Environmental Appeal Board
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**DECISION NO. EAB-WSA-22-A002(a)**

In the matter of an appeal under the *Water Sustainability Act*, SBC 2014, c. 15

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| **BETWEEN:** | Enfys Pooler | **APPELLANT** |
| **AND:** | Assistant Water Manager | **RESPONDENT** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Brenda Edwards, Panel Chair | |
| **DATE:** | Conducted by way of written submissions concluding on November 8, 2022 | |
| **APPEARING:** | For the Appellant: Jeffrey Frame, Counsel | |
| | For the Respondent: Livia Meret, Counsel<br>Amanda Macdonald, Counsel | |

## STAY APPLICATION DECISION

## INTRODUCTION AND PROCEDURAL BACKGROUND

[1] This is an application by Enfys Pooler (the "Appellant") for a stay of an Engineer's order (the "Order") issued by an Assistant Water Manager (the "Water Manager") on June 20, 2022.

[2] The Order requires the Appellant to take certain steps to decommission and remove a dam associated with works authorized by Conditional Water Licence 102838 by October 31, 2022.

[3] On July 26, 2022, the Appellant filed a Notice of Appeal seeking to have the Order quashed.

[4] On August 3, 2022, a case manager at the Board noted that the Notice of Appeal appeared to have been filed outside of the statutory time frame for submitting an appeal. As a result, she sought clarification from the parties as to when and how the Order was delivered to the Appellant.

[5] After hearing from the parties, the case manager wrote the parties on August 11, 2022, stating that after hearing from the parties, the Board considered that, based on the information from the parties, the Order would be considered to have been delivered to the Appellant on July 4, 2022, and the Notice of Appeal to have been filed within the 30-day appeal deadline, subject to any application from the Water Manager objecting to the Board's conclusion.

[6] On October 12, 2022, the Appellant applied under Rule 16 of the Board's Rules of Practice and Procedure, for a stay of the Order. In her application, the

Appellant listed 19 "facts". She also appended an affidavit in support of the application.

[7] On October 27, 2022, the Water Manager wrote the case manager stating that he did not oppose a stay but did not agree with the facts cited in support of the Appellant's application. The Water Manager did not specify which facts he contested. The Appellant did not file a reply submission.

## THE ORDER

[8] The order begins with a reference to the authority under which the Order is made, i.e., section 93 of the Act. What follow are a series of preambular clauses listing a series of facts or conditions which have not yet been established in the appeal.

> **WHEREAS** Enfys Mair Pooler is the registered owner of THE EAST ½ OF THE SOUTH WEST ¼ OF SECTION 8, TOWNSHIP 17, RANGE 17 WEST OF THE 6th MERIDIAN, KAMLOOPS DIVISION, YALE DISTRICT EXCEPT THE LAND COVERED BY THE WATERS OF NAPIER LAKE AT TIME OF SURVEY OF SAID LAKE AND EPP67190, and;
>
> **WHEREAS** Conditional Water Licence 102838 authorizing the storage of water in Danton Slough for use as irrigation, was abandoned in April 2010, and;
>
> **WHEREAS** the Dam associated with the works authorized by the Licence, which was constructed across the natural drainage of an unnamed tributary connecting Danton Pond to Napier Lake, was never decommissioned, and;
>
> **WHEREAS** water continues to be impounded or stored behind the Dam without authorization, and;
>
> **WHEREAS** the unauthorized use of the impounded water or stored water for irrigation and stockwatering purpose is ongoing, an:
>
> **WHEREAS** the impounded or stored water is tributary to Napier Lake and Campbell Creek, of which all available water is fully recorded for all purposes, and for which a new downstream application has been refused, and;
>
> **WHEREAS** no water has been made available for subsequent licencing due to any abandonment or cancellation of other Licenced rights, and;
>
> **WHEREAS** the impoundment or storage of water by the Dam is negatively impacting the availability of water for existing downstream licensees, and;
>
> **WHEREAS** the impoundment or storage of the water by the Dam is negatively impacting the availability of water for the environmental flow needs of the downstream ecosystem, and;
>
> **WHEREAS** I am authorized under Section 93 (2)(d) of the *Water Sustainability Act* to:
>
> (d) Order the construction, alteration, installation, replacement, repair, maintenance, improvement, sealing, deactivation, decommissioning or removal of any works and
>
> **I HEREBY ORDER Enfys Mair Pooler, to:**

1. Hire a Qualified Professional registered in the Province of British Columbia to develop a PLAN to decommission, or otherwise modify the Dam to put it into a permanent state or condition where it no longer allows the impoundment or storage of water, and;
2. Carry out to completion all decommissioning activities of the Dam in accordance with the PLAN, and under the supervision of the Qualified Professional, and;
3. Remove the diversion structure, pump and any works associated with the unauthorized irrigation from Danton Slough, and;
4. Ensure the Qualified Professional submits to the Assistant Water Manager a record of completion certifying that decommissioning of the Dam has been completed to the standards identified by the PLAN, and;
5. Complete all activities specified in the PLAN, and pursuant to this Order by October 31, 2022.

