

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Dates of Hearing – March 2 and 9, 2001
Date of Further Written Submissions – May 8, 2001
Date of Report and Recommendations – June 8, 2001

IN THE MATTER OF Sections 85, 86, 87, 91, 92 and 93 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 and Section 115 of the *Water Act*, S.A. 1996, c.W-3.5.

-and-

IN THE MATTER OF an appeal filed by Mr. Neil Martin with respect to Enforcement Order 2000-WA-02 issued under the *Water Act* on September 20, 2000 by the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment.

Cite as: *Martin v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment.*

HEARING BEFORE:

Dr. M. Anne Naeth, Panel Chair
Dr. John P. Ogilvie
Dr. Curt Vos

PARTIES:

Appellant: Mr. Neil Martin.

Director: Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment, represented by Ms. Heather Veale and Mr. David France, Alberta Justice.

Intervenor: Mr. Gary and Ms. Cathy Fitzgerald; and the Summer Village of Island Lake (by letter only).

WITNESSES:

Appellant: Mr. Neil Martin.

Director: Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment; Mr. Todd Ponich, Mr. Bill Cruthers, and Mr. Daryl Watters, Conservation Officers, Alberta Environment; Mr. Gerry Haekel, Alberta Agriculture, Food and Rural Development.

Intervenor: Mr. Gary and Ms. Cathy Fitzgerald.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Valerie Higgins, Hearing Officer; and Ms. Denise Black, Hearing Officer.

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EXECUTIVE SUMMARY

[1] Mr. Neil Martin filed an appeal of an Enforcement Order that was issued to him. The Order requires him to remove the sand (6 or 7 wheelbarrow loads) that he had placed in front of his property near Island Lake. The placing of sand on the shore of a lake is an activity that requires an approval under the *Water Act*. Mr. Martin did not have an approval.

[2] Mr. Martin believed he had general permission from the Summer Village of Island Lake and his local M.L.A. to place the sand on the shore of the lake, but he still applied for and was refused an approval from Alberta Environment. He also believed that he was only doing what many other lakefront property owners have done in the past.

[3] The Board concludes that Mr. Martin contravened the *Water Act*. However, he should not have to remove such a small amount of sand from his property because to do so would potentially cause more environmental damage than to leave it in place. Instead, the Board is of the view that Mr. Martin should develop, in conjunction with the Director, an effective plan for the maintenance of the shore in front of his property to minimize any further environmental impacts. The Board, therefore, recommends that the Enforcement Order be varied in accordance with these terms. Further, the Board recommends that a lakeshore study should be undertaken and the lakefront property owners, the Summer Village of Island Lake, and the Director should work together on a plan to develop the lakefront in a manner that will ensure protection of the environment. The Board also recommends that Alberta Environment further develop its education program to ensure that all lakefront property owners in Alberta understand that the placing of sand and cutting weeds on lakeshores can have negative environmental impacts and that an approval is required for such activities.

I. BACKGROUND

[1] This appeal concerns the decision of the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment (the “Director”), to issue Enforcement Order No. 2000-WA-02 (the “Order”), dated September 20, 2001, under the *Water Act*, S.A. 1996, c. W-3.5, to Mr. Neil Martin. The Order states that on April 21, 2000, Mr. Martin placed sand on the bed and shore of Island Lake, in the Summer Village of Island Lake, Alberta. This is said to be a violation of section 36(1) of the *Water Act*.¹ The Order requires Mr. Martin to submit a plan to the Director outlining the remedial action to be taken to remove the sand from the bed and shore of Island Lake. The Order further requires that Mr. Martin carry out the plan once it has been reviewed by the Director.

[2] On October 30, 2000, the Environmental Appeal Board (the “Board”) received a Notice of Appeal (EAB Appeal No. 00-065) from Mr. Neil Martin. A letter addressed to the Minister of Environment, outlining the concerns of Mr. Martin, accompanied the Notice of Appeal. Mr. Martin states in the Notice of Appeal that “... residents have been attempting to resolve lakefront issues with environmental officials by cooperation rather than confrontation. We have been met with zero tolerance, discrimination and harassment...We would have appealed earlier, however we were under the impression that a lakeshore study was to be implemented and that any orders would be put on hold.” The relief sought by Mr. Martin is the rescinding of the Order and the development of a shoreline study.

[3] The Board acknowledged the Notice of Appeal on November 1, 2000 and requested that the Director provide the Board with all relevant documents concerning the appeal (the “Record”). According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board on November 1, 2000 asking whether this matter had been the subject of a hearing or review under their respective legislation. Both Boards replied in the negative.

¹ Section 36(1) of the *Water Act* states:

36(1) Subject to subsection (2), no person shall commence, or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.

[4] On November 14, 2000, the Director wrote to the Board requesting further clarification regarding grounds of the appeal. In this letter, the Director also invited Mr. Martin to meet with his staff to discuss matters contained in the Notice of Appeal. The Board acknowledged the Director's letter and requested that Mr. Martin provide additional information by November 22, 2000. The Board received the Record on November 15, 2000 and subsequently forwarded a copy to Mr. Martin.

[5] In a letter dated December 2, 2000, Mr. Martin alleges that "... Environmental Officers have discriminated by harassing, threatening and issuing enforcement orders to some residents while ignoring others." He states that he wants the "...same rights to make sand improvements as virtually all other residents have done." Mr. Martin further indicates that he objects "... to environmental officials frequent and intimidating presence at island lake [sic] and entering onto private property...", and he believes "... lakes should be individually assessed by an independent committee to include owners and village council members." The Board sent a copy of the letter to the Director on December 5, 2000.

