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## A Stay of Proceedings and Endangered Species at the Environmental Appeals Board

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**Decision commented on:** *Hanson and Lindberg v Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: County of St. Paul (07 November 2013), [Appeal Nos. 13-005 and 006-ID1](#) (AEAB).

This is a decision on preliminary matters by the Alberta Environmental Appeals Board (EAB) concerning an approval issued by Alberta Environment and Sustainable Resource Development (AESRD) under the *Water Act*, RSA 2000 c W-3 to fill a wetland in the County of St. Paul. The EAB hearing on the merits of the approval will be heard in January 2014. Before the EAB in this matter was a request by the Appellants for a stay of the approval pending the merit hearing. The EAB grants the stay, and I will comment on that here. I also note this decision for its discussion on how the federal *Species at Risk Act*, SC 2002, c 29 (*SARA*) applies to this case – keeping in mind *SARA* is federal legislation but does have some application within provinces and thus it is of ongoing interest to observe how *SARA* is considered and applied by provincial authorities.

In April 2013 AESRD issued an approval under section 38 of the *Water Act* to the County of St Paul for the partial filling of a wetland to allow for a new road. The Hansons and Lindbergs (the Appellants) reside on land adjacent to the wetland and in early May 2013 they filed a Notice of Appeal with the EAB to oppose the AESRD approval. The Appellants allege there is no justification for the new road since there is an existing road nearby or, alternatively, that the new road should be realigned so as to avoid the wetland. The Appellants also allege the area is frequented by species which are listed as endangered or threatened under *SARA*, and that the County failed to consider this in its environmental impact assessment conducted as part of its application to AESRD.

Efforts to mediate the dispute failed, and in late September the EAB decided to proceed to a hearing on the merits of the approval, and that hearing is scheduled for January 23, 2014. In the interim, the Appellants requested the EAB to stay the AESRD approval so that the road construction did not proceed before the hearing. Normally the filing of an appeal with the EAB does not stay the underlying decision, however section 97(2) of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*) provides the EAB with the power to grant a stay.

*EPEA* does not provide any criteria for the EAB to consider in a stay application, but there is significant case law governing the issuance of a stay or an injunction as interim relief in proceedings. The EAB applies the criteria provided by Supreme Court of Canada in *RJR MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311. In deciding whether to grant a stay of proceedings, a decision-maker such as the EAB in this case must ask itself 3 questions: (1) is

there a serious issue to be tried in the proceedings; (2) will the applicant suffer irreparable harm if the stay is not granted; (3) which party will suffer greater harm if the stay is or is not granted (the so-called balance of convenience factor) (*RJR MacDonald* at paras 44-74).

The EAB makes short work of the criteria, ruling in favour of the Appellants that (1) the impacts on the wetland constitute a serious issue to be tried in the merit hearing (at para 46); (2) there will be irreparable harm to the wetland, and the Appellants' use of the wetland, if the stay is not granted and the work proceeds before the hearing (at para 57); and (3) the EAB need not decide the balance of convenience since AESRD and the County did not provide any submissions on the granting of the stay. Accordingly, the EAB grants a stay of the AESRD approval prohibiting the County from proceeding with the road work until the EAB hearing is conducted and the Board's recommendation is submitted to the Minister who then ultimately decides whether to confirm, vary, or reverse the AESRD approval under section 100 of *EPEA* (at para 59).

What is most noteworthy to me about this ruling is how the EAB applies the second factor of the *RJR MacDonald* criteria. Environmental advocates typically have a lot of difficulty obtaining a stay of proceedings because the alleged irreparable harm is not suffered by the advocate themselves (the Appellants in this case) but rather the environment (or the wetland in this case), and evidence about how the project in question will affect the advocates is qualitative and difficult to assess. The EAB decision does not elaborate on what uses will be impacted, other than noting the Appellants assert the intact wetland and surrounding area has scenic and other aesthetic values (at paras 16, 17 and 62). That is not to say this is the first decision to apply the irreparable harm factor directly to the benefit of the land, water or species in question, or to accept harm to aesthetic values as sufficient to meet the test, but I'd say this is a rare application and worth noting for future reference should you find yourself before the EAB in similar circumstances.

I also note that the EAB doesn't consider the balance of convenience factor, which almost always works to the favour of the party with the economic interest at stake. In other words, if the stay is granted the project proponent can typically quantify its losses in dollars whereas the environmental advocate is left with qualitative assertions of loss if the stay is not granted in its favour. The fact here that AESRD and the County did not seem to vigorously oppose the stay seems to have influenced the EAB. And some courts have also considered factors 2 and 3 in the *RJR MacDonald* criteria as one consideration. Nonetheless it is noteworthy how easily the EAB moves past the balance of convenience in this case.

One of the issues to be raised by the Appellants at the merit hearing in January is that the AESRD approval failed to adequately consider the impact of this road project on species listed as endangered or threatened under *SARA*. They may also reference species listed as such under Alberta's *Wildlife Act*, RSA 2000, c W-10 but they will soon realize there are no substantive legal implications of such listing relevant to their dispute here (for an overview of the inadequacies of Alberta's endangered species laws see Shaun Fluker and Jocelyn Stacey, "The Basics of Species at Risk Legislation in Alberta" (2012) 50 *Alta L Rev* 95 or see my early comment on ABlawg [here](#)).

Both AESRD and the County have stated their view that a consideration of *SARA* is outside the jurisdiction of both AESRD and the EAB. The EAB summarizes the position of AESRD (referred to as the Director below) as follows:

[69] The Director stated he has no obligation to require studies under the *Species At Risk Act* and is not required to review these studies prior to issuing the Approval. The Director stated he has no jurisdiction over federal legislation and he does not have the ability to assess the adequacy of any study conducted pursuant to the federal legislation. The Director explained *Species At Risk Act* studies are only required where the land has been designated critical habitat for a recovery strategy for a listed species, and there is no evidence to suggest the lands where the proposed road is to be built are designated as critical habitat. The Director stated the studies proposed by the Appellants go beyond what is required in the *Water Act* and the Director's authority. The Director stated it is the Approval Holder's obligation to ensure compliance with the *Species At Risk Act*.

The EAB observes it has jurisdiction to consider whether the AESRD approval adequately addresses the impacts of the project on the aquatic environment, and moreover that this consideration includes impacts on species that rely on the wetland for survival (at paras 75-78). In relation to *SARA* specifically, the EAB rules it does not have jurisdiction to assess compliance with *SARA* but that *SARA* can be used as a reference to identify species at risk which should be considered in the approval and thus may contribute to the EAB's decision on whether the AESRD approval adequately addresses the impacts of the project on the wetland (at para 85). I think the EAB is correct to assert as such.

From reading this decision we don't know which *SARA*-listed species are potentially affected by this project. But given that the area in question is a wetland, we might speculate that such species would be either fish or migratory birds. And if this is the case here, then *SARA* potentially has more application than either the EAB or AESRD suggests and indeed the federal *Migratory Birds Convention Act*, SC 1994, c 22 may also apply (for some discussion see Fluker and Stacey, above). Together these two federal statutes provide some of the strongest legal protection available in relation to fish and migratory birds found in Canada.

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