

ALBERTA  
ENVIRONMENTAL APPEAL BOARD

Decision

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Date of Decision – June 4, 2002

**IN THE MATTER OF** sections 91, 92 and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3.

**-and-**

**IN THE MATTER OF** an appeal filed by Mr. Steve Seniuk with respect to Enforcement Order No. 2001-WA-08 issued by the Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment.

Cite as: *Seniuk v. Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment.*

## **EXECUTIVE SUMMARY**

Alberta Environment issued Enforcement Order No. 2001-WA-08 to Mr. Steve Seniuk with respect to an earthen berm located at SE 7-54-17-W4M, near the Hamlet of Hilliard, in Lamont County, Alberta.

Mr. Seniuk admitted in his submissions that he had constructed the berm and that it was built to prevent flooding onto his land. However, the berm affected the natural flow of the water. This caused the water to backup, flooding adjacent properties and creating the potential of damaging the adjacent county roadway. After repeated attempts to get Mr. Seniuk to remove the berm, the Director issued an Enforcement Order.

Mr. Seniuk filed a Notice of Appeal on December 31, 2001. As the appeal was filed well past the seven-day time limit under the *Water Act*, the Board dismisses Mr. Seniuk's appeal.

**HEARING BEFORE:**

William A. Tilleman, Q.C., Chair.

**PARTIES:**

**Appellant:** Mr. Steve Seniuk, represented by Ms. Stella Varvis and Mr. Brewster Kwan, Duncan & Craig.

**Director:** Mr. Wayne Boyd, Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment, represented by Mr. David France, Alberta Justice.

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## I. BACKGROUND

[1] On September 6, 2001, the Director, Enforcement and Monitoring, Parkland Region, Alberta Environment (“the Director”) issued Enforcement Order No. 2001-WA-08 (the “Order”) under the *Water Act*, R.S.A. 2000, c. W-3,<sup>1</sup> to Mr. Steve Seniuk (the “Appellant”) requiring the removal of a berm constructed on SE¼ 7-54-17-W4M in the County of Lamont, Alberta. The Order was served on the Appellant’s son on October 7, 2001.

[2] On December 5, 2001, the Director issued an amendment to the Order, allowing for an extension of time to comply with the Order to December 21, 2001. The amendment was served on the Appellant’s wife on December 14, 2001.

[3] The Board received a Notice of Appeal from the Appellant on December 31, 2001. On January 7, 2002, the Board acknowledged receipt of the Notice of Appeal and requested the following further information from the Appellant:

- “1. **Mr. Seniuk** is requested to complete the attached Notice of Appeal form and return it to the Environmental Appeal Board by **January 21, 2002**.
2. The normal time limit prescribed in the *Water Act* for filing such an appeal is 7 days. As Mr. Seniuk’s Notice of Appeal appears to be outside the time limit prescribed in the *Water Act*, **Mr. Seniuk is requested to advise the Board if he wishes to request an extension of time to appeal?** Please indicate to the Board the reasons for the extension of time to appeal **and provide an explanation as to why the appeal was filed outside of the 7-day time limit**. The granting of the extension of time is at the discretion of the Board and is not routinely granted. Mr. Seniuk is requested to provide this information to the Environmental Appeal Board by **January 21, 2002**.” (Emphasis in the original.)

[4] In this same letter, the Board requested that the Director provide a copy of all correspondence, documents, and materials relevant to this appeal (the “Record”).

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had

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<sup>1</sup> On January 1, 2002, the *Water Act*, R.S.A. 2000, c.W-3 replaced the *Water Act*, S.A. 1996, c.W-3.5.

been the subject of a hearing or review under their respective legislation. Both Boards responded in the negative.

[6] On January 14, 2002, the Appellant attended at the Board office and provided the Board staff members with a Summary of Facts in response to the Board's letter of January 7, 2002. In the Summary of Facts, the Appellant stated that he had in fact removed the blockage by digging a ditch, but this work was not done to the satisfaction of the Director. The Appellant was told that the County of Lamont was concerned about flooding, but according to the Appellant, the County was satisfied with the work completed. The Director again advised the Appellant that the work was not satisfactory, and he again dug the ditch deeper. The Appellant is of the view that he has complied with the Order and that no further work needs to be done.

[7] On January 22, 2002, the Director advised that another inspection of the site had been done and noted that the work required under the Order had not been completed. The Board acknowledged this letter on January 24, 2002, and, at that time, indicated to the Appellant that the Board was considering dismissing the appeal as the Appellant had not provided sufficient reasons to the Board for granting an extension. However, the Board provided the Director with an opportunity to respond to the Appellant's Summary of Facts. The Director's response was to state that the work had not been completed, and therefore, the Appellant had not complied with the Order.