[6] On December 12, 2000, the Director requested that the appeal proceed to a hearing without mediation. On December 22, 2000, the Board acknowledged the Director's request and noted that the Notice of Appeal "...was filed outside the statutory timelines prescribed in the *Water Act*." The Board requested motions concerning the timing of the appeal by January 4, 2001 at which time it would review the request for a hearing. The Director indicated in a letter, dated January 8, 2001, that he did not have any objection to the timing of the Notice of Appeal and requested an early hearing date. The Board contacted the parties for hearing dates and suggested that the three enforcement orders² issued to residents of Island Lake be combined into one hearing. The Director responded in a letter dated January 23, 2001, that "...given the factual differences between the Martin appeal and the other two, the Director would like the Martin appeal to be heard separately and as soon as possible." The Director did not object to combining the other two appeals, but requested that the hearing of the other two appeals be scheduled for shortly after the hearing of this appeal.

² Martin Enforcement Order No. 2000-WA-02 *Water Act* EAB File 00-065 (appeal filed October 31, 2000), Gilmore Enforcement Order No. 2000-WA-05 *Water Act* EAB File 00-071 (appeal filed November 23, 2000), and Fitzgerald Enforcement Order No. 2000-WA-04 *Water Act* EAB File 00-072 (appeal filed November 24, 2000).

[7] After consulting with the parties the Board set March 2, 2001 as the hearing date.³ The Board received intervenor requests from Mr. Gary and Ms. Cathy Fitzgerald on February 16, 2001, and from Ms. Lorraine Robertson, the Administrator for the Summer Village of Island Lake, on February 22, 2001. Ms. Robertson requested that the Board consider the letter as their submission as Council members were unable to appear before the Board to provide an oral submission. The parties were asked by the Board to comment on the participation of these individuals as intervenors.

[8] The Board received comments regarding the intervenor requests from the Director on February 23, 2001, and from Mr. Martin on February 26, 2001. On February 26, 2001, the Director wrote to the Board stating that he did not object to the participation of the intervenors but requested a summary of the evidence and facts they wished to present. On February 27, 2001, the Board wrote to the parties and advised that it understood that the Summer Village of Island Lake would not be appearing at the hearing, but requested that the Fitzgeralds provide a summary of their proposed presentation by February 28, 2001 at which time the Board would decide on their request for intervenor status. On February 28, 2001, a summary of their proposed presentation was received from the Fitzgeralds and a copy was forwarded to the Director. On March 1, 2001, the Board wrote to the parties and advised that it would permit the Fitzgeralds to participate at the hearing by making a five-minute statement. The Board also indicated that the Fitzgeralds' written submission, dated February 28, 2001, would be accepted by the Board. The written submission from the Summer Village of Island Lake Council was also accepted by the Board.

[9] The hearing took place on March 2, 2001, and the Board reconvened the hearing March 9, 2001 to hear closing arguments and ask final questions. Following initial deliberations, the Board reopened the hearing to receive written submissions from the parties on the question: "What other potential decision could the Director have made with respect to this enforcement issue?" The Board wrote to the parties on April 9, 2001 asking for their submissions on this question, with the last of these written submissions being received on May 8, 2001.

³ An advertisement was placed in the Edmonton Journal on February 10, 2001 providing the details of the hearing and establishing a deadline of February 16, 2001 for the receipt of intervenor requests.

II. ISSUES BEFORE THE BOARD

[10] The issues before the Board are whether Mr. Martin undertook an activity, the placing of sand on the bed and shore of Island Lake, without an approval when an approval was required, and whether the Director acted reasonably, within his jurisdiction, and properly exercised his discretion to issue the Order.

III. SUMMARY OF THE HEARING

[11] Mr. Martin said that prior to purchasing his property he had planned to clean up the lakefront. He noted that many other lakefront property owners have added sand and cleaned weeds from their properties. He applied for an approval to add sand and cut weeds, but was only granted an approval to cut weeds up to 1 m below the surface of the water. He did not think that cutting weeds up to 1 m below the water would deal with his problems of stagnant water and weeds thick enough for children to get stuck in. Mr. Martin admitted that he dumped six to seven wheelbarrows full of sand on the shore in front of his property to fill in a low spot, considerably less than what the Director suggests he added. He said he used the same sand that other front property owners have used.

[12] Mr. Martin believes that it is imperative that the Mayor and Council of the Summer Village of Island Lake participate in a study to deal with proposed lakefront property development as it affects the property value and interests of all the lakefront property owners. He is concerned that his letters to the Minister of Environment have gone unanswered and with the lack of common sense, cooperation and discretion shown by the Director and his staff in addressing the situation. He said he got support from the local M.L.A. for his project and did not see a problem in proceeding with the sanding in spite of not having a formal approval. He said the Director's staff saw other people doing far more sanding and weed cutting than what he did and yet these other people were not issued enforcement orders. He said he asked Conservation Officers Ponich and Cruthers about this, but his questions were ignored. Thus, he felt discriminated against. He said that no one ever presented data to show that the activities he conducted on his property had an impact on fish populations in the lake.

[13] The Fitzgeralds said that four similar enforcement orders have been issued to other lakefront property owners at Island Lake. The Fitzgeralds stated that they met with other lakefront property owners, officials from the Summer Village of Island Lake, the local M.L.A., and that these parties have been working jointly to resolve the shoreline activity issues since March 1999. The Fitzgeralds provided photographs showing numerous other sand dumping activities on Island Lake that have not been addressed by the Director.

