

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision: January 20, 2005

IN THE MATTER OF sections 91, 92, 95, and 97 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 Linda Covey, Elin H. Barlem, J. Mark Barlem, Margaret Baycroft, Bill and Linda Biggart, Leo E. Carter, Judy Hudson, Robert R. Lewis, Ron Macdonald, Margaret E. Medak, Laurie A. Miller, Randy K. Miller, Len Plummer, Karen Strong, Laurence Strong, Leah Wile, Laurie Zaleschuk, Dixie and Kevin Ingram, Robert J. Miller, Larry and Eleanor Brown, Sydney and Myrtle Quartly, William and Doreen Thomsen, William Froling, and Jean Veldkamp and Howard Milligan with respect to Approval No. 00193447-00-00 issued under the *Water Act* to Hal Willis by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (20 January 2005), Appeal Nos. 03-014-019, 021-027, 029-038, and 03-082-ID1 (A.E.A.B.).

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Water Act* to Mr. Hal Willis to place clean fill on property adjoining Dodd's Lake in Innisfail, Alberta. The Environmental Appeals Board received 26 Notices of Appeal.

The Board granted a Stay as the appellants had shown, prima facie, that at least one of them would be affected by the project. A preliminary meeting was held to determine if any of the appellants are directly affected; if the Stay should remain in effect or be released; if the provincial government had participated in a *Canadian Environmental Assessment Act* review; and the issues to be heard at the hearing, if one is held.

After hearing the submissions of the parties, the Board determined:

1. The Appellants at the hearing will be: Ms. Margaret Baycroft, Ms. Margaret E. Medak, Ms. Laurie Ann Miller, Mr. Randy Miller, Ms. Leah Wile, Ms. Dixie and Mr. Kevin Ingram, and Ms. Doreen and Mr. William Thomsen. All the other appeals were dismissed.
2. The Stay will remain in place until the Minister of Environment releases his decision.
3. The matter was not the subject of a *Canadian Environmental Assessment Act* review.
4. The issue to be heard at the hearing is:
Has the Director properly considered the issue of water quality impacts in issuing the Approval to place the fill in the location specified in the Approval?

PRELIMINARY MEETING BEFORE: Dr. Steve E. Hrudehy, Panel Chair,
Mr. Ron V. Peiluck, Board member, and
Dr. Alan J. Kennedy, Board Member.

APPEARANCES:

Appellants: Ms. Linda Covey, Ms. Elin H. Barlem, Mr. J. Mark Barlem, Ms. Margaret Baycroft, Mr. Bill and Ms. Linda Biggart, Mr. Leo E. Carter, Ms. Judy Hudson, Mr. Robert R. Lewis, Mr. Ron Macdonald, Ms. Margaret E. Medak, Ms. Laurie A. Miller, Mr. Randy K. Miller, Mr. Len Plummer, Ms. Karen Strong, Mr. Laurence Strong, Ms. Leah Wile, Ms. Laurie Zaleschuk, Ms. Dixie and Mr. Kevin Ingram, Mr. Robert J. Miller, Mr. Larry and Ms. Eleanor Brown, Mr. Sydney and Ms. Myrtle Quartly, Mr. William and Ms. Doreen Thomsen, Mr. William Froling, and Ms. Jean Veldkamp and Mr. Howard Milligan.

Approval Holder: Mr. Hal Willis.

Director: Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

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I. BACKGROUND

[1] On June 30, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”) issued Approval No. 00193447-00-00 (the “Approval”)¹ under the *Water Act*, R.S.A. 2000, c. W-3 to Mr. Hal Willis (the “Approval Holder”) authorizing the placement of clean fill on property adjoining Dodd’s Lake at SW 28-35-28-W4M in Innisfail, Alberta.

[2] Between July 22 and 28, 2003, the Environmental Appeals Board (the “Board”) received Notices of Appeals from Ms. Linda Covey (03-014), Ms. Elin H. Barlem (03-015), Mr. J. Mark Barlem (03-016), Ms. Margaret Baycroft (03-017), Mr. Bill and Ms. Linda Biggart (03-018), Mr. Leo E. Carter (03-019), Ms. Judy Hudson (03-021), Mr. Robert R. Lewis (03-022), Mr. Ron Macdonald (03-023), Ms. Margaret E. Medak (03-024), Ms. Laurie Miller (03-025), Mr. Randy K. Miller (03-026), Mr. Len Plummer (03-027), Ms. Karen Strong (03-029), Mr. Laurence Strong (03-030), Ms. Leah Wile (03-031), Ms. Laurie Zaleschuk (03-032), Ms. Dixie and Mr. Kevin Ingram (03-033), Mr. Robert J. Miller (03-034), Mr. Larry and Ms. Eleanor Brown (03-035), Mr. Sydney and Ms. Myrtle Quartly (03-036), Mr. William and Ms. Doreen Thomsen (03-037), Mr. William Froling (03-038), and Ms. Jean Veldkamp and Mr. Howard Milligan (03-082) (collectively the “Appellants”) appealing the Approval.² The Appellants also requested a Stay.

[3] The Board acknowledged the Notices of Appeal and requested a copy of the documents related to the appeal (the “Record”)³ from the Director. The Board requested all the Parties⁴ provide available dates for a mediation meeting or a hearing.

¹ Director’s Record, Tab 7.