[8] On January 31, 2002, the Board again requested that the Director provide a response to the Appellant's statement of January 14, 2002. At this time, the Board again requested that the Director provide the Board with a copy of the Record.

[9] On February 5, 2002, the Director provided his response to the Board, in which he stated that the Appellant did not provide any reason to grant an extension of time to file the appeal. The Director requested that production of the Record be postponed until the Board had ruled on the issue of extending the time to file the appeal, and the Record would be forwarded only if the time extension was granted. The Board advised the Director that it wished to have the Record before making that determination and set February 8, 2002, as the date that the Record was to be received by the Board.

[10] On February 7, 2002, the Board acknowledged the letter dated February 6, 2002, from the Director and granted an extension to February 14, 2002, for the Record to be provided.

[11] On February 14, 2002, the Board received the Record, and it provided a copy to the Appellant.

[12] On February 25, 2002, the Board was notified that the Appellant had retained counsel and an extension was requested for the Appellant's response to the Director's submission. The Board granted an extension.

[13] The Appellant's response submission was received on March 19, 2002.

## **II. DISCUSSION**

[14] The Appellant had constructed a berm of soil, rocks, and stones within the fence line of his property. As a result of the berm, the natural pathway for the water flow was impeded, possibly causing the water to back up onto neighbouring property and potentially damaging the adjacent road. The Appellant claimed that the berm was constructed to prevent flooding on his land, flooding he claimed was a result of ditches being constructed on the neighbouring property to the east.

[15] There is a history involving the site and the Appellant. The Director had received complaints from the County of Lamont regarding the berm as early as December 1998.<sup>2</sup> The complainant had concerns that the berm could potentially block water flowing from the culvert. In January 1999, the Director received a public complaint regarding the berm as the complainant considered there was the potential for flooding on adjacent private land.<sup>3</sup> In April 1999, the Director's staff inspected the site, and a letter was sent to the Appellant in June 1999, advising that the berm was unauthorized and was to be removed within one month. The Director's staff completed inspections in August 2000, October 2000, and January 2001. At each inspection, the berm had not been removed. At the time of the October inspection, the Director's staff discussed the matter with the Appellant, and the Appellant responded by stating that he refused to remove the berm.

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<sup>2</sup> See: Enforcement Order No. 2001-WA-08.

<sup>3</sup> See: Enforcement Order No. 2001-WA-08.

[16] In July 2001, the Director received another complaint from the County regarding the backup of water as a result of the berm. The Director's staff re-inspected the site and confirmed that the berm had not been removed and the water had backed up in the ditches.<sup>4</sup> It was in response to this complaint and the inspection that, on September 6, 2001, the Director issued the Order. The Director's staff did another inspection on January 22, 2002,<sup>5</sup> and the work under the Order had yet to be completed.

[17] Without deciding the merits of this case, the actions of the Appellant appear to be within the definition of activity as defined in section 1(1)(b) of the *Water Act*. Specifically, this section states:

“(b) ‘activity’ means

- (i) placing, constructing, operating, maintaining, removing or disturbing works,<sup>6</sup> 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
  - (A) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage,
  - (B) changes, may change or may become capable of changing the location of water or the direction of flow of water, including water in a water body, by drainage or otherwise...
- (ii) altering the flow, direction of flow or level of water or changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose...”

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<sup>4</sup> See: Enforcement Order No. 2001-WA-08.

<sup>5</sup> See: Letter from Director, dated January 30, 2002.

<sup>6</sup> “Works” is defined in section 1(1)(nnn) of the *Water Act* as:

“...any man-made structure, device or contrivance, or part of it, including a man-made dam and canal, and

- (i) land associated with it, and
- (ii) mitigative measures associated with it,

and includes anything that is defined as a works in the regulations for the purposes of this Act.”

[18] An approval is required prior to the start of an activity. Section 36 of the *Water Act* states:

“(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.

(2) No person shall commence or carry out an activity that is designated in the regulations as an activity in respect of which notice must be provided to the Director unless that person provides notice to the Director, in accordance with the regulations, of the intention to commence the activity or to carrying out the activity....”

[19] The construction of the berm falls under the definition of an activity as stated above, and therefore, an approval was required before the Appellant erected the berm. The Director has the authority to issue an enforcement order if, in the opinion of the Director, there has been a contravention of the *Water Act*.<sup>7</sup> As no approval was obtained prior to construction of the berm, the Appellant appears to be acting in contravention of the *Water Act*.