**This Order shall remain in place until all aspects have been satisfied, or revoked through written notice by the Comptroller, a Water Manager, or Engineer designated under the Water Sustainability Act.**

## BACKGROUND

[9] For the purpose of this preliminary application only, I will assume certain facts to be established based on my understanding of the Appellant's sworn affidavit and exhibits to that affidavit and information contained in the preamble to the Order. The parties remain at liberty to introduce evidence at the hearing of the appeal on the merits, that either establishes or refutes these assumed facts.

Assumed Facts:

1. The Appellant is the registered owner of property with a legal description as the East ½ of the Southwest ¼ of Section 8, Township 17, West of the 6th Meridian, Kamloops Division, Yale District, except the land covered by the waters of Napier Lake at the time of survey of said lake and EPP67190 (the "Property").
2. The Property has improvements including a house, outbuildings, wells, and an irrigation system; approximately five acres of the Property are fenced.
3. The Appellant's father (the "Previous Owner") acquired the Property in 1985. He raised cattle and grew hay on the property; the cattle were watered from the slough.
4. In or about 1987, the Previous Owner built a house and a driveway to the house and excavated a low-lying area of the Property that the Appellant refers to as the "dugout." The dugout filled with water.
5. The Appellant appended to her affidavit a Water Licence Application Report (the "Report") approved by the Water Manager on January 23, 2002. The Report states that works related to the application (i.e., dugout, dam, pump, pipe and irrigation system) were "partly constructed."
6. The Report further states that, in excavating the dugout, the Previous Owner may have intercepted a groundwater flow that may be recharging the dugout

and surrounding slough. The Report also states that it is probable that the dugout intercepted a groundwater source based on observations at the site.

7. The Report includes Fig. 1 which is described as the drainage area boundary of the slough as overlaid on aerial photos. The photos include a portion of Napier Lake, an area depicted as "S.W. ¼ S. 36, T.P. 100).
8. The Report notes that groundwater was not licensable at the time.
9. The Appellant attests that the driveway, i.e., the dam runs along the northern end of the low-lying area containing the slough. The Appellant asserts that there is a culvert under the driveway. At the time the Report was prepared, the author noted that there was a roadbed of the old Kamloops-Merritt highway and there was no sign of any culvert through the roadbed.
10. In or about 2002, the Water Manager issued Conditional Water Licence 102838 (the "Licence") to the Previous Owner. The Licence authorized the diversion and use of a maximum of 4.3 acre feet per annum of water for storage purpose and 4.3 acre feet per annum for irrigation purpose from a source referred to as "Danton Slough."
11. Danton Slough, including the dugout, as depicted in a drawing that forms part of the Licence, crosses Crown land and appears to drain into a pond noted as "Danton Pond". The dam and other authorized works under the Licence are noted on the drawing.
12. The Licence further authorized works described as "dugout, dam, pipe and irrigation system" as shown on a plan attached to the Licence. The construction of the works was to be completed and the water put to beneficial use prior to December 31, 2005. Thereafter, the licensee was required to make regular beneficial use of the water as authorized.
13. On July 14, 2009, the Previous Owner filed a Licence Abandonment Form on which he indicated that the authorized works under the Licence "were never constructed."
14. By letter dated April 22, 2010, the Water Manager acknowledged receipt of the notice of abandonment and informed the Previous Owner that, regardless of abandonment of rights held under the Licence, the owner of the Property to which the Licence was attached was not relieved of liability for damage resulting from the works constructed, operated or maintained by the owner, or from a defect, insufficiency or failure of the works. The letter further required that the Previous Owner send photographic proof that the dam at the outlet of the Danton Slough will not store water.
15. The dam associated with the works authorized by the Licence was not decommissioned and the Appellant acknowledges that the Previous Owner did not provide the photographic proof referenced in the Water Manager's letter dated April 22, 2010.
16. The Appellant uses water from the Danton Slough to water livestock and irrigate a hayfield on the Property.
17. Water continues to be impounded or stored behind the dam and used for irrigation and stock watering without authorization.
18. The Water Manager issued the Order on June 20, 2022.