² Ms. Davina Daly withdrew her appeal with respect to the Approval on September 24, 2003. The Board issued a Discontinuance of Proceedings on September 25, 2003. See: *Daly v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (25 September 2003), Appeal No. 03-020-DOP (A.E.A.B.). Mr. R.C. Sifton withdrew his appeal on October 30, 2003. See: *Sifton v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 November 2003), Appeal No. 03-028-DOP (A.E.A.B.).

³ The Board received a copy of the Record on August 28, 2003, and copies were forwarded to the other Parties on September 8, 2003.

⁴ “Parties” in this decision refers to the Appellants, the Approval Holder, and the Director.

[4] 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 been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] On August 14, 2003, the Board wrote to the Parties regarding the Stay applications. The Board requested the Appellants answer the following questions:

- “1. What are the serious concerns of each of the Appellants that should be heard by the Board?
2. Would each of the Appellants suffer irreparable harm if the Stay is refused?
3. Would each of the Appellants suffer greater harm if the Stay was refused pending a decision of the Board than Mr. Hal Willis would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are each of the Appellants directly affected by Alberta Environment’s decision to issue the Amending Approval to Hal Willis? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected.”

[6] Between August 20 and August 28, 2003, the Board received responses from Ms. Jean Veldkamp and Mr. Howard Milligan, Mr. Kevin Ingram, Ms. Linda Covey, Ms. Elin H. Barlem, Mr. J. Mark Barlem, Ms. Margaret Baycroft, Mr. Bill and Ms. Linda Biggart, Mr. Leo E. Carter, Ms. Davina Daly, Ms. Judy Hudson, Mr. Robert R. Lewis, Mr. Ron Macdonald, Margaret E. Medak, Ms. Laurie Miller, Mr. Randy K. Miller, Mr. Len Plummer, Mr. Ms. Karen Strong, Mr. Laurence Strong, Ms. Leah Wile, Ms. Laurie Zaleschuk, Ms. Dixie and Mr. Kevin Ingram, Mr. Robert J. Miller, Mr. Larry and Ms. Eleanor Brown, Mr. Sydney and Ms. Myrtle Quartly, Mr. William and Ms. Doreen Thomsen, and Mr. William Froling.

[7] On September 19, 2003, the Board requested the Director and the Approval Holder to respond to the same questions as the Appellants had answered. The Board received the Approval Holder’s response on September 30, 2003, and the Director responded on October 1, 2003. The Appellants provided their final response on October 10, 2003.

[8] The Board notified the Parties on October 24, 2003, that a temporary Stay was granted on the basis that, *prima facie*, at least one of the Appellants is directly affected. The Stay

was to remain in place until a decision was made on the matters to be heard at the Preliminary Meeting or until otherwise directed by the Board.

[9] On November 5, 2003, Ms. Linda Covey provided the Board with documents she had received from Fisheries and Oceans Canada, and copies were provided to the other Parties.

[10] On November 26, 2003, the Board notified the Parties that a Preliminary Meeting would be held on December 16, 2003, to hear the following issues:

- “• The directly affected status of the Appellants (as noted above, to determine the directly affected status of the Appellants the Board will be looking at the location of the Appellants in relation to the project, when, why and how often the Appellants use the area in question and how the project will affect the Appellants).
- Whether the Board should extend or release the Stay.
- Whether the Government has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all of the matters included in the notices of appeal. The Board notes that it received correspondence from Ms. Covey indicating she has been in contact with the Department of Fisheries and Oceans. The Board further notes that pursuant to section 95(5)(b)(ii) of the *Environmental Protection and Enhancement Act* that if the Alberta Government (Alberta Environment) has participated in a review in relation to this matter under the *Canadian Environmental Assessment Act* (Canada) the Board must dismiss the appeals.
- The issues to be heard at a hearing should one be held.”

[11] The Parties provided written submissions on the issues between December 5 and 10, 2003.

[12] The Preliminary Meeting was held on December 16, 2003, in Red Deer, Alberta.

II. DIRECTLY AFFECTED

A. Submissions

1. Appellants

[13] Ms. Linda Covey explained she lives directly behind the area to be filled, but does not live directly on the shore of the Lake. Ms. Covey expressed concerns regarding the Lake

generally, and she stated she used the Lake primarily for recreational use. Ms. Covey argued the area was public land and was under water, and people believed it would remain that way. She discussed the various public recreational uses of the land and the lake, including canoeing, fishing, and wildlife watching. Ms. Covey stated, "...the fill directly affects and unduly interferes with the amenities of the neighbourhood, interferes with and affects the use, and enjoyment and value of adjacent parcels of land."⁵

[14] Mr. Larry and Ms. Eleanor Brown stated they live directly beside and in full view of Dodd's Lake. Mr. and Ms. Brown stated the lower Lake levels have an adverse affect as there are now foul odours from the Lake, a decrease in the wildlife population but an increase in the number of flies and mosquitoes, and there is limited access to the Lake. They explained that they chose to retire by the Lake, as they enjoy watching the wildlife but now, with the odour and mosquitoes, it is unpleasant for them to work in their yards and gardens or to open their windows. Ms. Brown stated they cannot get to the waters edge now as the docks are well away from the water.

[15] Ms. Dixie and Mr. Kevin Ingram explained they live directly on the eastern shore of the Lake. They stated the project will result in a deterioration of wildlife habitat, especially the aspen grove and the marshy, cattail area. They did, however, concede the cattail area and the aspen grove are on the Approval Holder's private property. They argued the further loss of shorefront to development decreases areas wildlife could access the Lake. According to these Appellants, decreased access also makes it more difficult for people to use the Lake for recreational purposes.