[14] The Director said the Order was issued properly to deal with an activity that contravened the *Water Act*. The Director, Mr. Slatnik, said that sand can cause siltation, lakebed erosion, and alteration of fish habitat. He said that until the *Water Act*, which came into force on January 1, 1999, it was difficult to stop shoreline disturbances such as sanding and weeding. He said that Mr. Martin was not singled out for enforcement, and that Mr. Martin was warned prior to the Order being issued. Mr. Haekel, of the Public Lands Division of Alberta Agriculture, Food and Rural Development, said that the sanding that Mr. Martin did took place on reserve lands⁴ and on the crown owned bed and shore of the lake. Conservation Officer Ponich said he was off duty when he became aware that Mr. Martin was dumping sand. He said he asked Mr. Martin if he had an approval and, when Mr. Martin said he did not, Conservation Officer Ponich warned Mr. Martin to stop. Mr. Martin said other people were putting sand on the shore in front of their properties so he felt he should be able to do so as well.

[15] Conservation Officer Cruthers said that the issue of shoreline development has a long history and that an education program for lakefront property owners has been undertaken. The Director's witnesses provided a lengthy account of the education program for lakefront property owners. The Director also showed the Board a segment of a video on the importance of shoreline vegetation. Conservation Officer Watters, a fisheries biologist, provided general information on the environmental issues relating to depositing sand. He indicated that past practices were no longer appropriate. He said that fish populations in the lake were good, but there were no data on conditions prior to the historic sanding by lakefront property owners.

⁴ Reserve lands are lands set aside during the subdivision process, and are owned by the local municipality – here the Summer Village of Island Lake.

[16] When the hearing was reopened to receive written submission on the issue stated in the April 9, 2001 letter, Mr. Martin suggested that the Director and his staff should work with lakefront property owners to improve lake access without compromising the environment. Mr. Martin said he recognizes that he may have broken the law, but emphasized the extenuating circumstances. He said that he obtained permission from the Summer Village of Island Lake and from the local M.L.A. He said that many of the lakefront property owners do not know that Alberta Environment permission is required. He indicated that the education program implemented by Alberta Environment started either just after or at the same time that many of the lakefront property owners began to do work on the lakeshore. He suggested that a lakeshore study is required. Further, he does not believe an administrative penalty or prosecution should be used and expressed doubt that a warning letter would be effective in sending the message to other lakefront property owners that sanding and weeding are not permitted.

[17] The Director argues that the correct decision was made because an enforcement order is the only remedy for non-compliance under the *Water Act*. The Director argues that it would be inappropriate for the Board to recommend to the Minister enforcement options other than that proposed by the Director.

IV. CONSIDERATIONS OF THE BOARD

A. Did Mr. Martin engage in an activity requiring an approval?

[18] Mr. Martin told the Board that he placed approximately six to seven wheelbarrow loads of sand on the bed and shore of the lake without an approval even though he knew was aware that he needed one according to the *Water Act*. He gave several reasons for doing this, each of which the Board will discuss.

[19] Mr. Martin said he was only doing what other lakefront property owners are currently doing and have historically done. He said that the area where he placed the sand had been sanded by the previous owner only a year earlier. He said he believed that he was being singled out by the Director and punished for activities that other lakefront property owners were engaging in. The Board does not agree with Mr. Martin that he should be able to add sand to the lakefront of his property simply because other property lakefront owners are currently doing it

and that they have done it in the past. The *Water Act* clearly states that activities⁵ that involve the placing of materials that might cause an effect on the aquatic environment are not allowed without an approval. Mr. Martin was aware that he needed an approval to add sand to the property, he applied for such an approval and was effectively denied it, and then he undertook the activity anyway. The fact that a large number of people are conducting an activity that contravenes an act does not make it acceptable. Although Mr. Martin expressed frustration in communicating with the Director and the Director's staff on several issues (trying to get a lakeshore study, being singled out for an Order, trying to get definitive data on the environmental effects of sanding) he does not have the right to conduct these activities without an approval.

[20] Mr. Martin further told the Board that in reality he did not believe he contravened the *Water Act* by adding sand and cutting weeds, as this was an exempt activity associated with landscaping.⁶ Mr. Martin did not adequately address why the property to which he added sand would not be considered part of the lake as defined in the *Water Act*. Nor did he adequately address why this activity, if it was landscaping and it was not conducted in a lake, did not have an adverse effect on the environment. Although Mr. Martin alluded to the large number of fish removed from the lake, and on this basis argued that the quality of the lake was not declining, he

⁵ Section 1(1)(b)(i)(C) and (D) of the *Water Act* states:

- 1(1) In this Act ...
- (b) "activity" means
 - (i) placing, constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material, or carrying out any undertaking, including but not limited to groundwater exploration, in or on any land, water or water body, that ...
 - (C) causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body, or
 - (D) causes, may cause or may become capable of causing an effect on the aquatic environment

⁶ Schedule 1, Section 2(d) of the Water (Ministerial) Regulation, A.R. 205/98, states:

- 2 The following activities are exempt from the requirement for an approval: ...
- (c) landscaping that is not in a watercourse, lake or wetland if the landscaping does not result in
 - (i) an adverse effect on the aquatic environment on any parcel of land, or
 - (ii) any change in the flow or volume of water on an adjacent parcel of land;

did not have any other data to clearly show that there were no adverse habitat effects as a result of his activity. This is particularly important from a cumulative perspective in which 15 people doing an activity may cause no harm, but 16 or 17 together might. If Mr. Martin believes his activities were exempt from the requirement to obtain an approval, he would need to convince the Board. He has not succeeded in doing this, but only brought it up as an additional point in the presentation of his evidence. The fact that he applied for an approval indicates was aware one was required and that his planned activities were not exempt. Mr. Martin also did not discuss this potential exemption with the Director when he applied for the approval, nor when he was denied it.