## ISSUE

[10] The sole issue arising from this application is whether the Board should grant a stay of the Order pending a hearing of the appeal on the merits.

## APPLICABLE LEGISLATION AND LEGAL TEST

[11] Section 25 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 (the "ATA") allows the Board to order a stay of the Order. Section 25 provides that an appeal does not operate as a stay of a decision under appeal unless the Board orders otherwise1.

[12] As described in the Board's Practice and Procedures Manual,2 the Board decides stay applications using the test set out by the Supreme Court of Canada in RJR-Macdonald Inc. v. Canada (Attorney General) (1994), 111 D.L.R. (4th) 385 [RJR-MacDonald]. This test was referenced by the Appellant in her submissions. The test involves three prongs:

- whether the appeal raises a serious issue;
- whether the applicant for the stay will suffer irreparable harm if a stay is refused; and
- whether the harm that the applicant will suffer if a stay is refused exceeds any arm that may occur if a stay is granted (the "balance of convenience" test).

[13] The Appellant, who has applied for the stay, bears the onus of proof in this application. A stay order is considered to be an extraordinary measure.

[14] I will address each aspect of the RJR-MacDonald test as it applies to this application.

## DISCUSSION AND ANALYSIS

### Does the appeal raise a serious issue?

[15] The Appellant did not expressly address whether the appeal raises a serious issue, but her submissions imply that the issue is serious to her. She submits that she uses water from the slough to water her livestock and hayfield. She submits that she will have to remove her livestock and will lose her hayfield if the stay is not granted. She submits that she has two wells on the Property, but they do not generate sufficient water for livestock or irrigation. She further submits, but offers no proof, that the Property is located within the Agricultural Land Reserve and is classified as a farm for taxation purposes. She asserts that if the stay is not granted, the Property will lose its farm classification. She did not offer any evidence

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[1] Section 25 of the ATA appears in Part 4 of that Act. Section 105(4) of the WSA provides that Division 1 of Part 8 of the Environmental Management Act, S.B.C. 2003, c.53 (the "Environmental Management Act") applies to appeals brought under the WSA. Division 1 of Part 8 of the Environmental Management Act contains section 93.1, which provides that Part 4 of the ATA applies to the Board (subject to some exemptions not relevant to this decision).

[2] Publicly available at: http://www.eab.gov.bc.ca/fileappeal/eab_proc_manual.pdf

in support of her assertion. It is not clear from her submissions whether the farm is a commercial operation, how many head of livestock are watered from the slough, or whether she is currently using water from the slough to irrigate a crop.

[16] The Appellant states in her application that if the Danton Slough filled sufficiently, it would naturally flow northward and, because of a culvert in the dam, would not be prevented from doing so. She asserts that it would require an unprecedentedly large flow of water to flow off the Property toward Napier Lake.

[17] The Appellant submits that she will incur financial losses if the Order is not stayed. Her affidavit in support of her application does not provide evidence of the actual or anticipated costs and potential financial losses that she will incur if the stay is not granted. I address the issue of the potential financial harm to the Appellant under the second prong of the test, i.e., whether the Appellant will suffer irreparable harm if the stay is not granted.

[18] As noted earlier, the Water Manager submitted only that he did not oppose the application but did not agree with the facts as alleged by the Appellant. The preamble to the Order includes clauses which suggest to me that the Water Manager believes that there are serious issues to be decided in the appeal including:

- whether the dam constructed as authorized under the Licence remains in place and if so whether it has been modified so that it does not impound or store water;
- whether any impounded or stored water behind the dam and in the Danton slough is tributary to Napier Lake and Campbell Creek;
- whether any impoundment or storage of the water by the dam is negatively impacting the availability of water for existing downstream licensees, or for the environmental flow needs of the downstream ecosystem.

[19] There may be other serious issues that the Water Manager will seek to have determined during the appeal but absent submissions from him, I cannot ascertain at present what those issues may be.

*The Panel's Analysis and Findings*

[20] The Supreme Court of Canada in RJR-MacDonald set the first part of the test for a stay at a low threshold. The Court did not identify any particular requirements that must be met to establish that there is a serious issue to be decided.

[21] The Board has previously held that, except in rare circumstances, the first stage of the test is to be decided on an extremely limited review of the case on its merits. As a general rule, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry should proceed to the next stage: Wohlleben v. Assistant Regional Manager, Decision No. 2017-WAT-014(a), April 16, 2018, at para. 54.

[22] In my view, the Appellant's affidavit and the preamble to the Order raise the question of whether there remain unauthorized works on the Property, and whether the existence of such works results in the unauthorized storage of water that is negatively impacting downstream licensees and the ecosystem. I am satisfied that these are serious issue to be decided in the appeal.