[16] Mr. Sydney Quartly stated he has lived in the area for over 80 years, 10 of which have been in the area of Dodd's Lake, and he is not aware of any flooding in the area. He emphasized the poor Lake conditions that have resulted from the decreased lake level, including the foul odour and increased aquatic growth.

[17] Ms. Elin Barlem was generally concerned about the shoreline habitat and the resulting changes in the ecosystem. She stated she purchased her property because of the natural area behind her place that she believed was the property of the Town of Innisfail. She stated she

⁵ Ms. Linda Covey's submission, dated December 4, 2003.

has tried to leave her property in a natural state and was concerned the development, including the noise associated with construction, would impact her enjoyment of the land. She stated the trees would be gone and houses would be in the way of her view of the Lake.

[18] Ms. Laurie Ann Miller stated she tries to keep her land in a natural condition by not clearing the shoreline. She was concerned the Town's plan of changing the Lake to a storm water retention pond and the management plan basically equate to a swamp. She explained the shoreline is out about nine feet from where it once was, and where three quarters of an acre was under water, now only one half an acre is underwater.

2. Approval Holder

[19] The Approval Holder argued aerial photographs and maps from 1893 demonstrate that the Lake does not have a history of water levels claimed by some of the Appellants.⁶ He stated that with the growth of the Town of Innisfail, a number of wet areas had been filled in and built upon, and this, along with more pavement, caused the water to flow into Dodd's Lake. With increased siltation, the water level in the Lake increased, forcing the Town to use the Lake as a storm water management pond. According to the Approval Holder, this has resulted in water covering four acres of the 6.5 acres of useable land he owns. He stated the fill is intended to try and save the remainder of his land.

[20] The Approval Holder stated the fill will be placed well back from the waters' edge, and the required municipal and federal reserves have been established. He explained the fill would cover only some of the cattails. He stated he received permission from the Town of Innisfail to place the fill dirt and received the required approvals from the Department of Fisheries and Oceans and Alberta Environment. He also stated he had contacted Navigable Waters Protection and was told they did not have a concern with the project as he was not placing the fill in the water body and was back from the set levels of the Lake.

[21] The Approval Holder stated he has obtained approval to develop a six-lot subdivision of his property. He stated the environmental concerns expressed by some of the Appellants were considered, prior to the planning authorities giving the approval.

⁶ See: Approval Holder's submission, dated September 29, 2003.

[22] The Approval Holder explained the fill area is on his own property and will be against the Municipal Reserve, and therefore, well away from the Environmental Reserve and the waters edge. The Approval Holder stated a portion of the cattail area will remain after the fill is added. The Approval Holder did not believe a permit is required to do the work.

[23] The Approval Holder argued the Appellants would not be directly affected by the project, as the fill is not near the water. He added that "...the concerns listed by the appellants focus on further development of the property..." and the Board should not consider these concerns.⁷

[24] The Approval Holder requested the Board dismiss all of the appeals.

3. Director

[25] The Director stated he accepted numerous Statements of Concern and would not take any position on the issue of directly affected.⁸

B. Basis for Directly Affected

[26] Before the Board can accept a notice of appeal as being valid, the individual must show that he or she is directly affected. Under section 115 of the *Water Act*, an individual who is directly affected by the decision of the Director – here the issuance of the Approval - has the right to file a notice of appeal with the Board.⁹ The Board has examined the term "directly affected" in a number of previous appeals, providing a framework to determine if appellants should be given standing to appear before this Board. The test is the same whether the appeal is filed under the *Water Act* or the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.

⁷ Approval Holder's submission, dated September 29, 2003.

⁸ See: Director's submission, dated October 1, 2003.

⁹ Section 115(1) of the *Water Act* provides:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ...

(c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted

(i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was

E-12 (“EPEA” or the “Act”). Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.¹⁰

[27] The requisite test for determining a person’s directly affected status has two elements; the decision must have an effect on the person and that effect must be directly on the person. In *Kostuch*,¹¹ the Board stated “...that the word ‘directly’ requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval in question.”¹²

[28] The principle test for determining directly affected was stated in *Kostuch*:

“Two ideas emerge from this analysis about standing. First, the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. The first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person’s interests. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernible interest, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. ‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.

Second, a person will be more readily found to be ‘directly affected’ if the interest in question relates to one of the policies underlying the Act. This second issue raises a question of law, i.e., whether the person’s interest is supported by the statute in question. The Act requires an appropriate balance between a broad range of interests, primarily environmental and economic.”¹³

previously provided under section 108...”

¹⁰ See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

¹¹ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246, Appeal No. 94-017 (A.E.A.B.) (“*Kostuch*”).

¹² *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 28, Appeal No. 94-017 (A.E.A.B.).