[21] Several times during the hearing Mr. Martin indicated that there was no proof that the activities he conducted would affect the quality of the lake. He said that there was no proof the fish population had been affected by the historical development activities conducted on Island Lake. The Board reminds Mr. Martin that the *Water Act* clearly states activities "...that cause, may cause or may become capable of causing...", an effect needs to be considered. Although the Director did not provide any specific evidence to prove that the activities Mr. Martin engaged in caused an effect in Island Lake, he did indicate that the scientific literature concludes an effect may be caused. Thus, the activity can be considered one that may cause an adverse effect.

[22] Mr. Martin indicated he thought he had verbal approval from the Summer Village of Island Lake and the local M.L.A.⁷ Based on this verbal approval, he said he did not see a problem in proceeding with sanding when his request for an official approval was effectively denied. Yet the fact remains that he applied for an official approval. Mr. Martin did not convince the Board that he made a reasonable attempt to resolve the controversy between thinking he had

⁷ Letter dated February 28, 2001, from Gary Fitzgerald to the Environmental Appeal Board.

"Various meetings between the four parties have been held with other lakefront property owners, officials from the summer village and the local MLA...."

Letter dated October 21, 1999, from the Summer Village of Island Lake to the Honourable Gary Mar, Minister of Environment.

"Council shares the owner's opinion that nothing major was done that would pollute or endanger the lakeshore as we would be lead to believe. ... In early April 1999, Mr. Cardinal, MLA for Athabasca/Wabasca, also visited some of the sites and agreed with out assessment."

“approval” for his activity from the Summer Village and the local M.L.A., yet still applying for an official approval from the Director. He stated that he made many attempts to discuss development plans and remedial lakeshore activities with the Director’s staff and that these discussions failed to reach the satisfactory conclusion of getting a lakeshore study for Island Lake. The Board concludes that if Mr. Martin truly believed he had “approval” from the Summer Village of Island Lake and the local M.L.A. he would not have made and application for an official approval. Yet the Board also acknowledges that he had sufficient evidence to indicate that the Summer Village, the local M.L.A., and the other lakefront property owners did not disapprove of what he was doing.

[23] Mr. Martin did not convince the Board that he acted appropriately within the context of the *Water Act*. The Board concludes that Mr. Martin conducted an activity that required an approval after being denied such an approval. Yet the Board acknowledges that Mr. Martin believed that the Summer Village of Island Lake and the local M.L.A. did not disapprove of his activities. However, this does not excuse Mr. Martin’s actions. At best, this belief must be taken into account in the overall interpretation of the reasonableness of his actions by the Board.

B. Did the Director act reasonably, within his jurisdiction, and properly exercise his discretion to issue the Order?

[24] The Order was issued under sections 135(1) and 136(1) of the *Water Act*.⁸ Clearly the *Water Act* states the Director can issue an enforcement order to any person who

⁸ Section 135(1) and 136(1) of the *Water Act* states:

135(1) The Director may issue an enforcement order to any person if in the Director’s opinion that person has contravened this Act, whether or not that person has been charged or convicted in respect of the contravention.

136(1) In an enforcement order, the Director may order any or all of the following: ...
(c) if no approval, preliminary certificate or licence has been issued and no registration has been effected, the stopping or shutting down of any activity, diversion of water, or operation of a works or thing either permanently or for a specified period of time;
(d) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking until the Director is satisfied that the construction, operation, maintenance, repair, control, replacement or removal or the carrying out of the undertaking will be done in accordance with this Act.

contravenes the *Water Act*, he can shut down any inappropriate activity, he can order replacement or removal of any works, and he can require the submission of a proposal or plan to remedy the contravention. Thus, the Board believes the Director clearly acted within his jurisdiction to issue the Order.

[25] However, the Board does not believe the Director acted reasonably or properly exercised his discretion as it relates to the remedies found in this Order. There were clearly many factors indicating that the actions of Mr. Martin could have been dealt with in a more appropriate manner. If the Order were issued, there were other remedial efforts that would be, in the Board's view, more logical than those included in the Order.

[26] There is a long history of the lakefront property owners at Island Lake trying to work with Alberta Environment to develop a plan for lakeshore management.⁹ In spite of the plethora of educational materials, information releases, and meetings conducted by Alberta

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- (e) The submission to the Director, for the Director's approval, of a proposal or plan to be undertaken by the person in order to remedy the contravention;
 - (f) the removal or otherwise rendering ineffective of
 - (i) a works placed or constructed without approval,
 - (ii) a works that is no longer required or for which an approval or licence has been cancelled or is no longer in effect, or
 - (iii) an obstruction to the flow of water caused in any manner; ...
 - (h) the minimization or remedying of an adverse effect on
 - (i) the aquatic environment,
 - (ii) the environment, caused by a problem water well or drilling, or
 - (iii) human health, property or public safety; ...
 - (j) the restoration or reclamation of the area affected to a condition satisfactory to the Director; ...
 - (l) the reporting on any matter that the order requires to be carried out; ...
 - (n) the reporting periodically to the Director;
 - (o) the specification of the time within which any measure required by the order is to be commenced and the time within which the order or any portion of the order is to be complied with; ...
 - (r) the taking of any other measure that the Director considers necessary to facilitate compliance with the order or this Act.

⁹ Hearing Transcript, Page 36:

Mr. Martin: "Well, I know as a community and as individuals we've literally begged the environmental people to cooperate with us. I just might bring to your attention that this study, which I don't have a copy of, but I'm sure that the Department of the Environment does, directly relates to issues involving the sanding of beaches with the help of the environment officials to make sure that it's done right. Now, at Island Lake we're in a situation where we're so frustrated simply because we can't even talk to you, and I just wonder why there's such a difference."

