.

[13] Following December 12, 2019, RSR began investigating stormwater management improvements. RSR retained Pottinger Gaherty Environmental Consultants Ltd. ("PGL"), an environmental consultant, to advise on improving the capacity of the stormwater system and the treatment of stormwater before its discharge into the River. PGL advised that accumulated, contaminated sediments in a stormwater ditch that drained into the River were contaminating the River during stormwater discharges.

[14] Throughout 2020, PGL investigated the Facility. By September 2020, PGL developed a plan which became known as the Drainage and Mitigation Plan (the "Plan"), which establishes a series of measures to identify and control potential contaminants at source, minimize contact between contaminants and stormwater, and effectively treat the stormwater so that it satisfied the Guidelines before discharge into the River. RSR and PGL continued to revise the Plan after its development.

[15] PGL also determined that the bioswale and Ditch had become contaminated with sediments accumulated over time. In addition to recommending that the stormwater drainage system and treatment works be upgraded, PGL recommended that the bioswale and Ditch be remediated, with contaminated sediments removed for disposal.

[16] During 2020, the Ministry also investigated the Facility. In July 2020, officers from the Ministry inspected the Facility and requested records of quarterly analyses of effluent that RSR reported doing. No records were immediately produced.

[17] On April 15, 2021, a professional engineer with PGL, Mr. Gagne, wrote a letter to the City of Richmond, stating that surface water throughout the Facility exceeded the Guidelines, and PCB impacts were not localized to one area. Mr. Gagne added that, "... low levels of PCBs are likely related to ongoing activities,

regardless of the controls RSR has or might reasonably put in place to prevent the PCB materials from entering the [Facility].”

[18] On April 26, 2021, Ministry staff emailed RSR, again seeking effluent sampling records, to assess and characterize any potential or actual ongoing pollution.

[19] On May 7, 2021, RSR emailed its Plan and an Environmental Management Plan to the Ministry. RSR did not provide any sampling information.

[20] On August 5, 2021, the Ministry issued Pollution Prevention Order number 110800 (the “First Order”), which was subsequently amended several times, most recently on January 14, 2022. The First Order, as framed in August 2021, required RSR to:

1. retain a qualified professional by August 26, 2021 to create a Waste Characterization Plan (“Waste Plan”) detailing how RSR will:
 - identify contaminants of potential concern in effluent throughout the site and in the oil/water separator discharge,
 - identify the source of those contaminants of potential concern and the activities onsite responsible for them, and
 - obtain laboratory results in support of that analysis and compare the results to the Guidelines and to criteria found in Schedule 1.2 of the *Hazardous Waste Regulation*, B.C. Reg 63/88 (the “*Hazardous Waste Regulation*”);
2. submit the Waste Plan to the Director for approval by September 16, 2021;
3. implement the Waste Plan within two weeks of obtaining the Director’s approval;
4. submit a report detailing the findings from the Waste Plan by January 12, 2022;
5. submit certain documents by September 2, 2021, that are used to develop all versions of the Plan;
6. submit the following documents by September 2, 2021:
 - reports, results, or assessments related to the environmental quality of effluent or stormwater at the Facility,
 - laboratory analyses for the contaminants of potential concern outlined in the Waste Plan,
 - records of the oil/water separator maintenance and cleaning schedule and manifests detailing its residual wastes, and
 - records detailing work already done on the bioswale and Ditch;
7. submit monthly updates of its activities, including progress made on complying with other elements of the First Order; and
8. require the retained qualified professional to complete paperwork to be submitted with its first submission of work.

[21] On September 8, 2021, PGL provided documentation of sampling done at the Facility since December 2019, as required in the First Order (the sampling results to be described later).

[22] PGL also provided the required Waste Plan, which described that most areas of potential environmental concern at the Facility were unprotected from rainfall and situated on concrete. Various substances, including hydraulic fluid, and rainwater that had fallen on a variety of work areas, were considered at risk of entering the groundwater, the stormwater system, or both.

[23] PGL also noted that the River supports numerous species of life, including mussels and a variety of fish, such as various types of salmon, trout, whitefish, sturgeon, smelt, bass, and others.

[24] In September 2021, PGL applied to Fisheries and Oceans Canada ("DFO"), and to the Ministry of Forests, Lands, Natural Resource Operations and Rural Development ("FLNRORD"), on behalf of RSR, to authorize remedial work in the Ditch. DFO granted the application on December 9, 2021 (in the "DFO Directive"), but required that remediation take place between calendar dates of June 16 and February 28. By letter dated February 11, 2022, FLNRORD stated that no work in or about a stream should proceed until an approval was issued under the *Water Sustainability Act* (the "WSA").

[25] On January 13, 2022, Ministry staff inspected the Facility and noted effluent running into the Ditch, and then discharging into the River. Staff took samples of the effluent. These results will be summarized later.

[26] Also in January 2022, RSR applied for a discharge authorization under section 15 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA"). Section 6(2) of the *EMA* prohibits the introduction of waste into the environment in the course of conducting a prescribed industry. Vehicle dismantling and recycling is a prescribed industry under Schedule 2 of the *Waste Discharge Regulation*. Therefore, RSR requires authorization to discharge waste¹ to the environment. The *EMA* provides a director with the discretion to issue a permit (section 14) or a temporary approval (section 15) authorizing the discharge of waste to the environment. On April 4, 2022, RSR perfected its application for an approval under section 15 of the *EMA* to discharge treated stormwater runoff to the Fraser River for a period of 15 months.

[27] On February 14, 2022, RSR contracted with a supplier, Stormtec Filtration Inc. ("Stormtec"), to install a temporary, mobile water treatment plant (the "Plant") at the Facility. Stormwater is diverted to the Plant via the Facility's storm drainage system, and the Plant is intended to treat that water to meet the criteria in the Guidelines. The Plant discharges treated water directly into the River, where the Ditch empties into it. Since the Plant became operational, RSR and Stormtec have attempted to optimize the Plant and achieve compliance with the Guidelines.

¹ Section 1(1) of the *EMA* defines "waste" as including effluent, and it defines "effluent" as meaning a substance that is introduced into water or onto land and that: injures or is capable of injuring the health or safety of a person; injures or is capable of injuring property or any life form; interferes with or is capable of interfering with visibility; interferes with or is capable of interfering with the normal conduct of business; causes or is capable of causing material physical discomfort to a person; or damages or is capable of damaging the environment.

[28] Before the Plant became active, there were ten sampling events where surface water was collected from the Ditch near its starting point, and five sampling events where surface water was collected from the Ditch at its endpoint, where it empties into the River. These results revealed numerous exceedances of the standards reflected in the Guidelines.

[29] Of the Ditch samples, eight taken between April 22, 2020 and January 13, 2022, exceeded the Guidelines value for toluene of 0.5 µg/L. The highest measurement was taken on December 10, 2021, and was 5.7 µg/L.

[30] The Ditch samples all showed exceedances of the Guidelines with respect to polycyclic aromatic hydrocarbons. The largest exceedance, relative to the standards in Guidelines, was for pyrene on July 22, 2020, with a measured concentration of 8.61 µg/L, over 400 times the Guideline limit of 0.02 µg/L.