¹³ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35, Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[29] In coming to this conclusion in *Kostuch*, one of the considerations was that the directly affected person "...must have a substantial interest in the outcome of the approval [certificate or licence] that surpasses the common interest of all residents who are affected by the approval."¹⁴ In *Kostuch*, the Board considered its previous decision in *Ross*,¹⁵ saying directly affected "...depends upon the chain of causality between the specific activity approved...and the environmental effect upon the person who seeks to appeal the decision."¹⁶

[30] Further, in *Kostuch* the Board stated that the determination of directly affected is a "...multi-step process. First, the person must demonstrate a personal interest in the action taken by the Director. Assuming the interest is specific and detailed, a related question to be asked is whether that interest is a personal (or private) interest advanced by one individual, or similar interests shared by the community at large. In those cases where it is the latter, the group will still have to prove that some of its members will have their own standing. Finally, the Board must feel confident that the interest affected is consistent with the underlying policies of the Act."¹⁷

The Board further stated that:

"If the person meets the first test, then they must go on to show that the action by the Director will cause a direct effect on the interest, and that it will be actual or imminent, not speculative. Once again, where the effect is unique to that person, standing is more likely to be justified."¹⁸

[31] A similar view was expressed in *Paron* where the Board held that the

"...Appellants are also concerned that the Approval Holder has been able to obtain an Approval to cut weeds and carry out beach restoration, while the Appellants have not been able to obtain similar approval to carry out such work on their property. While this argument goes to matters that are properly before the Board – the decision-making role of the Director – it does not demonstrate that the Appellants are directly affected, though they are probably generally affected by the Approval. But, the Appellants have not demonstrated that they are impacted by the decision to issue the Approval in a different way than any other lakefront property owner anywhere in Alberta that has been refused a similar

¹⁴ *Ross v. Director, Environmental Protection* (24 May 1994), Appeal No. 94-003 (A.E.A.B.) ("*Ross*").

¹⁵ *Ross v. Director, Environmental Protection* (May 24, 1994), Appeal No. 94-003 (A.E.A.B.).

¹⁶ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 33, Appeal No. 94-017 (A.E.A.B.).

¹⁷ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 38, Appeal No. 94-017 (A.E.A.B.).

¹⁸ *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraph 39, Appeal No. 94-017 (A.E.A.B.).

approval. The Appellants have not demonstrated a unique interest that would make them entitled to appeal this decision.”¹⁹

[32] *Paron* also reminds us the onus to demonstrate this distinctive interest, to show they are directly affected, is on the Appellants. In *Paron*, the Board held that:

“Beyond these arguments, the Appellants have not presented any evidence – beyond a bare statement that they live in proximity to the proposed work – which speaks to the environmental impacts of the work authorized under the Approval. They have failed to present facts which demonstrate that they are directly affected. As a result, the Appellants have failed to discharge the onus that is on them to demonstrate that they are directly affected.”²⁰

The Board’s Rules of Practice also make it clear that the onus is on the Appellants to prove that they are directly affected.²¹

[33] The Board still adheres to the two-step approach in determining a person’s directly affected status, and the individual must pass both parts of the test. It is not enough to show that an individual is affected by an activity, as arguments can be presented to show that for populated areas or areas of high use, countless individuals are affected by the Director’s decision, but in reality, normally only a few can show they are *directly* affected.

[34] In the recent *Court*²² decision, Justice McIntyre summarized the following principles regarding standing before the Board.

“First, the issue of standing is a preliminary issue to be decided before the merits are decided....

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need

¹⁹ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (1 August 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 22 (A.E.A.B.) (“*Paron*”).

²⁰ *Paron et al. v. Director, Environmental Service, Northern East Slopes Region, Alberta Environment* (August 1, 2001), Appeal Nos. 01-045, 01-046, 01-047-D at paragraph 24 (A.E.A.B.).

²¹ Section 29 of the Board’s Rules of Practice provide:

“Burden of Proof

In cases in which the Board accepts evidence, any party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.”

²² *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4th) 71 (Alta. Q.B.).

not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question....

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing....

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm...."²³

[35] Justice McIntyre concluded by stating:

"To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted...."²⁴

[36] Before the Board makes its decision regarding the Stay and whether there will be a hearing, the Board must determine the directly affected status of the Appellants.

C. Discussion and Analysis

[37] At issue before the Board in these appeals is whether adding fill to the area specified in the Approval will have a detrimental effect to the quality of water in the Lake. Based on the information presented thus far, the Board is not certain whether the fill will or will not have an adverse affect on the Lake. As the level of proof is on the balance of probabilities, the Board will, for the purposes of determining who is directly affected, accept there is a possibility of an adverse impact. Therefore, this is the basis on which the Board will determine who is, and who is not, directly affected.

[38] In *Bildson*,²⁵ the Board stated:

²³ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4th) 71 (Alta. Q.B.) at paragraphs 67 to 71.

²⁴ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4th) 71 (Alta. Q.B.) at paragraph 75.

²⁵ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky*

“The greater the proximity between the location of the appellant’s use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity.”²⁶

[39] Based on this initial starting point, the Board considered where the Appellants’ land is located relative to Dodd’s Lake. According to the map provided by Ms. Linda Covey, some of the Appellants have land abutting the Lake. These individuals are Ms. Margaret Baycroft, Ms. Leah Wile, Ms. Margaret E. Medak, Ms. Laurie Ann Miller, Mr. Randy Miller, Ms. Dixie and Mr. Kevin Ingram, and Ms. Doreen and Mr. William Thomsen. The remaining Appellants own land that does not abut Dodd’s Lake.

[40] The Board accepts the argument that the fill entering the Lake has the potential to cause an affect on water quality, and is therefore a basis for finding those owning property abutting the Lake to be directly affected. The Approval Holder and the Director did not provide sufficient information to show that erosion will not occur, and therefore, this is a logical starting point for assessing directly affected. It is important to note that even though owning land adjacent to the Lake supports the argument the individual is directly affected, it is not the only criteria considered in making the final assessment of an Appellant’s standing before the Board.