[20] In the initial Order, dated September 6, 2001, the removal of the berm was to be completed by September 30, 2001. However, the document was not served on the Appellant until October 7, 2001. As a result of the inconsistent time frames, the Director issued an amendment on December 5, 2001, which was served on the Appellant’s wife on December 14, 2001. It should not have taken two months for the Director to realize that it would be impossible for the Appellant to comply with the Order, and this likely contributed to the miscommunication between the Director and the Appellant. However, giving the Appellant the benefit of the doubt, the Notice of Appeal, at the latest, should have been filed by December 21, 2001.

[21] In the Appellant’s rebuttal submission, it is argued that the Order was not properly served on the Appellant.<sup>8</sup> Although the *Water Act* states that the “...Director must give a copy of it [(the enforcement order)] to the person to whom it is directed...”,<sup>9</sup> this does not state that it

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<sup>7</sup> Section 135(1) of the *Water Act* states:

“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.”

<sup>8</sup> The original Enforcement Order was served on the Appellant’s son, and the subsequent Order was served on the Appellant’s wife.

<sup>9</sup> Section 135(2) of the *Water Act*.

must be “personal service” as defined in the Alberta Rules of Court.<sup>10</sup> Even though it is not expressly stated that personal service is required, the Board is of the view that delivery to the residence of the person to whom the order is directed and acceptance by an adult at the residence would perfect service.

[22] In the *Water Act*, time limits for filing an appeal with respect to an enforcement order are clearly stated and must be adhered to. Section 116 states:

- “(1) A notice of appeal must be submitted to the Environmental Appeal Board
- (a) not later than 7 days after
  - (i) receipt of a copy of a water management order or enforcement order....”

[23] In this case, even if the original Order was not served properly, the amended Order was delivered to the Appellant’s residence and properly served. The appeal period, of seven days, would then have started on the date of service, which was December 14, 2001. Therefore, even if the Board accepted the second Order as the proper one to be appealed, the Notice of Appeal was still filed on January 7, 2002, 15 days after receipt of the Order.

[24] Under section 116(2),<sup>11</sup> the Board can grant an extension of time allowed for filing an appeal. However, the Appellant must provide sufficient evidence to indicate to the Board that there were extenuating circumstances that made it difficult for the Appellant to file the Notice of Appeal within the specified time frame.

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<sup>10</sup> See: Alberta Rules of Court, sections 13-28. Rule 15(1) states:

- “(1) Personal service is effected on an individual by leaving with him a true copy of the document to be served.”

Rule 13 specifically states that:

- “(1) A document required by these Rules to be served need not be served personally unless personal service is expressly prescribed by these Rules or by order of the Court.”

Rule 24 (1) states:

- “(1) If an address for service is furnished, all documents not required to be served personally shall be deemed to be sufficiently served if a true copy is left at or sent by prepaid registered mail to that address.”

<sup>11</sup> Section 116(2) of the *Water Act* states:

- “The Environmental Appeal Board may, on application made before or after the expiry of the period referred to in subsection (1), extend the period, if the Board is of the opinion that there are sufficient grounds to do so.”

[25] The initial submission did not provide the basis on which the Board could determine that an extension was appropriate. To be fair, the Board provided the Appellant an opportunity to provide *further* details as to why an extension should be granted, but the Appellant failed to provide the required information within the specified time frame.<sup>12</sup> The submission provided was basically a chronological list of events with minimal explanation provided.<sup>13</sup>

[26] The Board also notes that the Appellant brought forth many new arguments in its rebuttal submission. Even though the Board had asked the Appellant to provide reasons why an extension should be granted to the appeal period and reasons why the legislated appeal period was not adhered to, it was not until the “rebuttal submission” was filed that *some* reasons were presented. A rebuttal submission is intended to afford the Appellant an opportunity to respond to new issues that arose as a result of the Director’s submission.

[27] However, even after considering the rebuttal submission, the Board is unable to find sufficient circumstances to warrant an extension. As stated in another previous case, *O’Neill*,<sup>14</sup> there may be times when an extension would be granted. However, “...those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case.”<sup>15</sup>

[28] The Board notes that, as a farmer, the Appellant was in all probability busy from September to November. However, this was not the first occasion the Director had contacted the Appellant regarding the berm.