Environment,¹⁰ the lakefront property owners are clearly not convinced that sanding and cutting weeds constitute an environmental problem.¹¹ Mr. Martin was apparently under the impression that he got a go ahead from the local M.L.A.¹² Other lakefront property owners believed they had a go ahead from the Summer Village of Island Lake. There were clearly all kinds of miscommunications and differing lines of communication with the lakefront property owners of Island Lake. This does not excuse Mr. Martin's contravention of the *Water Act*, but it does lead the Board to think that the lines of communication are weak and inconsistent. In view of the long history and the potential for misinterpretation, issuing enforcement orders to some residents but not others would certainly lead to more hard feelings and a further lack of community building. It certainly precludes any community efforts at protecting the environment.

[27] There is considerable disagreement about the amount of sand Mr. Martin placed on the shore and the amount of sand the Director expects Mr. Martin to remove. Conservation

¹⁰ Hearing Transcript, Page 40:

Mr. Haekel: "But we have made a concerted effort since 1993 to visit communities, to visit summer villages, to talk to summer villages, lake associations and inform them of what the rules are, and we've been doing that for the last ten years. And that in many ways is so that we in fact can prevent a lot of potential enforcement actions if we can communicate what the Department's goals are, what the law is, and also what the consequences are when you don't obey those laws, which are duly made by the Legislature. So we've gone through that process, including at the Summer Village of Island Lake. And we will continue to do that. I think that's one of the key roles, that you know, we, in the various forms of the jobs that we each have, try to do."

Hearing Transcript, Page 42:

Mr. Haekel: "I don't know how much more that we as staff can do. We've exercised a very wide range of options available to us and here we are today."

¹¹ Hearing Transcript, Page 41:

Mr. Martin: "This isn't one or two people standing up here and saying we've got a problem. This is a whole community standing up. It's a voice of the summer village and I understand that you've got black and white here, but we're saying we don't like all of your black and white. And all I'm saying is why don't you address those issues with us?"

¹² Hearing Transcript, Page 37:

Mr. Martin: "We've even had a Minister involved that came out there and said, look, I don't see any big deal here. And we – I think you might be aware, maybe you're not, but are you aware that we had requested that a shoreline study be done?"

Officer Watters indicated that the sand that Mr. Martin placed on the shore was measured by Mr. Mike Melnyk of Public Lands, Alberta Environment within a week of being placed and that the sand that Mr. Martin would have to remove would be determined based on Mr. Melnyk's measurements.¹³ The Board questions the ability to determine, with much accuracy, the amount of sand Mr. Martin added to the site. If it was measured a week after being placed, it could have been subjected to snowmelt, precipitation, and wind. The Director could not address this concern of the Board adequately. Going back a year later to determine new and old sand does not seem feasible with any degree of accuracy. Thus, the Board questions the Director's wisdom in determining the amount of sand placed on the shore by Mr. Martin. In fairness to Mr. Martin, he should only have to remove what he placed. If that amount can not be accurately determined it is questionable how the Director can legitimately enforce the removal of the sand.

[28] Conservation Officer Watters also discussed the problem with nutrient loading from foreign material added to a lake, particularly in the form of nitrogen and phosphorus. He said this was one of the main problems with adding sand – the foreign material comes with the sand. The Board questions how much nitrogen and phosphorus would be found in sand, particularly if that sand had been in place in or near the water for several weeks. Sand has a very low cation exchange capacity (“CEC”) and high hydraulic conductivity. Thus, any phosphorus

¹³ Hearing Transcript, Page 49:

Mr. Watters: “... Working with Public Lands, we would have established a volume given his measurement on this photograph.”

Hearing Transcript, Page 66:

Mr. Slatnik: “I’ll just interject for a second. I have spoken briefly with Mr. Melnyk to ask him how he determined just your exact question, and he said he dug some small core samples and he felt he was fairly confident in seeing a different -- a change in the substrate or in the soil conditions or the sand conditions to determine what he in his best opinion was new sand and what became the old sand. I honestly don’t know what grounds he’s got to determine that, but he tells me he was confident that he could at that point when it was still fresh determine the difference. So that’s the basis of his measurements.”

Hearing Transcript, Page 67:

Mr. Cruthers: “... What we normally find is the compacted sand and the fresh sand are – it’s not a difficult task to distinguish between the fresh sand and the compacted sand that’s underneath it.”

and nitrogen in the sand, which would likely be very little based on the very low CEC, would easily leach from the sand within a short period of time. If nutrient loading is a significant concern as a result of adding the sand, and thus requiring its removal, the Board questions the Director's belief that enough nutrients would remain in the sand to make it worth removing, balancing the amount of siltation that would occur if the sand was removed.

[29] Conservation Officer Watters was also concerned that the adding of sand might cover up vegetation essential for spawning.¹⁴ But he also said he believed pike would seek vegetation for spawning elsewhere, implying they would simply avoid the small area Mr. Martin covered with sand. Conservation Officer Watters said plants for spawning will not grow on sand, but they will grow on the "muck". He did not convince the Board that adding six to seven wheelbarrows of sand would change the textural composition of the lakebed sufficiently to detrimentally affect the plant habitat required for spawning. This would be physically impossible given the volume of sand required to make a textural change in an area the size of the lake.