[41] The Board acknowledges the Appellants’ concerns regarding the potential for flooding of the development. However, it appears their concern is more directly related to additional costs that will be required for disaster services. Therefore, this argument does not assist in determining who is directly affected. If the houses flood, it will be the concern of the Approval Holder, and increased costs for disaster services does not relate to being directly affected. The monetary effects do not specifically affect any of the Appellants in a way that is different from the other taxpayers in the Town of Innisfail. The Appellants did not provide evidence of a direct, proximate connection between the addition of the fill and disaster services. The possibility of increased taxes to support additional disaster services as a result of the fill being added is too remote to be properly related to the Approval and is too speculative to form the basis of finding the Appellants directly affected.

River Coal Limited (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

²⁶ *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.) at paragraph 33.

[42] At the Preliminary Meeting, the Appellants stated they were not concerned that the flood fringe would be used up by adding the fill, thereby increasing the risk of flooding to adjacent landowners. They did, however, recant their position later. The Board remains skeptical. However, the people who would be affected by the increased flooding risk are the same individuals who would be directly affected with changes in the water quality – those individuals owning land immediately adjacent to the Lake. Therefore, this argument does not support finding additional Appellants directly affected.

[43] The issue that adding fill will prevent the Town of Innisfail from taking steps to increase lake level is purely speculative. The Appellants must realize the current lake levels have nothing to do with the Approval Holder. If the water level is increased in the future and flooding occurs, the problem will belong to the Approval Holder and the Town of Innisfail. This position does not support the argument that other individuals are directly affected, as there is no direct personal effect to the Appellants.

[44] Arguing economic matters without first establishing an environmental effect will not support the directly affected status of an appellant.

[45] Many of the Appellants expressed the following concerns: (1) how the development will affect their view; (2) the removal of a stand of trees on the Approval Holder's property; and (3) impact on their property values. Therefore, none of these concerns support the directly affected status of the Appellants. Although these may be the concerns of the Appellants, it does not demonstrate how the environment is affected by issuing the Approval and how the resulting project will affect the individual.

[46] The fill will be added to private land, that belonging to the Approval Holder. Although his neighbours may enjoy the clear view of the Lake or the aspen grove, the Approval Holder has the right to use his property in the manner he decides, providing all applicable regulations are adhered to. There is a clear distinction between individuals using public lands and those using private lands to determine who is directly affected by an activity.²⁷ The Approval Holder intends to complete the work on private lands, providing he has the requisite approvals in place. The Board cannot consider matters such as removal of trees on private lands

²⁷ See: *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Genstar*

or the effect this would have on the Appellant's view when the Board is determining the directly affected status of the Appellant.

[47] As stated in previous Board decisions, to be found directly affected, the person must have a substantial interest in the outcome of the proposed project. In most circumstances, economic matters are not an issue the Board will consider. As stated in *Boucher*:²⁸

“It is possible that concerns over economic matters may be relevant in establishing a causal connection with the project appealed, but there must *first* be an environmental effect that is directly felt by the appellants.”²⁹ (Emphasis in original.)

[48] The economic issues raised by the Appellants, specifically the effect on property values, are not a matter the Board considers in assessing the directly affected status of an appellant.

[49] Therefore, only those Appellants owning land adjacent to Dodd's Lake - Ms. Margaret Baycroft, Ms. Margaret E. Medak, Ms. Laurie Ann Miller, Mr. Randy Miller, Ms. Leah Wile, Ms. Dixie and Mr. Kevin Ingram, and Ms. Doreen and Mr. William Thomsen - are directly affected, and the Board will hear their appeals.

[50] The appeals of the remaining Appellants – Ms. Linda Covey, Ms. Elin H. Barlem, Mr. J. Mark Barlem, Mr. Bill and Ms. Linda Biggart, Mr. Leo E. Carter, Ms. Judy Hudson, Mr. Robert R. Lewis, Mr. Ron Macdonald, Mr. Len Plummer, Ms. Karen Strong, Mr. Laurence Strong, Ms. Laurie Zaleschuk, Mr. Robert J. Miller, Mr. Larry and Ms. Eleanor Brown, Mr. Sydney and Ms. Myrtle Quartly, Mr. William Froling, and Ms. Jean Veldkamp and Mr. Howard Milligan are dismissed.

Development Company (28 December 2001) Appeal No. 01-074-D (A.E.A.B.).

²⁸ *Boucher v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 93-004 (A.E.A.B.).

²⁹ *Boucher v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 93-004 (A.E.A.B.) at page 6.

III. STAY APPLICATION

A. Submissions

1. Appellants

[51] The Appellants acknowledged that lake levels are not an issue in these appeals, but they considered it a competing issue, as the present application could not proceed without a water level management plan. The Appellants stated the placement of fill means "...the lake level will never be able to be raised again." According to the Appellants, if the fill is placed on the site, they will not be able to petition the Town of Innisfail to have the water level raised.

[52] Mr. Ingram asked the Stay remain in place as the Appellants have just been contacted by Environment Canada's Eco-Action Program, and they want to see what this program can offer in assistance with the issues.

2. Approval Holder

[53] The Approval Holder stated the fill will be placed well back from the waters' edge, and the required municipal and federal reserves have been established. He explained that only some of the cattails would be covered by the fill. He stated he received permission from the Town of Innisfail to place the fill dirt and received the required approvals from the Department of Fisheries and Oceans and Alberta Environment. He also stated he had contacted Navigable Waters Protection and was told they did not have a concern with the project as he was not placing the fill in the water body and was back from the set levels of the Lake.