[23] I am further satisfied that the potential harm to the Appellant's farming operation before the merits of her appeal is heard are not trivial. I accept that, for the Appellant it is a serious matter if the stay is not granted and she is required to remove the dam and is unable to provide adequate water for livestock and a hayfield, (which she says will lead to the loss of her farm status). I find that the circumstances as I have described them meet the low threshold for the first stage of the RJR-MacDonald test.

[24] In sum, I find that there are serious issues to be decided in this case that are neither frivolous nor vexatious and I should move on to considering the second and third prongs of the RJR-MacDonald test.

**Irreparable harm**

[25] The second prong of the RJR-MacDonald test requires that I consider whether the Appellant will suffer irreparable harm if the stay is denied. As stated in RJR-MacDonald, supra at page 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[26] The Appellant does not submit that she will suffer irreparable harm if the stay is not granted. As I noted above, the Appellant identifies the harm that she will suffer in very general terms as:

- She will incur the cost of having a Qualified Professional ("QP") prepare a plan to remove or modify the unauthorized work (which she refers to as a driveway).
- She will incur the cost of carrying out the work designed by the QP.
- She will have to remove livestock from the Property.
- She will lose her hayfield.
- The Property will lose its farm classification which will result in her paying higher property taxes.

[27] The Water Manager made no submissions on the issue of irreparable harm. The Order makes clear that the Appellant is responsible for hiring a QP to develop a plan to decommission or modify the dam as stipulated in the order, carrying out the decommissioning activities in the plan, removing the diversion structure, pump and any works associated with the unauthorized irrigation from Danton Slough.

*The Panel's Analysis and Findings*

[28] At this second stage of the test, the question is whether the Appellant has established that she will suffer irreparable harm if a stay is not granted. I am not satisfied that she has met that onus.

[29] The financial cost of complying with a lawfully issued order, on its own, does not constitute evidence of irreparable harm. As the Court made clear in RJR-MacDonald RJR-MacDonald at page 405:

> "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 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… (bolding added)

[30] The Appellant asserts that she will incur costs to comply with the Order. She has not, however, provided evidence that those costs would amount to irreparable harm. The Appellant has not provided me with any evidence that would allow me to conclude that, absent a stay, she will be out of business, will incur damage to her business reputation, or that natural resources on the Property will suffer a permanent loss. Indeed, there is no evidence before me that establishes that the Appellant farms commercially.

[31] The Appellant asserts that she has livestock on the Property but does not indicate the number of livestock, the amount of water they consume and the cost of moving them to another Property, or of bringing water to the Property from another source to water them pending a determination of the appeal on the merits.

[32] Further, the Appellant asserts that, if the order is not stayed, she will lose her hayfield but has not offered any evidence that she currently has a crop of hay that requires irrigation from Danton Slough. I note that in her application, the Appellant notes that her father grew hay on the Property, but she does not assert that he irrigated the hayfield from the Danton Slough. Even if the Appellant is currently growing a crop of hay which is in danger of being lost without water from Danton Slough (which seems unlikely given that it is November), she has not quantified the cost to her of losing that crop.

[33] The Appellant also asserts that she will lose her farm status if she removes her livestock and does not raise hay in the field irrigated from the slough but offers no evidence in support of that assertion. Neither has she provided me with any evidence that a loss of farm status in such circumstances would be irreversible.

[34] Still further, the Appellant has not provided any evidence quantifying the anticipated costs that she will incur if the Order is not stayed. For example, there is no evidence before me regarding the cost to the Appellant of retaining a QP to prepare the Plan and of carrying out the decommissioning activities required under the Order. Neither has she identified how such costs are irreparable.

[35] I am mindful that the Appellant has not asserted that the Plan and activities under it are unnecessary as she has already fully decommissioned the dam. Instead, as I understand her submission, she asserts that it is unnecessary to plan for or carry out the decommissioning given the topography. I am not persuaded that is the case. I have given little weight to the surveyor (Brent Taylor's) email and map appended to the Appellant's affidavit for several reasons. First, Mr. Taylor offers opinion evidence in his email, but he has not been tendered as an expert, nor has the Appellant complied with the Board's rule regarding the introduction of expert evidence (Rule 25). Still further, Mr. Taylor states in his email that he is not a civil engineer, nor a hydrologist, and he suggests that it may be appropriate for the Appellant to seek an opinion from an expert with those qualifications. I do not find his email useful to me.