[31] The Ditch samples also revealed metal concentrations above the levels described in the Guidelines. The largest exceedance, relative to the associated threshold from the Guidelines, was copper on July 22, 2020, when concentrations of 911 µg/L were recorded, over 450 times the Guideline level of 2 µg/L.

[32] Eight of the Ditch samples were tested for PCBs, and all exceeded the Guideline standard for total PCBs, 0.0001 µg/L. Values ranged from 0.848 µg/L on January 13, 2020 to 65.5 µg/L on July 22, 2020. Of the PCBs, the largest exceedance was for PCB 126². On July 22, 2020, the concentration was measured to be 0.00441 µg/L, more than 17,500 times the Guideline value of 0.0000025 µg/L. Total Arochlor PCBs exceeded their associated Guidelines value of 0.0001 µg/L five times, with a maximum concentration measured on July 22, 2020. It was more than 600,000 times above that limit, 64.6 µg/L.

[33] Of the five samples taken before the Plant became operational, where the Ditch empties into the River, three samples taken on December 10, 2021 and January 13, 2022 revealed toluene concentrations in excess of the Guidelines standard, ranging from 5.36 µg/L and 6.4 µg/L.

[34] The samples from where the Ditch empties into the River also revealed the presence of polycyclic aromatic hydrocarbons, in excess of the standards contained in the Guidelines. The largest exceedance relative to the Guideline level was for pyrene taken on December 10, 2021. The concentration measured on that date was 1.97 µg/L, nearly 100 times the Guideline threshold of 0.02 µg/L.

[35] The five samples taken from where the Ditch empties into the River also revealed metal concentrations above the levels found in the Guidelines. The largest exceedance, relative to the Guidelines levels, was for manganese. On June 17, 2021, a concentration of 495 µg/L was measured, and exceeded the Guideline level of 0.82016 µg/L by over 600 times.

[36] Of the samples taken where the Ditch empties into the River, four were tested for PCBs. And all showed exceedances of the levels listed in the Guidelines.

² PCB 126 is the identifier assigned to 3,3,4,4,5-pentachlorobiphenyl.

Total PCBs were measured at up to 2.84 µg/L on January 13, 2022, more than 28,000 the threshold listed in the Guidelines.

[37] After the Plant became active, three measurements were taken from the Ditch near its starting point, and four from where the Ditch ends, where it empties into the River.

[38] In the Ditch, one sample had an exceedance for toluene, 3.8 µg/L on February 22, 2022. Two samples had exceedances for polycyclic aromatic hydrocarbons, both for pyrene (0.101 µg/L on February 22, 2022 and 0.18 µg/L on April 25, 2022).

[39] All three Ditch samples had exceedances for metals. The largest exceedance, relative to the corresponding threshold in the Guidelines was for zinc. The concentration measured on April 25, 2022, 23,200 µg/L, was over 700 times the acute exposure limit in the Guidelines (33 µg/L) and over 3,000 times the chronic exposure limit in the Guidelines (7.5 µg/L).

[40] All three Ditch samples had exceedances for PCBs as well. The largest exceedance, relative to the threshold in the Guidelines, was for total PCBs. On March 15, 2022, a concentration of 1.9 µg/L was measured, 19,000 times the limit in the Guidelines (0.0001 µg/L).

[41] Of the four samples taken where the Ditch empties into the River, there was one exceedance for polycyclic aromatic hydrocarbons (0.402 µg/L of acridine on May 9, 2022).

[42] Only three of the samples from where the Ditch empties into the River were tested for metals. The largest exceedance relative to the thresholds in the Guidelines was zinc, as measured on February 28, 2022. The concentration measured on that date was over five times the limit for acute exposure (33 µg/L) and over 20 times the limit for chronic exposure (µg/L).

[43] Three of the samples from where the Ditch empties in the River were tested for PCBs. All revealed PCB concentrations in excess of the standards from the Guidelines. The largest exceedance, relative to Guidelines standards, was for total Arochlor PCBs. On March 15, 2022, a concentration of 0.455 µg/L was measured, more than 4,500 times the Guideline limit of 0.0001 µg/L.

[44] Analyses were also undertaken of the discharge of the Plant, on three different days after it became operational: March 4, March 23, and April 4, 2022. The analyses showed exceedances of the threshold in the Guidelines for toluene (2 µg/L on March 23, 2022, with the other unable to detect down to the Guideline level), total antimony (three measurements ranging from 8.09 to 11 µg/L), total copper (three measurements ranging from 7.89 to 27.1 µg/L), total zinc (three measurements ranging from 70.8 to 103 µg/L), and dissolved aluminum (one measurement on April 4, 2022, 60.6 µg/L, above the Guideline level of 50 µg/L, with the other two below).

[45] PCBs were only measured in the Plant discharge on two days, March 4 and 23, 2022. Total Arochlor PCBs and PCB 126 could not be measured down to the threshold in the Guidelines on either occasion. Exceedances were noted on March 23, 2022 for PCB 105 (0.000152 µg/L) and PCB 77 (0.000066 µg/L). Total PCBs

exceeded the thresholds in the Guidelines on both days (0.00206 µg/L and 0.0265 µg/L).

[46] There were also exceedances in on-site infrastructure and at a marsh at the Facility for various parameters, the details of which I do not consider relevant to this preliminary decision.

[47] On March 8, 2022, Ministry staff issued an inspection report (number 184118), directing RSR to "... cease unauthorized discharges to the environment [and] obtain a waste discharge authorization under the *Environmental Management Act.*" [block italics removed]

[48] As of April 26, 2022, PGL advised RSR, based on water sampling analyses taken on March 4, March 23, and April 4, 2002, that effluent from the Plant was generally compliant with the Guidelines, other than for "a couple of analytes". Attachments containing laboratory analyses described these exceedances and other potential exceedances, actually numbering eleven, in detail. The information described in PGL's letter is summarized above.

[49] In the same letter, PGL also advised that RSR, PGL, and Stormtec were working at improving the Plant's treatment efficiency, and that those analyses no longer represent the chemical composition of the stormwater discharge from the Facility.

[50] On April 28, 2022, the Manager issued the Order, on behalf of the Director.

[51] The Order was made under section 81 of *EMA*, which allows a Director (or their delegate) to make orders where they are "... satisfied on reasonable grounds that an activity or operation has been or is being performed by a person in a manner that is likely to release a substance that will cause pollution" Section 1 of *EMA* defines pollution as "... the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment."

[52] The Order stated that effluent from the Facility had caused pollution by substantially altering or impairing the usefulness of the environment, due to the "... significantly high concentrations of contaminants, including but not limited to polychlorinated biphenyls (PCBs), metals and total suspended solids." This conclusion was based on analyses of effluent from the Facility, up to and including February 28, 2022.³ The Order also summarized recent correspondence between the Ministry and RSR or its contractors, and concluded that RSR had continued discharging contaminants into the environment, despite repeated instructions to cease discharging effluent into the Ditch and then into the River. The Order states that "Regular monitoring of RSR effluent indicates that the effluent entering [the River] exceeds [the Guidelines], in some cases, by multiple orders of magnitude ..." and thereby substantially alters or impairs the usefulness of the environment.