[30] At first Conservation Officer Watters said he did not know¹⁵ if removing the six to seven wheelbarrows of sand would be more environmentally damaging than just leaving it there. Conservation Officer Watters said that at least in terms of fish production and returning or restoring the health of that aquatic environment, it would be better to accept the short-term pain of restoration for a long-term gain. However, he did not convince the Board of this. It defies scientific principles and logic that creating siltation to remove an indeterminate but small amount of sand would improve conditions when the nutrients from the sand would have been already leached and the amount of sand would not likely change the lakebed texture anyway. Conservation Officer Watters said that if the sand were removed the worksite could be contained with a sediment barrier of some kind, "... probably a vertically staked filter cloth

¹⁴ Hearing Transcript, Page 65:

Mr. Watters: "...Sand doesn't lend itself to growing the plants that fish and bugs and whatnot need...if we don't do anything, the return of those plants will be very much delayed. So the objective is to try to return that site to a condition that will grow more plants."

¹⁵ Hearing Transcript, Page 65:

Mr. Watters: "... I don't know. I don't know."

arrangement.”¹⁶ He felt that, with effort, the sand could be removed. He indicated that he, and possibly some the Director’s staff, would be on-site during such work to assist and supervise. The Board questions the wisdom of such an endeavour and the use of so many people's time to remove such a small amount of sand, especially since there is no scientific evidence that such a small amount could cause more damage than the siltation that would occur during the removal of the sand.

[31] The Director, Mr. Slatnik, said he consulted with the Minister of Environment and the local M.L.A. about the situation at Island Lake. It is unclear to the Board¹⁷ as to how Mr. Martin's requests were responded to. Mr. Slatnik says Mr. Martin's letters were sent to the Minister of Environment and Mr. Slatnik, himself, was involved in dealing with this. Mr. Slatnik then goes on to say the response letters were not addressed to Mr. Martin directly. He said he was not aware of the letters from Mr. Martin.¹⁸ Conservation Officers Ponich and Cruthers believe they had appropriate communication with Mr. Martin. The Board is thus uncertain how the Director and Alberta Environment fully addressed communication with Mr. Martin.

[32] The Board agrees with the Director that lakefront property owners can not continue to add sand and cut weeds if it is scientifically proven to damage fish habitat and thus lake quality. In this regard it would have been far more helpful to the Board if the Director had

¹⁶ Hearing Transcript, Page 76.

¹⁷ Hearing Transcript, Page 60-61:

Mr. Slatnik: “One at least two occasions letters I’m aware of that Mr. Martin has brought up were sent – not himself but on behalf of several cottage owners in the lake, around the lake. They were sent to our Minister, one of Mike Cardinal that was subsequently to our Minister. Those were responded to, I can assure you. I was involved in doing much of it.”

The Chairperson: “So letters were sent to Mr. Martin—”

Mr. Slatnik: “Yes. No, not Mr. Martin directly.”

Mr. Martin: “I received nothing on that.”

The Chairperson: “Okay. But that would have been to the —”

Mr. Slatnik: “To whoever initiated the letter. Mr. Martin didn’t initiate, to my knowledge, any letter-”

Mr. Martin: “I did initiate a letter to the Minister, about the same time as the Fitzgeralds.”

Mr. Slatnik: “Okay. I didn’t honestly see that one. I know of two letters, one was initiated from the summer village itself and one was initiated from Mike Cardinal, the MLA, on behalf of the summer village. I’m aware of those two. And they were responded.”

¹⁸ Exhibit 6.

focused on the scientific evidence against sanding and weeding rather than on their general educational efforts for the lakefront property owners. The Board further agrees that cumulative effects are an important consideration in determining if such historical practices should continue. All of the parties realize that something needs to be done.¹⁹ It is apparent to the Board that the education program the Director discussed is not working. Perhaps the Director could explore such simple additions to this program as posting signs at lakes, summer village offices, and boat launches that approvals are required to undertake lakeshore development.

[33] The Board agrees with the Director that to ignore Mr. Martin's contravention of the *Water Act* would have a negative impact on his authority to dealing with further contraventions by other lakefront property owners. The considered and effective enforcement of the *Water Act* is essential to protect the lakeshore environment. However, the Board does not believe it is appropriate to use an enforcement order to deal with a historical problem. The Board has to consider how this cycle must end. The Board believes that the situation with Mr. Martin could have been avoided had the Director more clearly outlined to the lakefront property owners what the issues were and more importantly, how they would be addressed. The lakefront property owners of Island Lake clearly asked for a study of their lake and the opportunity to get involved in developing an appropriate development plan.²⁰ Surely this would be a more

¹⁹ Letter dated October 21, 1999, from the Summer Village of Island Lake to the Honourable Gary Mar, Minister of Environment.

“In Council’s opinion, the additional incidents that have recently occurred with the hauling of sand will not make a significant difference whether this lake survives or not. However, we would be very naive to think that our lake can continually withstand over development and realize that there has to be limits of what can be done.”

Hearing Transcript, Page 15:

Mr. Watters: “But as knowledge and information changes, it becomes clear that some past practices are no longer acceptable and appropriate, without that clear understanding that the way we use to do our business isn’t the way we should be doing our business now threatens our lakes, not only for ourselves but our future generations of Albertans.”

²⁰ Letter dated February 20, 2001, from the Summer Village of Island Lake to the Environmental Appeal Board.

“There does not appear to be any common ground around which the department of environment is even willing to consider. This of course frustrates individuals and even crates more and more anxiety between the parties. Many harsh words have been directed at certain individuals in

expedient and efficient way of making people familiar with the new *Water Act* and giving them some input into the lake's management. The Board also believes that a single clear message needs to be communicated to the lakefront property owners by all of the government bodies to insure that there is no confusion as to what the requirements are to carry out such activities. Perhaps this is another indication that a carefully developed plan involving all affected parties is necessary for any occupied lake. Such a plan should include an interpretation of what activities are not permitted by the *Water Act* (e.g. what constitutes landscaping), what activities require approval, and from whom that approval should be sought. Such a plan should also clearly indicate what the repercussions are for not following the plan.