[29] Before the Board can grant an extension to file an appeal, an appellant must come “with clean hands.” In other words, this Board will consider the actions of the appellant and the actions must be *bona fide*.<sup>16</sup> In this case, the Appellant may have reinforced the berm after the Director had instructed him to remove the berm, and it appears that attempts were made to avoid

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<sup>12</sup> See: Board’s Letter, dated January 7, 2002.

<sup>13</sup> See: Appellant’s Submission, dated January 14, 2002.

<sup>14</sup> *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D.

<sup>15</sup> Although in this case the Board was referring to an extension to file a Statement of Concern, the same principles apply for extending the time to file a Notice of Appeal.

<sup>16</sup> *Bona fide* is defined as “...in or with good faith; honestly, openly, and sincerely; without deceit or fraud.”

the Director's staff.<sup>17</sup> These are not the types of actions that indicate naiveté or ignorance of the facts that would support the granting of an extension.<sup>18</sup> It appears that the Appellant had numerous opportunities to comply with the requests of the Director prior to the Order being issued, proving the Appellant knew about the Order.

[30] After receiving the original Order, the Appellant was well aware what the Director wanted from the Appellant. The Order specifically stated that the berm was to be removed by the Appellant, and the Director was to be contacted regarding the start date.<sup>19</sup> That would have been enough information upon which to file an appeal.

[31] Even though the exact date that the Appellant received the original Order cannot be determined,<sup>20</sup> the Appellant did receive the document on which it is clearly stated that a "...right of appeal may exist with [this] Board."<sup>21</sup> The address and the telephone numbers for the Board were provided in the Order. The Director did what he reasonably could to inform the Appellant of the correct appeal procedure. The opportunity was there for the Appellant to contact this Board to ask further questions as to the appeal options available to him with respect to the Order. However, the Appellant chose to contact a councilor from the County instead of this Board. The Appellant chose to follow the advise of the councilor rather than follow the

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(*Black's Law Dictionary*, 6<sup>th</sup> ed., (St. Paul: West Publishing, 1990).

<sup>17</sup> See: Enforcement Order No. 2001-WA-08.

<sup>18</sup> In the Report, there are references to the Appellant trying to avoid Alberta Environment officials by "sneaking away down the alley" and not being home at the pre-arranged times. See: the Director's Record, Letter from Mr. Lionel Veldkamp to Mr. Bernie Arnold, dated February 6, 2001, and the Enforcement Order No. 2001-WA-08.

<sup>19</sup> See: Enforcement Order No. 2001-WA-08. The Order states:

"...1. The Party shall immediately remove the Berm and the reinforcements of the Berm, including all bales and rocks, and restore natural drainage flows in the Drainage Course on the Lands [the "Remedial Work"].

2. The Party shall complete the Remedial Work no later than September 30, 2001.

3. The Party shall provide notice of the Remedial Work start date to the Manager, at least two days prior to beginning the Remedial Work; [and]

4. Within 5 days of the completion of the Remedial Work required by this Order the Party shall submit a final report confirming the work undertaken to comply with this Order."

<sup>20</sup> See: Appellant's Rebuttal Submission, dated March 19, 2002.

<sup>21</sup> See: Enforcement Order No. 2001-WA-08.

directions of the Director or to even contact someone else at Alberta Environment regarding the matter.<sup>22</sup>

[32] The Board is not satisfied on these facts that special circumstances existed to extend the prescribed time limit under the *Water Act* for submitting the Notice of Appeal. As a result, the appeal has been filed out of time and is not properly before the Board.

### III. DECISION

[33] For the reasons stated above, the Board finds that the appeal against the Order is filed out of time and therefore, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12,<sup>23</sup> the appeal is dismissed.

Dated on June 4, 2002, at Edmonton, Alberta.

“original signed by”  
William A. Tilleman, Q.C.  
Chair

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<sup>22</sup> See: Appellant’s Rebuttal Submission, dated March 19, 2002. It states:

“...after Mr. Seniuk received the Order, he contacted Terry Cossey, a councilor for the County, for advise. Mr. Cossey visited Mr. Seniuk’s property to inspect the alleged blockage and advised Mr. Seniuk that he would contact Alberta Environment to see whether the matter could be resolved. In the meantime, Mr. Cossey advised Mr. Seniuk to dig a drainage ditch, which Mr. Seniuk did on the north side of the berm. However, since Mr. Seniuk was still having problems with excess drainage flooding onto his property as a result of his neighbour’s actions, Mr. Cossey suggested that Mr. Seniuk should not remove the berm itself until the ditches on the neighbour’s property were filled.”

<sup>23</sup> On January 1, 2002, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1993, c.E-13.3.