³ Mr. Dhillon reports, in an affidavit dated June 17, 2022 (not countersigned by a Notary Public or Commissioner for taking Affidavits), that he was informed by an unnamed party that the sample on February 28, 2022 was taken of water that represented a mixture of the effluent from the Plant and water emerging from the contaminated bioswale at the Facility.

[53] The Order requires RSR to it to:

1. immediately cease all waste discharges to the environment;
2. submit a report by a qualified professional, describing details related to the cessation of waste discharges into the environment;
3. record, for each of solid, sludge, slurry, and liquid waste streams generated at or removed from on-site infrastructure or mitigative works:
 - o the date and quantity of that waste generated at, stored on, and consigned, removed, or disposed of from the Facility;
 - o storage locations and their maximum capacity;
 - o a variety of laboratory analyses for effluent and each waste stream generated at, stored on, and consigned, removed, or disposed of from the Facility; and
 - o moving documents (waybills, manifests, bills-of-lading, etc.) for effluent or related waste streams consigned, removed, or disposed of from the Facility;
4. carry out specified laboratory sampling of effluent and waste stream discharge where the Ditch empties into the River, monthly (starting by April 15, 2022) and during or immediately after significant rainfall events (as defined in the Order);
5. submit monthly compliance reports from a qualified professional, reporting on achieving or maintaining compliance with the Order, and including various documents and information specified in the Order; and
6. documents to be completed by the qualified professionals performing work in response to the Order, with respect to their competency and any conflicts of interest.

[54] On May 27, 2022, RSR appealed the Order. In its Notice of Appeal, RSR requested a stay of the requirements in the Order.

[55] On June 10, 2022, FLNRORD advised RSR that it did not consider the Ditch to be a stream and that no approval was required under the WSA for the remediation work to proceed.

[56] On June 17, 2022, RSR filed its application for a stay. It requests a stay of the following portions of the Order:

- Item #1 - "Cease All Waste Discharges to the Environment: Immediately upon receipt of this order cease all waste discharges to the environment";
- Item #3 – Record, for each "Related Waste Stream" (defined to mean solids/ sludges/ slurries/ liquids generated at or removed from on-site infrastructure or mitigative works),
 - in clause b), the date and quantity generated at, stored on, and consigned, removed, or disposed of from the Facility, and
 - in clause d), laboratory analysis for parameters listed in Appendix B;
- Item #4 – Sample monthly, with retroactive effect approximately two weeks before the Order was issued starting "no later than April 15, 2022";

Item #4 - Sample during or immediately after 'significant rain events' which are defined to be any period in which "precipitation meets the intensity of 25 mm in 24 hrs as reported by Environment Canada at Vancouver Intl A station" and "immediately" is defined to mean "within 12 hours of EC recording precipitation equal to or in excess of 25 mm in 24 hrs"; and

Item #4 – Submit a "QP-certified daily record of visible flow at the Ditch/River sampling point ... for any missed monthly sampling due to lack of flow at this sampling point."

[57] In support of the stay application, RSR provided an affidavit dated June 17, 2022 by Harbinder Dhillon, the President of RSR; an affidavit dated May 18, 2022 by Leonard Firkus, the President and Chief Executive Officer of Stormtec; and, an affidavit dated June 17, 2022 by F. Keith H. Gagne, a Senior Consultant with PGL. Subsequently, RSR provided a second affidavit by Mr. Firkus, dated June 23, 2022.

[58] After it appealed the Order, RSR has continued to engage with the PGL to amend and update the Plan, which is required under the *British Columbia Vehicle Dismantling and Recycling Industry Environmental Planning Regulation*, B.C. Reg 200/2007 (the "*Recycling Regulation*"), to require improved stormwater treatment, instead of the bioswale and Ditch.

[59] RSR completed the new stormwater treatment system in February 2022 and says it has resulted in a reduction or elimination in the contaminants released by the discharge of stormwater from the Facility. The new stormwater treatment system is undergoing ongoing refinement.

[60] RSR has attempted to further reduce discharges to the River via the Ditch by installing a sump and pump system that redirects surface water in the Ditch to the new stormwater treatment system; however, some small amount of water may periodically be discharged from the Ditch.

INITIAL RULINGS

[61] RSR provided additional information in its final reply with respect to the stay application. This information included technical information pertaining to effluent from the Plant, which I do not consider appropriate to consider in this preliminary application. RSR had the opportunity to submit this information in support of its application but did not do so. It would be unfair to the Director to rely on this information.

[62] RSR has also indicated that its application for an approval under *EMA* to discharge stormwater into the River has been denied. RSR has, in fact, appealed a decision dated July 4, 2022, in which the Director refuses⁴ its application for an approval.

[63] RSR submitted arguments about the appropriateness of its application for an approval and the Director's denial of that application. I do not consider it fair to the

⁴ For reference, this describes appeal EAB-EMA-22-A010.

Director, to rely on this information without giving the Director an opportunity to comment. That said, I do not consider it necessary to give the Director the opportunity to address the fact that the Director denied RSR's application for an approval to discharge stormwater effluent to the River in the context of this preliminary application. As noted below, it is not a controversial fact and does not prejudice the Director in this decision.

[64] In their submissions, the parties also addressed whether the Order was necessary, appropriate, or practicable. This includes whether the Facility's stormwater discharges into the River have caused, or are likely causing, pollution, such that the Order is appropriate. This question may be addressed on the merits of the appeal. Neither party is asked to, or expected to, argue whether the Order is necessary or should have been made, or should have been made as it was in the context of this preliminary decision. Accordingly, I will not summarize those arguments or address them further in this preliminary decision.

[65] There was also conflicting information about the precise nature of RSR's operations, whether contaminants may seep into soil at the Facility, and whether the Director could have discovered contaminants that are intended to be addressed by having the Plant treat stormwater at the Facility. These are not relevant to this preliminary decision. As a result, while I have considered the information presented by both parties on this point, I will not discuss it in further detail.

[66] There are other factual disputes between the parties that are relevant to the stay application, for which there is limited available evidence. It is not uncommon for the parties not to have gathered all information they would ultimately submit with respect to an appeal, when a stay application is being considered. To decide this stay application (as with many), I must rely on the assertions of the parties to some extent. Where matters are controversial or technical, I must acknowledge limitations in the evidence and decide the stay application as best I can in the circumstances.

ISSUES

[67] I must decide two issues in this preliminary stay:

1. whether RSR's stay application is a collateral attack on the *EMA*, as argued by the Director; and
2. whether to grant RSR's application for a stay of certain portions of the Order, pending the outcome of this appeal.

ANALYSIS

1. Whether RSR's stay application is a collateral attack on the *EMA*

Summary of the Parties' Submissions

[68] The Director describes RSR's stay application as a collateral attack on the *EMA*, by effectively asking the Board to authorize it to discharge effluent into the environment, bypassing the administrative and regulatory process, and defying the Director's decision to deny RSR's application for authorization to discharge effluent

into the River. The Director says this is sufficient cause to dismiss RSR's stay application.