[54] The Approval Holder did not agree that any of the Appellants would suffer irreparable harm with the placement of the fill. He argued he would be the only one who would face financial harm as the costs to complete the work continue to rise.

[55] The Approval Holder stated the application process has "...attracted the attention of just over 30 people in a town of over 6000," and he has the support from as many or more

residents "...offering encouragement and support for our plan and dismay for the delay..." Therefore, according to the Approval Holder, there is no public interest warranting a Stay.³⁰

[56] The Approval Holder requested the Board dismiss the Stay application and the entire appeal.

3. Director

[57] The Director did not take any position on the Stay application. However, he did question whether the concerns of the Appellants are within the Board's jurisdiction, as they appear to be land use issues.

4. Appellants' Rebuttal Submission

[58] The Appellants argued they are directly affected as their residents back onto the area in question. They stated the removal of the trees in the area will result in the loss of the wildlife they value. The Appellants further stated the area to be filled is the only flood plain and cattail area the Lake has. They submitted that adding fill and stripping the trees will "...cause irreparable harm to us, the ecosystem of the lake, and the environment for now and for future generations."³¹

[59] The Appellants stated the addition of fill to the area will prevent the lake level from ever being raised and making it impossible for the Appellants to petition to have the water level raised. According to the Appellants, the low water level also affects recreational uses on the Lake, including water skiing, canoeing, and fishing.

B. Legal Basis for a Stay

[60] The Board is empowered to grant a Stay pursuant to section 97 of EPEA. This section provides, in part:

"(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.

³⁰ Approval Holder's submission, dated September 29, 2003.

³¹ Appellants' submission, dated October 7, 2003.

(2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted.”³²

[61] The Board’s test for a Stay, as explained in the cases of *Pryzbylski*³³ and *Stelter*,³⁴ is based on the Supreme Court of Canada case of *RJR MacDonald*.³⁵ The steps in the test, as stated in *RJR MacDonald*, are:

“First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.”³⁶

[62] The first step of the test has a very low threshold. Based on the evidence submitted, the applicant has to have some basis on which to present an argument. The applicant must show that there is a serious issue to be tried. As not all of the evidence will be before the Board at the time the decision is made regarding a Stay application, “...a prolonged examination of the merits is generally neither necessary nor desirable.”³⁷

³² Section 97 of the Act, also provides:

“(3) Where an application for a stay relates to the issuing of an enforcement order or an environmental protection order or to a water management order or enforcement order under the *Water Act* and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out,

(a) order the Director under this Act or the Director under the *Water Act* to take whatever action the Director considers to be necessary to carry out those terms and conditions and to determine the costs of doing so, and

(b) order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the *Water Act* in the form and amount the Board considers necessary to cover the costs referred to in clause (a).”

³³ *Pryzbylski v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd.* (6 June 1997), Appeal No. 96-070 (A.E.A.B.).

³⁴ Stay Decision: *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: GMB Property Rental Ltd.* (14 May 1998), Appeal No. 97-051 (A.E.A.B.).

³⁵ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR MacDonald*”). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid v. Ethicon*, [1975] 1 All E.R. 504 (“*American Cyanamid*”). Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110, at paragraph 30 (“*Metropolitan Stores*”) and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paragraph 41.

³⁶ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paragraph 43.

³⁷ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paragraph 50.

[63] The second step in the test to determine whether a Stay is warranted requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.³⁸ Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, *not its magnitude*. The harm must not be quantifiable, the harm to the applicant *could not be satisfied in monetary terms*, or one party could not collect damages from the other. In *Ominayak v. Norcen Energy Resources*,³⁹ the Alberta Court of Appeal defined irreparable harm by stating:

“By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be denial of justice.”⁴⁰

The party claiming that damages would be inadequate compensation must show that there is a real risk that harm will occur. It cannot be mere conjecture.⁴¹ The damage that may be suffered by third parties may also be taken into consideration.⁴²

[64] The third step in the test is the balance of convenience – “...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”⁴³ The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the applicant would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The courts have considered factors such as the cumulative effect of granting a Stay,⁴⁴ third parties that may suffer damage,⁴⁵ or if the reputation and goodwill of a party will be affected.⁴⁶

³⁸ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

³⁹ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

⁴⁰ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.), at paragraph 30.

⁴¹ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.), at paragraph 78.

⁴² *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.), at paragraph 78.

⁴³ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110, at paragraph 36.

⁴⁴ *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.), at paragraph 121.

⁴⁵ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.), at paragraph 78.

⁴⁶ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.), at paragraph 79.

[65] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. In *Metropolitan Stores*, it was recognized the public interest is a special factor in constitutional cases.⁴⁷

[66] The mandate of this Board requires that the public interest be considered in appeals before it, and therefore the public interest is an important consideration in the balance of convenience.⁴⁸ Therefore, the Board has required the public interest be a separate step in the test when applying for a Stay. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "...concerns of society generally and the particular interests of identifiable groups."⁴⁹ The effect on the public may sway the balance for one party over the other.⁵⁰

C. Analysis

1. Serious Issue

[67] As indicated, the first step in determining if a Stay should be granted has a very low threshold – there needs to be a serious issue to be tried.

[68] The Board requires further information to determine if the placement of the fill will have an adverse affect on the quality of the water in Dodd's Lake. With the potential of the water quality being affected, the Board accepts there is a serious issue to be heard, and the Appellants have met the first part of the test for a Stay.