[34] The Board concludes that the Director acted within his jurisdiction to issue the Order. However, the Board believes that the Director did not act reasonably, nor properly exercise his discretion in electing the remedial steps within the order. In light of the fact that Mr. Martin placed a small amount of sand on the site, an amount that would be difficult to accurately determine, the nutrient loading damage would already be done, and that removal of this amount of sand could create as much or more environmental damage through siltation than leaving it in place, it is environmentally unreasonable to require Mr. Martin to remove it. The Board further concludes that given the nature of the long-term miscommunication with the lakefront property owners it would be prudent to work towards a lakeshore plan as requested by the residents of Island Lake rather than take enforcement action against historical activity and require questionable remedial measures. The Board agrees with the Director that lakefront property owners must be stopped from undertaking activities such as sanding and cutting weed until this lakeshore plan is completed and even then lakefront property owners should only be permitted to undertake such work under the terms of an approval.

government which Council is certain has helped fuel the government hard line position. It is our view as Council, representing the majority of lake property owners that furthering this issue with fines will accomplish nothing but fuel more hard feelings between government and the Albertans they serve. It is our hope that the Environmental Appeal Board seriously consider this matter at hand and come up with a better solution than letting government use a big stick to resolve these issues.”

V. CONCLUSIONS AND RECOMMENDATIONS

[35] The Board believes the Director took too strong an action in dealing with Mr. Martin. However, it is clear that Mr. Martin carried out an activity requiring an approval without an approval.²¹ The Director needs to send a message to lakefront property owners that appropriate enforcement action will be taken against them under the *Water Act* if they continued historical practices. An enforcement order to stop an activity which was already done is appropriate, as is an enforcement order to undertake remedial action that is logical, reasonable, and environmentally sound. However, an enforcement order that includes a direction to undertake remedial action when it is not logical or reasonable to do so is not appropriate.

[36] In conclusion, the Board recommends that the Enforcement Order be varied due to the circumstances discussed. The Director acted within his jurisdiction in issuing the Order. Mr. Martin contravened the *Water Act*. However, the other parties involved in this matter did not operate in concert with each other to ensure that Mr. Martin was getting the same message about what he should or should not do. To remove the sand that Mr. Martin added makes no ecological or economic sense. The Board recommends all involved parties - the lakefront property owners, the Director, and the Summer Village of Island Lake - participate in a lakeshore planning exercise to ensure that any development by the lakefront property owners occurs within the constraints of ensuring environmental protection. The Board supports the Director's efforts to make it clear to lakefront property residents that any activities on the shore and bed of the lake should cease until the lakeshore plan is developed and implemented, and even then activities can only be carried out with an approval. Further efforts should be made to clearly communicate the Director's concerns to the lakefront property owners even during this planning process. Once the plan is implemented, it should be made widely known to all residents and property owners.

²¹ Section 142(1)(h) and 142(2)(f) states:

- 142(1) A person who ...
 - (h) commences or continues an activity except under an approval or as otherwise authorized by this Act.
- (2) A person who knowingly ...
 - (f) commences or continues an activity except under an approval or as otherwise authorized by this Act;....

[37] In accordance with section 91 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3, the Board recommends to the Minister of Environment that the decision of the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment to issue Enforcement Order No. 2000-WA-02, issued to Mr. Neil Martin, on September 20, 2001 be varied to:

1. replace the requirement to remove the sand placed by Mr. Martin with a requirement for Mr. Martin to work with the Director to develop a maintenance program for the lakefront of his property that will minimize environmental impacts; and
2. this plan should be developed within six months of the date of the Minister's Order respecting this Appeal and implemented as soon as possible thereafter.

[38] Attached for the Minister's consideration is a draft Ministerial Order implementing these recommendations.

[39] Finally, with respect to section 92(2) and 93 of the Act, the Board recommends that copies of this Report and Recommendations and any decision of the Minister be sent to the following parties:

1. Mr. Neil Martin;
2. Mr. Doug Slatnik, Director, Northeast Boreal Regions, Natural Resources Services, Alberta Environment, represented by Ms. Heather Veale and Mr. David France, Alberta Justice;
3. Mr. Gary and Ms. Cathy Fitzgerald;
4. the Summer Village of Island Lake, represented by Ms. Lorraine Robertson, the Administrator for the Summer Village; and
5. Mr. Chet and Ms. Kathleen Gilmore.

Dated on June 8, 2001, at Edmonton, Alberta.