[69] The Director says a collateral attack is an "impermissible attempt to nullify the result of another proceeding outside the proper channels for review of that decision".⁵ The Director says that, by seeking a stay of the Order, RSR is seeking to circumvent the Director's power to authorize discharge of waste into the environment pursuant to sections 14 and 15 of the *EMA*.

[70] RSR says that its stay application is not a collateral attack. Using the Director's criteria for defining a collateral attack, RSR says the Board is the appropriate venue to consider a stay and there is no separate proceeding involving this application. In any event, that is not a relevant consideration under the *RJR-MacDonald* analysis. RSR also says that the Director's reasoning is "perverse", as it amounts to a statement that a pollution abatement order should never be stayed if its legality is challenged.

Panel's Findings

[71] I find that the stay application is not a collateral attack on the *EMA*. A stay would temporarily suspend the operation of some portions of the Order until the Board decides the merits of the appeal. The temporary suspension of those portions of the Order would not mean that any effluent being discharged would be authorized under *EMA* or that RSR can bypass the regulatory process for obtaining an authorization to discharge waste into the environment. The stay application is a request to delay the implementation of some parts of a pollution abatement order that the Director is using to compel RSR to do certain things. If the Board stays the requested portions of the Order, this does not mean that the First Order (a pollution prevention order) is stayed, or that RSR's discharge of effluent is authorized. Moreover, even if the stay is granted, the portions of the Order that are not the subject of the stay application would remain in effect.

2. Whether RSR's application for a stay should be granted based on the three-part test set out in *RJR-Macdonald*

Applicable Legal Test

[72] Both parties agree that the test the Board should apply in deciding the stay application is the one found in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR-MacDonald*].⁶

[73] The test described in *RJR-MacDonald* involves consideration of three questions, whether:

1. there a serious issue to be tried;
2. the applicant established that it will likely suffer irreparable harm if the stay application is denied; and

⁵ *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227 at para. 39.

⁶ RSR says that the applicable legal test is "essentially" the one from *RJR-MacDonald*, but RSR does not describe in any way how the Board should deviate from what is described in that case, or any other test that the Board should apply, in addition or instead.

3. the balance of convenience favours granting the stay application.

[74] I agree that this is the applicable test. The Board has regularly and routinely applied this test. Absent any convincing argument that the Board should modify this test or apply a different one, I will consider the three questions contained in the test from *RJR-MacDonald*.

Serious Issue

Summary of Parties' Submissions

[75] RSR submits that the Order imposes onerous obligations on it, and the appeal involves serious questions of fact and issues of law. The appeal is not frivolous or vexatious and merits serious consideration by the Board.

[76] The Director says the question of whether he had reasonable grounds to believe that RSR's effluent discharge was "pollution" for the purposes of section 83 of the *EMA* is not vexatious or frivolous. This necessarily involves an assessment of technical evidence. The Director does not dispute that RSR has met the low threshold of the first branch of the *RJR-MacDonald* test.

Panel's Findings

[77] With respect to the first part of the test, both parties say that the appeal raises a serious issue to be tried. I agree. The portions of the Order that are the subject of the stay application compel RSR to do a number of things that it does not wish to do. RSR challenges both the legal and factual basis for the Order. RSR raises concerns about the Order that will require the Board to decide questions of law and fact, which are not trivial or vexatious. The Board should consider these issues on their merits. I find that there is a serious issue to be tried in this appeal.

Irreparable Harm

RSR's submissions

[78] RSR says that requirements contained in items 2b, 2c, 2d, 4, 5b, 5d, and 5e of the Order duplicate the requirements in the First Order, as subsequently amended. Furthermore, RFR says it is subject to the *Recycling Regulation*, which also has requirements that are substantively duplicated in parts 3c, 3d, and 5d of the Order.

[79] With respect to the first element of the *RJR-MacDonald* test, RSR says that it only has to show "credible evidence" of irreparable harm. RSR says that it has presented enough evidence to establish that complying with the Order would require it to violate the DFO Directive. Furthermore, compliance would require RSR to spend money that it will not be able to recover if it is successful in this appeal. RSR notes that the Board has previously held that "... the lack of a mechanism to obtain recovery of money spent in complying with an order that is later set aside constitutes irreparable harm."⁷

⁷ See, for example, *Comet Investments Ltd. v. British Columbia (Ministry of the Environment)*, Decision No. 2011-WAT-009(a)-010(a), September 29, 2011.

[80] RSR relied on Mr. Dhillon's affidavit dated June 17, 2022, to quantify its costs of compliance. According to Mr. Dhillon, pumping and removing an estimated 40,000 cubic meters of stormwater from the Facility's stormwater system would cost in excess of \$10,000,000 per year. Mr. Dhillon also says that remediating the Ditch and bioswale immediately, rather than when they are drier, would increase the cost of remediation from around \$3,000,000 to around \$6,000,000. Furthermore, Mr. Dhillon says that RSR would need to hire an additional employee to handle additional work required under items 3 and 5 of the Order, and he estimated this would cost in excess of \$60,000 per year. Mr. Dhillon added that laboratory analyses required under the Order cost at least \$10,000 per month.

[81] Furthermore, RSR says the Order prohibits all waste discharges from the Facility, even those authorized under an air emissions permit that it holds. This would mean that RSR must stop operating and would incur irrecoverable losses of revenue.

The Director's submissions

[82] The Director argues that RSR provided insufficient evidence to support its claim that it would suffer irreparable financial harm if a stay is denied. RSR failed to explain why remediation of the bioswale and Ditch at the Facility is the only way that it can comply with the Order, or to adequately describe the remediation it says is required. RSR has not explained what remediation was proposed to DFO, and what DFO authorized or did not authorize.

[83] Furthermore, the Director argues that RSR described alternatives to remediation that would allow it to comply with the Order's requirement to halt emissions, such as by covering principal sources of contamination from rainwater, filtering contaminants from stormwater, and pumping collected stormwater out for disposal instead of discharging it into the River.

[84] The Director also says that RSR's argument that it would suffer irreparable financial harm to comply with the Order is vague and unsubstantiated. Furthermore, the impact of the estimated cost on RSR was undefined. The Director also argues that those costs are associated with complying with its legal obligations to not discharge effluent into the River without authorization, not costs of complying with the Order. These are part of the costs of operating a recycling facility, and ensuring that the surrounding environment is not inappropriately impacted.

[85] Similarly, the Director says that RSR did not adequately support its contention that its remediation costs would be doubled if the remediation was carried out earlier than RSR would prefer. However, even if the Board accepts RSR's evidence on this point, the Director says these are costs associated with RSR's operations in a heavily regulated industry.

[86] Finally, the Director says that RSR's argument that the Order precludes all emissions, and so necessitates the shutdown of the Facility, is unreasonable. The Director argues that the overall context of the Order establishes that it pertains to the discharge of effluent into the River.

RSR's reply

[87] RSR expressed surprise that not all waste discharges are included under the Order, despite its wording. RSR was “grateful” to hear that the Order is intended to capture only the discharges into the River.