⁴⁷ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110, at paragraph 90.

⁴⁸ The Court in *RJR MacDonald*, at paragraph 64, stated:

"The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants."

⁴⁹ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paragraph 66.

⁵⁰ The Court in *RJR MacDonald*, at paragraph 68, stated:

"When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large.... Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant.... The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

2. Irreparable Harm

[69] What needs to be considered in assessing irreparable harm is whether the applicant can be compensated in damages if the stay is not granted and they succeed at the hearing. The Appellants in these appeals argued the water quality of the Lake would be negatively affected if the fill is placed on the site.

[70] In making a decision, whether it is regarding a Stay or any other matter in its jurisdiction, the Board assesses which option would have the minimum effect on the environment. In this particular situation, the Approval Holder wants to add fill along the shore of Dodd's Lake. The residents have argued there is a potential of the fill eroding into the Lake, causing environmental effects to the Lake. One of the issues the Board must determine when it holds the substantial hearing is whether adding the fill will be detrimental to the Lake. If the Board finds the fill should not have been added, and the Stay has not been granted, there will be further environmental effects to the Lake should the Approval Holder be required to move the fill. This certainly would not minimize the environmental effects on the Lake; instead, the effect would be intensified.

[71] In previous decisions, the Board has acknowledged the additional adverse effect of having to remove an activity once completed. In the case of *Martin*,⁵¹ the Board discussed the effect of requiring the removal of an illegal deposition of sand. After evaluating the effect of the activity, plus the potential effect the project could have on the environment, and comparing it to the effect of removing the activity, the Board stated:

“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.”⁵²

⁵¹ *Martin v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal No. 00-065-R (A.E.A.B.).

⁵² *Martin v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal No. 00-065-R (A.E.A.B.) at paragraph 34.

[72] In a similar case, *Gilmore*,⁵³ the Board discussed the reasonableness of an enforcement order that required removal of sand. In *Gilmore*, the Board stated:

“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.”⁵⁴

[73] In *McNabb*,⁵⁵ a case where the approval holder had essentially completed the realignment of a creek pursuant to the terms and conditions of his approval, the Board stated:

“In this case, since the work is essentially completed, there are no remedies that the Board can give the Appellant that will satisfy his concerns. The Board cannot make the recommendation to reverse or vary the decision appealed in this circumstance as the work has been completed in accordance with the Approval, and this type of work cannot be reversed without causing further damage to the environment.”⁵⁶

[74] The Board does not know the extent of the harm, if any, that may be caused by adding the fill. However, if the water quality of the Lake is harmed, it would be difficult, if not impossible, to reverse the impact. As this type of damage cannot be realistically quantified, the Board finds it is reasonable to have the Stay remain in effect until the Minister issues his decision.

3. Balance of Convenience

[75] Some of the Appellants requested the Stay remain in place until an environmental assessment is completed on the Lake, including any response from the Navigable Waters Protection Branch (Canada). The Board cannot place a Stay on the Approval Holder that is dependent on another entity outside of its jurisdiction, and the Board cannot dictate to the

⁵³ *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal Nos. 00-071-072-R (A.E.A.B.).

⁵⁴ *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* (8 June 2001), Appeal Nos. 00-071-072-R (A.E.A.B.) at paragraph 48.

⁵⁵ *McNabb v. Director, Bow Region, Natural Resources Service, Alberta Environment re: Axel Steinmann* (10 May 2002), Appeal No. 01-091-D (A.E.A.B.).

⁵⁶ *McNabb v. Director, Bow Region, Natural Resources Service, Alberta Environment re: Axel Steinmann* (10 May 2002), Appeal No. 01-091-D (A.E.A.B.) at paragraph 16.

Navigable Waters Protection Branch what it should or should not do, including whether an environmental assessment needs to be completed.

[76] The Board recognizes the Approval Holder will be prevented from proceeding with the development until a decision is made by the Minister. However, if the Minister decides the Approval should not have been granted and the fill cannot be placed on the site, the Approval Holder would be faced with additional costs associated with removing the fill in such a manner as to prevent further damage to the environment.

[77] The balance of convenience favours the Stay remaining in place until the Minister's releases his decision to minimize the risk of additional environmental effects should the Approval be revoked. The Board will take whatever steps it can to minimize the period of time the Approval Holder will have to wait to see if he can proceed.

4. The Public Interest

[78] On the question of the public interest, the Supreme Court in *RJR MacDonald* stated:

“When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large.... Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant.... The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.”

[79] Water quality is an important issue to all Albertans. As it is the water quality in Dodd's Lake that could be affected by the fill, the public interest supports the Stay remaining in effect. Once water quality is compromised, it is often difficult to reverse the effects.

[80] The number of appeals filed is indicative of the public interest in the project. The quality of water in Dodd's Lake is important to the residents of the Town of Innisfail and, presumably, also to the Approval Holder.

[81] Therefore, considering the issue under appeal, the public interest, in these circumstances, warrant the Stay remaining in place until the Minister issues his decision.

5. Summary

[82] The Appellants have shown there is a serious issue to be decided and have, therefore, succeeded on the first element of the test. The Appellants failed to demonstrate they would suffer irreparable harm if the Stay was not granted. The public interest and the possibility of further damage to the environment should the Approval be reversed, warrants the Stay remaining in place. As a result, the Appellants' application for a Stay succeeds, and the Stay remains in effect until the Minister releases his decision.