[36] In sum, I am not satisfied that the Appellant will suffer harm, other than possible harm which is purely monetary and is, as of yet, unquantified. The RJR

MacDonald test states that "irreparable" harm is harm that "could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application". I am not satisfied that any harm the Appellant may suffer meets the test.

**Balance of Convenience**

[37] The third prong of the test requires that I determine which party will suffer the greatest harm from granting or denying the stay application.

[38] I have already identified the harm that the Appellant submits that she will suffer if the stay is not granted. She further submits in her application that no holder of a water license within the Napier Lake watershed will be cut off from any water that would otherwise be available to them if the stay is granted. The Appellant did not identify any evidence in support of this submission.

[39] The Appellant submits that the Board considered a similar application in Stanley and Wendy Nichol v. Assistant Water Manager, Decision No. EAB-WSA-20-A007(a) ["Nichol"] and granted the stay. The Appellant submits that I ought to apply the same analysis and reach the same conclusion as the Board did in Nichol.

[40] As with the other two prongs of the test, the Water Manager made no submissions on the issue of the balance of convenience. That said, I am mindful that, in the preamble to the Order, the Water Manager asserted that the impounded or stored water is tributary to Napier Lake and Campbell Creek, both of which are fully recorded for all purposes. The Water Manager further asserted in the Order that the dam at issue is negatively impacting the availability of water for existing downstream licensees the environmental flow needs of the downstream ecosystem. I consider these assertions by the Water Manager as potential harms that will be suffered if the stay is not granted.

*The Panel's Analysis and Findings*

[41] I have already found that, while there are serious issues to be determined in the appeal, based on the evidence before me, that any harm that the Appellant may suffer if the stay is not granted, is quantifiable in monetary terms and does not constitute irreparable harm. I have nevertheless considered whether, in the circumstances the stay ought to be granted.

[42] I have considered that the Water Sustainability Act provides for the diversion, retention or use of water for conservation, domestic use, industrial, irrigation and mining purposes (section 2). It also provides that a person must not divert water from a stream or an aquifer, or use water so diverted, unless they hold an authorization to do so (e.g., a licence) or their use is authorized under the regulations to the Act. The Water Manager is tasked with administering the Act in the public interest.

[43] The Appellant has not provided any evidence that she is authorized under a water licence or regulation to divert or store water on the Property. She submits that no other water licensee will be negatively impacted if the stay is granted but she offers no evidence in support of that submission. In contrast, the Water Manager has asserted in a presumptively lawful/regular order that there are licensed downstream users and conservation uses that are being negatively impacted by the dam on the Property that justify his issuing the Order. The

presumption of regularity is an evidentiary presumption that stipulates that where a person (such as the Water Manager) is acting in an official capacity, it is presumed that his acts are regular, and that he would not have acted without authorization. The British Columbia Court of Appeal recognized this common law presumption in Canada Safeway Ltd., v. Surrey (City) 2004 BCCA 499 (CanLII) at para. 24 and I have applied it to this matter. As a result, I find that the Order is admissible as evidence in this application.

[44] In the circumstances as I have described them, I find that the balance of convenience weighs in favour of the protection of existing downstream licensees and the ecosystem. In other words, I find that the balance of convenience tilts in favour of the public interest in protecting the rights of existing licensees and the environment.

[45] In reaching my decision and while I am not bound by previous decisions of the Board, I considered the Board's decision in Nichol. In this matter as in Nichol, the panels of the Board considering the stay application applied the same test, i.e., the RJR-MacDonald test. I have reached a different conclusion than the Board in Nichol based on the evidence. In Nichol, the evidence before the Board was that the works at issue may have been authorized. Further, the Water Manager's evidence in Nichol (regarding his concern for fish habitat and environmental impacts) was related to when and how the structure would be decommissioned and was not in relation to the state of the structure at the time of the application.

[46] In the matter under appeal, the Appellant does not submit that the dam on the Property is authorized. Instead, she acknowledges that she was aware that the Water Manager had required proof from the Previous Owner that the dam had been removed. She further acknowledged that no such proof had ever been provided. I find that there is evidence before me (i.e., the Order) that existing licensees and the downstream ecosystem are presently being negatively impacted. As a result, I find that the decision in Nichol is distinguishable from the matter before me and is not helpful.

[47] For all the above reasons, I find that the Appellant has not met her onus of proof and I decline to issue a stay of the Order. In reaching this decision, I considered the entirety of the Appellant's submissions and her affidavit in support, regardless of whether I specifically referred to it in the decision.

## DECISION

[48] The application for a stay is denied.

"Brenda L. Edwards"

Brenda L. Edwards, Panel Chair
Environmental Appeal Board

November 29, 2022