[88] RSR adds that, although not all the steps it presented may be required to comply with the Order if a stay is denied, some will be, and this will result in material expense for RSR. RSR says the Director does not dispute that material costs required to comply with the Order (including costs associated with certifications from qualified professionals and laboratory analyses) will be irrecoverable. RSR says that it does not need to present irrefutable proof, particularly where the exact dollar figure of compliance costs is not known, but just some evidence to support its assertion that it will suffer irreparable harm if the stay is denied. RSR says the Director did not dispute the credibility of the evidence, but rather argues that more should have been provided. RSR disagrees and says it has met the required level of proof for a stay to be granted. Because the Board cannot order the recovery of all these costs, they constitute irreparable harm to RSR.

[89] RSR says that, in order to comply with the Order, it must somehow contain, collect and dispose of all rainwater that falls on the Facility. This is not the case where altering work processes or turning off a tap can address the concern underlying the Order.

[90] RSR also says that it does not need to establish a financial impact. Both parties have agreed that the magnitude of the harm need not be considered under the second branch of the *RJR-MacDonald* test, yet the Director saying that evidence of financial impact is lacking contradicts that point of agreement.

Panel’s findings

[91] The submissions from RSR indicate that, even if I stay the Order, RSR would still have to satisfy the requirements in items 2b, 2c, 2d, 3c, 3d, 4, 5b, 5d, and 5e, because the First Order and/or the *Recycling Regulation* would still require RSR to do those things. As a result, there is no irreparable harm associated with those portions of the Order, as RSR says it must comply with those requirements in any event. As a result, these portions of the Order do not satisfy the test for irreparable harm in *RJR-MacDonald*.

[92] The elements which remain are contained in items 1, 2a, 3a, 3b, 3e, 5a, 5c, and 6. RSR did not seek a stay of any portion of items 2, 5, or 6, or item 3a, item 3e. The remaining elements that RSR seeks to have stayed are items 1 and 3b. Those elements require RSR to:

1. cease all waste discharges to the environment (item 1); and
2. for each effluent and related waste stream, record the date and quantity generated at, stored on, and consigned, removed, or disposed of from the Facility (item 3b).

[93] RSR’s arguments focused on the requirement in item 1 of the Order that it cease all waste discharges into the environment (which I have accepted, for the purposes of this preliminary decision, will only be enforced with respect to discharges into the River), and the associated requirements to provide information as required by item 3b of the Order. RSR’s other arguments, particularly those

involving laboratory analyses, relate to obligations that would exist whether or not I granted the stay requested by RSR. Consequently, I find that any costs which RSR may incur to comply with requirements that are imposed by both the Order and either legislation or another order do not satisfy the "irreparable harm" portion of the test in *RJR-MacDonald*. The Order is not the only source of the requirements that lead to those costs. These requirements are also imposed by legislation, the validity of which has not been challenged, or the First Order, which has not been appealed. Therefore, those costs would be incurred even if a stay of the Order is granted.

[94] In support of its position, RSR says that not discharging waste into the River requires it to create a barrier so runoff from the Ditch does not enter the River, and to remediate the bioswale and Ditch.

[95] I agree. Based on the information from PGL, I find that, in order to address all waste flowing into the River, the bioswale and Ditch, downstream of the Facility's stormwater treatment infrastructure, must be remediated. I acknowledge the Director's argument that RSR ought to have explained why no alternatives were possible, but I consider the information from GFL (provided by RSR) to be sufficient, at least for the purposes of this preliminary decision.

[96] RSR says building a barrier in the Ditch would violate the DFO Directive, but I find that not to be the case. RSR also says that remediation would be more costly during the spring than the summer, although as RSR noted in its reply submissions, the dryer months have arrived, so that concern is no longer applicable.

[97] RSR also argues that the work required to prevent the discharge of waste into the River constitutes irreparable harm to RSR's interests. Even if RSR is correct that it must create a barrier, remediate the bioswale and Ditch, or both, I disagree that this constitutes irreparable harm to RSR. Section 6(2) of the *EMA* prohibits RSR from discharging waste into the environment, because RSR does not hold an authorization allowing it to discharge any waste. In my view, the expenses associated with legislative compliance in the circumstances of this case cannot be claimed as irreparable harm, where one is ordered to comply with legislation that already applies, and where there is no challenge to the validity or applicability of that legislation.

[98] RSR also argues that it is incurring expenses associated with reporting information a required by item 3b of the Order. Mr. Dhillon has estimated that the cost of complying with items 3 and 5 of the Order to be in excess of \$60,000 per year. The Director has described this estimate as vague and unsubstantiated.

[99] I have concerns about Mr. Dhillon's evidence. The \$60,000 figure is presented as a conclusion without providing the underlying analysis used to derive that amount. This makes it impossible to determine what amount Mr. Dhillon would say is associated with compliance with item 3b (for which irreparable harm may exist), rather than the rest of item 3 and item 5 from the Order (for which I have found there is no irreparable harm). Even though I agree with RSR, that all the applicant must do is to "... provide credible evidence in support of the claim for irreparable harm", and that that evidence "... need not be so strong as to be irrefutable, but there should be evidence in support of the harm alleged", Mr.

Dhillon's evidence is insufficient. It is an asserted figure that includes the estimated costs of complying with all of items 3 and 5 of the Order, when only certain elements would not be required if the stay were granted. The estimate is not sufficiently robust or well-explained to be reliable.

[100] Furthermore, to succeed in its application, RSR must show that it will likely be irreparably harmed by the irrecoverable financial expenditures. The comment in *RJR-MacDonald* that establishes that irrecoverable financial expenditures can amount to irreparable harm discusses these expenditures only in the context of their irreparable nature:

'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 ...⁸

[101] As noted in that quote, it is not the magnitude of the irrecoverable financial expenditures that matters, it is the nature of the resulting harm. This means that the applicant for a stay must show that the level of expenditures would likely cause it to suffer irreparable harm. Here, RSR has not discharged that obligation. There is no evidence that denying the stay application will likely cause RSR to be put out of business, or to suffer permanent market loss or irrevocable damage to its business reputation. Further, there is insufficient evidence to conclude that RSR will likely suffer irreparable harm for any other reason, as a result of the financial losses it has described in its application and submissions.

[102] For these reasons, I conclude that RSR has not established that it will likely suffer irreparable harm if the stay is denied. While I do not need to address the balance of convenience, for the sake of completeness, I will do so.

Balance of Convenience

RSR's submissions

[103] RSR says that neither the environment nor the Ministry will suffer harm if the stay is granted. Stormwater quality has significantly improved and is now in substantial compliance with the Guidelines. RSR relied on Mr. Firkus' May 18, 2022 affidavit on this point. The affidavit states that RSR had taken "significant" steps toward compliance with the Guidelines, and he expected the Plant's effluent to comply with the Guidelines, other than for biological oxygen demand ("BOD") and PCBs, after improvements were made to the Plant on May 13, 2022, and particulate is removed from the stormwater as a pre-treatment step. Mr. Firkus' June 23, 2022 affidavit appended laboratory analyses, showing that the Plant's effluent had become compliant with the Guidelines, other than for BOD and PCBs (which were

⁸ See paragraph 59.

not detected in those samples, although the detection limit was above the concentration listed in the Guidelines).