Dr. M. Anne Naeth

Dr. John P. Ogilvie

Dr. Curt Vos

VI. EXHIBITS

Appeal EAB 00-065

March 2 and 9, 2001, Edmonton, Alberta

Neil and Bertha Martin

Enforcement Order No. 2000-WA-02/*Water Act*

E X H I B I T L I S T

Exhibit No.	Description
1	A Notice of Public Hearing advertisement was placed in the <i>Edmonton Journal</i> on February 10, 2001, advising of the hearing to be held on March 2, 2001, in Edmonton. A News Release issued on February 14, 2001.
2	Notice of Appeal filed by Mr. Neil and Ms. Bertha Martin on October 30, 2000.
3	Newspaper article “Sheila Copps is running on empty” published in the <i>Edmonton Sun</i> on Monday, February 12, 2001 from Mr. Martin.
4	Section 2 of the <i>Environmental Protection and Enhancement Act</i> from Mr. Martin.
5	Letter to the Honourable Halvar Jonson, Minister of Environment, dated approximately 1 year ago regarding the Summer Village of Island Lake from Mr. Martin.
6	Letter of December 2, 2000 to the Executive Director and Registrar of Appeals, Environmental Appeal Board regarding information to clarify their grounds for appeal from Mr. Martin.
7 A-C	Photograph-Mr. Martin’s neighbour 2 doors south – sand in lake 100ft August-September 2000

8 A-B	<p>A. Water (Ministerial) Regulation, A.R. 205/98, Schedule 1, Activities That Are Exempt From The Requirement For An Approval, Section 2, pages 41</p> <p>B. Water (Ministerial) Regulation, A.R. 205/98, Schedule 1, Activities That Are Exempt From The Requirement For An Approval, Section 2, pages 42</p>
9 A-O	15 Photographs from Mr. Gary and Ms. Cathy Fitzgerald
10	Letter to the Honourable Halvar Jonson, Minister of Environment, sent October 1, 2000 with petition from Mr. Gary and Ms. Cathy Fitzgerald
11	Written Submission for the Martin Hearing of the Director, Northeast Boreal Region, Natural Resources Services, Alberta Environment
12	The Director's Record related to Enforcement Order No. 2000-WA-02 (<i>Water Act</i>)
13	Diagram of properties that exist around lakes in Alberta from presentation of Mr. Gerry Haekel, Public Lands-Shoreland Management Coordinator, Alberta Agriculture, Food and Rural Development
14	Diagram of Summer Village of Island Lake from presentation of Mr. Gerry Haekel, Public Lands-Shoreland Management Coordinator, Alberta Agriculture, Food and Rural Development
15	Legal Title of the Martins' property from Mr. Gerry Haekel, Public Lands-Shoreland Management Coordinator, Alberta Agriculture, Food and Rural Development
16	Subdivision Plan of Island Lake
17	Diagram of boundary of lake
18	Diagram of Island Lake Near Athabasca Station D07BE904 Water Levels (1968 to 2000)
19 A-B	<p>Photographs April 22, 2000 from Department</p> <p>A. Reserve Bed and Shore in front of the Martins – North</p> <p>B. Reserve Bed and Shore in front of the Martins - South</p>

20 A-C	<p>Photographs (copies) of investigation from September 28, 1998 from the Department</p> <p>A. Island Lake sand piles at shore below bank</p> <p>B. Summer Village of Island Lake</p> <p>C. Island Lake Summer Village road crush/sand at shore, note sedges and willows</p>
21	<p>Letter to Summer Village of Island Lake cottagers and Brochure <i>Guidelines For Lakeshore Use</i> from Mr. Gerry Haekel, Shoreland Management Coordinator, Public Lane Management Branch, Alberta Agriculture, Food and Rural Development</p>
22	<p>Agenda for the April 9, 1999 Meeting with the Summer Village Island Lake Council</p>
23	<p>Agenda for the July 17, 1999 Meeting with the Summer Village Island Lake</p>
24	<p>Letter dated April 29, 1999 to Mayor Jim Sandmaier, Summer Village of Island Lake South from Mike Melnyk, Agricultural Conservation and Reclamation Officer, Alberta Agriculture, Food and Rural Development</p> <p>Letter dated April 29, 1999 to Ms. Lorraine Robertson, Administrator, Summer Village of Island Lake from Mike Melnyk, Agricultural Conservation and Reclamation Officer, Alberta Agriculture, Food and Rural Development</p> <p>Summer Village of Island Lake Newsletter dated June 1999 and inserts</p>
25	<p>Government of Alberta News Releases No. 00-054 Altering a water body may get you in over your head; No. 99-049 Protecting Alberta's Aquatic Resources; No. 99-020 A Lesson on Lakeshores – Leave Them Alone; No. 98-075 New Water Act proclaimed to manage, conserve and protect Alberta's water resources; No. 98-018 Life in a wet world is focus of Alberta Government report</p>
26	<p>A Fish Conservation Strategy for Alberta 2000-2005</p>
27	<p>Northern Pike in Alberta Public Review of Future Fishery Management Advisory Committee Summer Report and Recommendations November 1998</p>

28	Alberta's Northern Pike Management and Recovery Plan June 1999
29	<i>Atlas of Alberta Lakes</i> , Athabasca River Basin Island Lake, The University of Alberta Press
30	<i>Caring for Shoreline Properties</i> , Changing the Way We Look at Owning Lakefront Property in Alberta 1999
31	<i>The Vital Edge</i> video from Alberta Environment

VII. DRAFT ORDER

**Ministerial Order
/2000**

Environmental Protection and Enhancement Act,
S.A. 1992, c.E-13.3

**Order Respecting Environmental Appeal Board
Appeal No. 00-065**

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeal Board Appeal No. 00-065.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2001.

Honourable Lorne Taylor
Minister of Environment

Draft Appendix

Order Respecting Environmental Appeal Board Appeal No. 00-065

With respect to the decision of Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment to issue Enforcement Order No. 2000-WA-02, (the "Order") issued to Mr. Neil Martin, on September 20, 2001, I, Dr. Lorne Taylor, Minister of Environment order that the Order be varied by:

1. deleting the requirement to remove the sand placed by Mr. Martin and replacing it with a requirement for Mr. Martin to work with the Director to develop a maintenance program for the lakefront of his property that will minimize environmental impacts; and
2. requiring that this plan should be developed within six months of the date of this Ministerial Order and implemented as soon as possible thereafter.