[104] RSR argues there is no risk that the stormwater's quality would significantly change if the stay is granted, or that the volumes of stormwater being produced or likely to be produced would result in any significant environmental harm. RSR says that there is not enough evidence to support the conclusion that there is any actual alteration or impairment of the usefulness of the environment, let alone to a substantial degree as required by the definition of "pollution" in the *EMA*.

[105] In particular, RSR says that the fact that effluent may exceed the Guidelines in some respects does not establish any environmental harm. RSR says that the Guidelines are not a legal standard, but rather a policy document of generic application for the assessment of water quality and environmental impact assessments.

[106] Even if the Guidelines are used, however, RSR relies on Mr. Gagne's June 17, 2022 affidavit, which says that the Order is materially and factually incorrect, when it says that RFR's effluent discharge from 2020 onward exceeded the Guidelines, in some cases by multiple orders of magnitude.

[107] RSR also argues that the evidence establishes that the Plant has mitigated the contaminants present in stormwater that is ultimately discharged into the River, and that RSR is working to continually improve the Plant's performance. RSR says it intends to build a barrier to prevent surface water from the Ditch to discharge into the River. The only discharge into the River is now, and will be, effluent from the Plant. RSR argues that there is insufficient evidence to conclude that there are any impacts to the River as a result of these improved discharges.

[108] RSR says that, even where PCBs in the effluent exceed the Guidelines, the quantities involved are "incredibly miniscule". RSR says the dilution factor of discharging up to 300 gallons per minute into the River is "overwhelming" such that the discharge cannot be causing pollution (Gagne affidavit 1, para. 13). RSR says that, because PGL found no impacts to River sediments at the point of discharge, there are no material impacts from the discharge of effluent from the Plant.

[109] RSR also argues that granting the stay will allow it to focus on work which will lawfully allow it to prevent pollution. RSR says that, by contrast, the Order is not appropriate and is not reasonably required to protect the environment. RSR says it has demonstrated its willingness to continue to work diligently and in good faith to resolve concerns related to its stormwater discharges. In particular, it has engaged PGL to create a Plan that responds to the concerns underlying the Order. RSR has undertaken to proceed with any additional remedial work contemplated in that Plan as soon as it can do so without violating applicable laws, in particular the outstanding DFO Directive. Furthermore, even if stormwater discharges do not always meet the applicable Guidelines, the evidence does not support a conclusion that pollution is occurring or is likely to occur.

[110] RSR argues that the public interest is best served by allowing the appeal to continue, and be resolved through settlement or mediation, or with a decision by the Board.

[111] Furthermore, the public interest favours allowing the DFO Directive to take precedence over the Order—as its validity is not disputed, whereas the Order’s validity is. Allowing the Order to remain effective pending the conclusion of the appeal will require RSR to contravene a lawful directive of the DFO, create confusion, and bring the law and its administration into disrepute. By contrast, staying the Order will allow RSR to implement the measures indicated in the Plan, within the calendar window authorized by DFO. This will bring about compliance with the Order, or confirm that the discharge-related terms of the Order are already satisfied.

The Director’s submissions

[112] The Director says the balance of convenience favours denying the stay application, because RSR’s discharges are harmful to the environment and contrary to the public interest. Granting the stay would allow RSR to avoid complying with the environmental monitoring and reporting requirements necessarily associated with a request to discharge effluent into the environment.

[113] The Director says that the *EMA*’s purpose “... is to protect the environment and human health while allowing industry to operate under regulated conditions”. The Director also notes that the *EMA* prohibits the introduction of waste into the environment in a manner or quantity that causes pollution. Pollution is defined in section 1 of the *EMA* as “the presence in the environment of substances or contaminants that substantially alter or impair the usefulness of the environment”. Section 83 empowers the Director to make pollution abatement orders such as the Order, which require the controlling, abating, or stopping of pollution, or remediation, if the Director is satisfied on reasonable grounds that a substance is causing pollution. The Director says the Order’s purpose is twofold: to stop unauthorized contaminated discharge into the River; and to gather the information needed to assess the risk of harm associated with the discharge.

[114] The Director references paragraph 71 of *RJR-MacDonald*, which states (in part):

... in the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly from a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from restraint of that action.

[115] The Director notes that the Board has previously found, in *North Fraser Harbour Commission v. British Columbia (Ministry of Environment, Lands and Parks)*, (Appeal No. 97-WAS-05(a), June 5, 1997) [North Fraser Harbour] and *Howe Sound Pulp and Paper Ltd. v. Director, Environmental Management Act*, (Appeal No. 2008-EMA-001(a), March 7, 2008) [Howe Sound], that decisions made

under the EMA to regulate or control waste discharged to the environment are assumed, on their face, to be made in the public interest.

[116] In this case, the Director argues, the Order was intended to stop the discharge of unauthorized waste into the River, and to assess the harm associated with that discharge. The Director argues this is clearly in the public interest, as the decision fulfills the mandate of the Director to protect the environment for present and future use by controlling, ameliorating, and eliminating negative effects of pollution. In fact, the Director argues that RSR's estimate that it would have to remove 40,000,000 litres of stormwater only serves to establish the volume of effluent being discharged into the River.

[117] The Director says that this public interest function outweighs the unsubstantiated cost estimates and inconveniences RSR says it will face, which the Director says are more properly characterized as the costs of running a commercial waste management facility bordered by a large body of water, in a highly regulated industry.

[118] The Director says that RSR's attempts to minimize the urgent environmental risk posed by its contaminated effluent must not be accepted. RSR's ongoing effluent discharge poses unquantifiable risks to the environment, and there is the potential for irreparable harm to the environment if the Order is stayed. The Director argues that a stay would authorize this unauthorized effluent discharge, without the regulatory requirements normally imposed, including assessment, monitoring, and reporting. The Director says that this would "severely disrupt the balance".

RSR's reply

[119] RSR says that it is not trying to circumvent the regulatory process and has, in fact, applied for an authorization under the *EMA* to discharge waste in its stormwater.

[120] RSR also emphasizes that there is a public interest in allowing it to continue operating, as it diverts material from landfills and from being left to rust and deteriorate around the province. It also reduces environmental externalities associated with mineral exploration, mining, transportation, energy consumption, smelting, and metal fabrication by recycling metal from end-of-life products.

[121] RSR concedes that the Ministry is tasked with the protection of the environment, which is in the public interest, but says that the Ministry's focus on enforcement in this case does not serve that interest. RSR says that its efforts to address the stormwater problem predate the imposition of the Order and have only been made more difficult by the Director's refusal to engage with RSR on the issue.

[122] RSR says that the Director has not established that he will suffer any irreparable harm if the stay is granted, beyond "vague generalizations". RSR says the Director has not established any "compelling public interest" that will be served by denying the stay application. RSR says that, as the appeal proceeds, it will continue to optimize the Plant, remediate the bioswale/ditch, and implement other measures contemplated in the Plan to achieve discharges that comply with the Guidelines.

[123] Insofar as the Director says he is concerned with unauthorized discharges into the River, RSR argues that the Director, in denying RSR's application for an authorization, has perpetuated this concern. The Director's denial of RSR's application for an approval has led it to apply for a permit instead, although that process is ongoing.

[124] Insofar as the Director says that the Order is necessary to gather information, RSR argues that this supports that the Director does not have a reasonable basis to argue there is any urgent need to protect the environment against pollution. RSR says it plans to make further improvements to further reduce the contaminant concentrations in its effluent. RSR notes the Director did not address these facts and did not assess the impacts the effluent discharge has had, or is having, on the environment.

[125] Furthermore, RSR says that the First Order requires it to submit information to the Director, and RSR has done so and continues to do so. RSR argues that it is neither appropriate nor necessary for the Order to be used to gather that information. RSR also says that the Director could have obtained information by engaging with RSR after it applied for an authorization, but the Director chose not to do so.

[126] RSR also says it has shown it is taking all reasonably possible steps to abate the risk of pollution and reduce or eliminate the discharge of contaminants, and to obtain an authorization for the discharge of stormwater to the River. RSR says the Director would have better protected the environment by engaging with RSR, rather than imposing the Order.

[127] RSR does not dispute that the Director has the authority to protect the environment but argues that he cannot abuse his authority by acting without reasonable evidence, in an arbitrary and unfair manner. RSR continues to seek authorizations under the *EMA*, showing its respect for the relevant regulatory requirements. RSR is not asking the Board to authorize a discharge, but to address the Order, which RSR says was issued without proper legal foundation and without the assessment needed to conclude that the discharge was causing pollution. RSR has also asked that the Director be required to respect the requirements of the *EMA*. It has asked him to consider its application for an approval and now for a permit, authorizing discharges of treated stormwater into the River. RSR says the Director has an ability to authorize this discharge, and to set "appropriate conditions" on it.

Panel's findings

[128] The balance of convenience test considers "... which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction ...",⁹ in this case RSR's application for a stay of the Order, pending the outcome of the appeal.

[129] I have already found that RSR provided insufficient information to show that the financial burdens associated with the Order (and distinct from those required

⁹ *RJR-MacDonald*, at paragraph 62.

for statutory or regulatory compliance, and from those required to comply with the First Order) are likely to cause RSR to suffer irreparable harm. Even if RSR did incur unrecoverable costs to comply with the Order, RSR has not provided reliable information to quantify those costs and show that they would likely cause RSR to suffer irreparable harm.

[130] I have also already found that the Director has misconstrued the effect of granting a stay. If granted, it would not mean RSR is authorized to discharge any waste into the environment, or circumvent any regulatory requirements normally required where such discharges are authorized under the *EMA*. Rather, it would suspend certain requirements in the Order until the appeal concludes. Granting a stay in this case would not “severely disrupt the balance”, as the Director argues, or circumvent the regulatory process.

[131] I turn now to the public interest considerations. Both parties have asserted that the public interest supports their position. I will deal first with the arguments that granting the stay is in the public interest.

[132] First, I agree with RSR that its operations are in the public interest, insofar as the Facility recycles end-of-life products and helps to avoid the need to manufacture or import certain materials. I accept Mr. Dhillon’s evidence that RSR serves an important environmental purpose. However, as noted by RSR, compliance with the Order is independent from any cessation or reduction of its operations. RSR has not indicated that compliance with the Order would affect its ability to carry on its business. As such, the public interest in RSR continuing to operate is not impacted by whether the stay application is granted.

[133] Second, insofar as RSR has argued that the public interest supports having the DFO Directive take precedence over the Order, at this point there is nothing stopping RSR from engaging in the remediation of the bioswale and Ditch, while still following the DFO Directive.

[134] Third, insofar as RSR argues that the public interest is served by allowing the appeal to continue, to be resolved through settlement, mediation, or a final decision by the Board, it is unclear how denying the stay would preclude such a resolution. This is particularly so given that RSR has not yet succeeded in obtaining an authorization to discharge effluent into the River. The issues surrounding the Order are likely to remain for some time, until resolved in one of the ways contemplated by RSR, whether or not a stay is granted.

[135] Fourth, I agree with RSR that it has worked proactively to address the problem with its stormwater and runoff, but I do not agree that the Order distracts it from addressing this work to protect the environment. RSR has said that it intends to complete the remedial work proposed in the Plan as soon as possible, and I have found that this requires the remediation of the bioswale and Ditch. This is the case regardless of whether the stay application is granted. Therefore, RSR’s completion of the remedial work, either under the Order or not, does not factor into the balance of convenience test.

[136] In summary, I conclude that staying the Order is not in the public interest. I turn now to the arguments that denying the stay is in the public interest.

[137] Both parties agree that the Director has the authority under the *EMA* to protect the environment, which I have found to be in the public interest. I find that the Order is, on its face, an attempt to protect the environment, based on the Director's authority under section 83 of the *EMA*. As stated in paragraph 71 of *RJR-MacDonald*, which is reproduced above (and as described in *North Fraser Harbour and Howe Sound*), this decision would ordinarily be assumed to also be in the public interest in protecting the environment, and a suspension of that decision (a stay) would be assumed to run counter to that public interest.

[138] I consider this case to fall within that general presumption, and RSR has not provided a persuasive reason to conclude that the general presumption should not apply. I address its arguments in turn, below.

[139] First, while RSR asserts that the Order was made unfairly, arbitrarily, and based on insufficient evidence, these are questions that will only be addressed when considering the merits of the appeal.

[140] Second, it is insufficient that RSR has sought authorizations that would allow it to discharge effluent into the River. Merely applying for such authorizations does not mean that the Ministry cannot enforce the prohibition in section 6(2) of the *EMA* against prescribed industries discharging waste into the environment without a valid and subsisting permit or approval. If this were the case, enforcement would become impossible whenever a party facing enforcement applied for an authorization under the *EMA*.

[141] Third, while RSR says the Director is not concerned with the nature of the discharges into the River, but rather that they are unauthorized, RSR has provided insufficient information to support that position and rebut the presumption in favour of the Order being in the public interest in protecting the environment. The fact that the Director denied RSR's request for an authorization under the *EMA* does not mean that he is motivated only by the unauthorized nature of the effluent discharges from the Facility.

[142] Fourth, I disagree with RSR's contention that the Director's desire to gather information is inconsistent with any urgent environmental concern. The Director is obviously gathering information via both the First Order and the Order. This does not mean that the situation is not urgent—I have concluded that there is not enough information to determine whether that is the case. Only by gathering more information can the Director determine the magnitude of the environmental risks associated with RSR's discharge of effluent into the River.

[143] Fifth, while I have agreed with RSR that there has been significant improvement in the concentration and overall volume of contaminants being discharged into the River, there is undisputed evidence that the Guidelines were still being exceeded when the Order was issued, particularly with respect to certain metals and PCBs. The latter exceed the concentration thresholds in the Guidelines by one to four orders of magnitude, depending on whether the water discharging into the River comes as runoff from the Ditch or effluent from the Plant. I disagree that RSR is substantially complying with the Guidelines for those contaminants of concern.

[144] I wish to emphasize that it is not only the effluent from the Plant that must be considered. RSR has argued that rainfall will be low in the coming months. This is likely true, relative to levels earlier in the calendar year; however, the evidence presented to the Board does not support an inference that the discharge of any contaminants included would be reduced in a way that would be proportional to the decrease in rainfall. The evidence does not establish whether contaminant load within the surface water is linearly proportional to the quantity of rainfall. Furthermore, and more significantly, it is unlikely that an appeal of this complexity would be resolved during the relatively dry period in the region. As a result, this does not suggest that the lower level of rainfall in certain months supports granting RSR's requested stay.

[145] I recognize that, since the Plant has become operational, the Facility is discharging fewer contaminants, and at a lower concentration, than beforehand. In particular, surface water samples have indicated that exceedances for toluene have become less frequent. The frequency and magnitude of polycyclic aromatic hydrocarbons exceedances have been significantly reduced. Peak PCB concentrations were also significantly reduced. That said, surface water samples continue to show regular and significant exceedances of the PCB thresholds listed in the Guidelines (at times by a factor of over 1,000 times). Water samples continued to exceed the Guidelines for metals (at times by over 100 times the concentration in the Guidelines), some to a greater degree than before the Plant became operational and some to a lesser degree, where the Ditch empties into the River (where the Plant also discharges).

[146] Furthermore, the samples taken of the Plant effluent indicate that it contributes at least some of the contaminants to the discharge into the River. Exceedances of the Guidelines were present for toluene, metals, and PCBs. In particular, total PCB levels exceeded thresholds from the Guidelines by factors of 10 and 100 on the two testing days. Subsequent testing of the effluent does not establish that PCB concentrations have reached the objectives described in the Guidelines. As a result, I find, based on the evidence available, that contaminants from the Facility are discharged into the River, both by runoff from the Ditch and by Plant effluent.

[147] The samples taken where the Ditch empties into the River and the samples of the Plant's effluent are the best available evidence that indicates that contaminants are being discharged, as waste, into the River. As a result of these analyses, I conclude that, even if runoff from the Ditch is variable and intermittent, the Plant is discharging contaminated effluent into the River, and any surface water that is variably discharged from the Ditch likewise introduces contaminants into the River. Regardless of whether the Director could have or should have known what contaminants the Plant was intended to treat, the analyses indicate that the Plant is not yet removing sufficient amounts of all contaminants of concern from the stormwater that it is treating.

[148] RSR has argued that the Guidelines do not represent a legal standard, and I agree. At this point, the Director has submitted them as an indication of appropriate levels of water quality based on a vague description of research done at the Ministry. RSR has not, however, provided any persuasive information about

appropriate water quality standards for the contaminants of concern in this appeal. RSR refers to the "LC50 Trout toxicity test" and the standards in the *Hazardous Waste Regulation*, but RSR does not explain why those are more appropriate to use than the Guidelines when assessing the environmental risks associated with the discharge. Furthermore, RSR does not seem to object to the use of the Guidelines as a standard of water quality outside of this appeal. Mr. Firkus and Mr. Gagne both referred to the Guidelines when describing the contaminated surface water problem that both the Ministry and RSR are attempting to address. Moreover, RSR's submissions state that RSR is "committed to installing a permanent water treatment plant on the Site; one specifically engineered and designed to meet [the Guidelines]."

[149] As a result, although I acknowledge that the Guidelines are a policy of general application, and the research underpinning the Guidelines has not yet been explained well, I find that the Guidelines remain the best information available at this stage in the appeal process. They are sufficient for the purposes of this preliminary decision, for the reasons provided above, to establish a rough benchmark for water quality that will not substantially alter or impair the usefulness of the environment.

[150] As a result, I am not persuaded that there is no significant environmental harm attributable to these discharges. A pollution prevention order may only be issued when a director is satisfied on reasonable grounds that a substance is causing pollution. In the *EMA*, "pollution" means substances that substantially alter or impair the usefulness of the environment. By contrast, I consider the risk of environmental harm, even acknowledging that it is an uncertain given the information available at this time, to run counter to the public interest. RSR has not provided sufficient information to rebut the presumption that the Order, issued by the Director to protect against substances that he had reasonable grounds to believe were substantially altering or impairing the usefulness of the environment, was issued in the public interest for that purpose.

[151] RSR has also made arguments about the impacts associated with the discharges from the Facility, into the River. I will consider RSR's arguments, however, in determining whether the impact to the environment is low, as a factor to consider in the balance of convenience test.

[152] First, RSR characterizes the amount of PCBs in the available water samples as "miniscule". This is true as a fraction of the water sample; however, there is insufficient evidence to conclude that such a small fraction of PCBs would have a small impact on the receiving environment. The Guidelines provide some support for the conclusion that these "miniscule" concentrations can nonetheless have significant environmental impact.

[153] Second, RSR argues that, because PGL found no impacts on sediments at the point of discharge, there were no material impacts associated with the discharge of contaminants from the Facility, into the River. However, I find that RSR did not provide sufficient evidence to establish that these contaminants would have settled, adhered, or otherwise come out of solution and would be detectable in sediments in and around where they were introduced into the River. There is insufficient reason to conclude that any impacts on water in the River could be equated with the

detection of the contaminants at issue in sediments around where the Ditch discharges into the River.

[154] Third, RSR refers to Mr. Gagne's affidavit, stating that any contaminants flowing into the River would be so diluted that there would be no meaningful environmental effects. I find that Mr. Gagne did not adequately explain the basis for this opinion. No hydrological information was presented to establish that dilution would be effective in the environment close to the point of discharge from the Facility, into the River. For the same reason, I do not find Mr. Gagne's opinion to be persuasive.

[155] For these reasons, I am not persuaded that RSR's arguments about the impacts of the discharges rebut the presumption that the Order, made pursuant to the Director's authority to protect against substances that he had reasonable grounds to believe were substantially altering or impairing the usefulness of the environment, is in the public interest.

[156] Furthermore, even if RSR is diligently working to reduce its discharge of contaminants into the River, that is not enough to justify a stay of the Order. While RSR submitted that its efforts to resolve the problem have been made more difficult by the lack of engagement from the Director, this does not relieve RSR from the obligation to comply with the requirements of the *EMA*. That RSR thinks the process would have been easier if the Director had been more cooperative does not displace the presumption that the public interest would be harmed by staying the Order.

[157] Sixth, while RSR argues that the Director could have obtained information that must be provided under the Order through engagement with RSR, this does not displace the presumption that the Order is in the public interest. It is not enough to assert that another avenue could have produced the same results as are sought with the Order.

[158] In summary, I find that the Order is presumed, on its face, to be in the public interest in protecting the environment. RSR has not provided persuasive arguments or evidence that maintaining the Order is not in the public interest. As a result, the balance of convenience favours denying the stay application. Furthermore, I consider that even if granting a stay of the Order may result in some financial harm to RSR, it is poorly-defined and modest in magnitude, and is not irreparable in nature. Even in such a case, I would consider the public interest in denying a stay of the Order to outweigh the modest financial harm that RSR may suffer if a stay is denied.

CONCLUSION

[159] For the reasons above, I deny RSR's application for a stay of the Order, pending the outcome of the appeal.

[160] In deciding this preliminary application, I have considered all evidence and submissions provided to the Board, whether or not specifically mentioned in this preliminary decision.

“Darrell Le Houillier”

Darrell Le Houillier, Panel Chair
Environmental Appeal Board

October 3, 2022