IV. CANADIAN ENVIRONMENTAL ASSESSMENT ACT REVIEW

[83] The Board asked the Parties if they were aware of any proceeding under the *Canadian Environmental Assessment Act* ("CEAA"). Under section 95 of EPEA,⁵⁷ the Board, in determining which issues are to be included in the hearing, may consider whether the Alberta Government has participated in a public review process under CEAA, and if all matters were presented, the Board must dismiss the appeal.

[84] None of the Parties, including the Director, were aware of a CEAA review. The only federal involvement the Director was aware of was the approval given to the Town of Innisfail pursuant to the *Navigable Waters Protection Act* for the control structure. According to the Director, the Town of Innisfail approval application was forwarded to Fisheries and Oceans

⁵⁷ Section 95 of EPEA states:

“(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following...

(b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada)...

(5) The Board

(b) shall dismiss a notice of appeal if in the Board's opinion

(ii) the Government has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all the matters included in the notice of appeal.”

Canada. As for the Approval, Alberta Environment staff advised representatives of Fisheries and Oceans Canada of some of the details of the application.

[85] Based on this information, it would appear that section 95(5)(b)(ii) of EPEA is inapplicable in this circumstance.

V. ISSUES

A. Submissions

1. Appellants

[86] Ms. Linda Covey's concerns were with the lower lake levels and the resulting poor condition of the Lake. She argued the Approval was issued based on a flawed process, as the Lake levels were not validly arrived at. She argued the Town of Innisfail did not conduct a proper public consultation with respect to lake levels as required under the federal approval, and she has triggered an investigation by Navigable Waters Canada. Ms. Covey stated that if fill was added, it would be impossible to restore lake levels. She described the value of the shelterbelt of trees, as it is a sound barrier from the noises from the Lake, it acts as an odour barrier, and it protects the area from northeastern winds. Ms. Covey argued the ecosystem of the Lake has been destroyed as eutrophication is in its advanced stages. She stated the fill will be placed on the area with cattails, and as these plants are "...vital to the extraction of phosphorous and nitrates which are the direct cause of eutrophication," the adverse environmental damage will be compounded and will be impossible to reverse.⁵⁸ She stated the Appellants want the lake level adjusted and have contacted Navigable Waters Protection Branch, and in the meantime, she requested a Stay pending an environmental assessment on these matters.

[87] Mr. Larry and Ms. Eleanor Brown stated they were disappointed with the way the Town of Innisfail dealt with them and argued the Town took its actions in order to reclaim land, not for flood control.

[88] Ms. Dixie and Mr. Kevin Ingram argued there is no way to stop the fill from eroding and entering the Lake, which would negatively impact the water quality in the Lake.

They stated the addition of the fill would make it difficult to restore Lake levels. Mr. Ingram stated that, had the Town of Innisfail not approved the lowering of the lake level, a large part of the property in question would be under a fluctuating water level. He further stated that if the development is allowed to proceed, the lake level would never be able to be returned to a higher level.

[89] Mr. Sydney Quartly expressed concerns on the manner in which the Town of Innisfail has treated the residents in the area. He questioned why a developer can proceed when the project would affect so many people. Mr. Quartly stated his property will be devalued further with any more development on the Lake shore.⁵⁹

[90] Ms. Laurie Ann Miller showed the videotape “The Vital Edge,” a film produced by Alberta Environment demonstrating the importance of shoreline ecosystems. She emphasized two key points: (1) there will be negative impacts on the Lake with shoreline development; and (2) elimination of the buffer zone between the development and the shoreline will have a negative impact on the Lake.

[91] At the Preliminary Meeting, the remainder of the Appellants were represented by Mr. Ray Cerniuk. He expressed concerns regarding the failed communication between the Appellants and the Town of Innisfail and the feeling the Town had misled them. The Appellants’ arguments can be summarized as follows:

1. Erosion of the fill can occur as a result of surface runoff and as the water washes against the fill area. As the eroded fill enters the Lake, water quality will be affected. Erosion of the fill into the Lake is a water quality issue.
2. The fill added to the site will be too low, and the houses to be built will be flooded when the lake level rises.
3. Adding fill will use up the flood fringe, increasing the risk of flooding to adjacent landowners.
4. Allowing the Approval Holder to add fill to his property will prevent the Town of Innisfail from taking steps that will raise the Lake level.

⁵⁸ Ms. Linda Covey’s submission, dated December 4, 2003.

⁵⁹ Mr. Sydney Quartly’s submission, dated December 3, 2003.

[92] Mr. Cerniuk also submitted that the storm sewers releasing into the Lake at this location would have an impact on the fill and ultimately the Lake.

2. Approval Holder

[93] The Approval Holder did not identify any specific issues to be heard. However, he submitted that all of the appeals should be dismissed.

3. Director

[94] The Director pointed out that many of the concerns expressed by the Appellants relate to the lake levels. According to the Director, the *Navigable Waters Protection Act* approval and the Town of Innisfail *Water Act* approval and amending approval govern the lake level, neither of which is relevant to the present Approval. Also, the investigation or review that has been requested by the Appellants is under a federal Navigable Waters process, and therefore cannot be reviewed by the Board. He further submitted that any federal process, the Town of Innisfail's processes, or any concern under public lands or Navigable Waters, are not within the Board's jurisdiction. The Director stated municipal land use planning, land zoning, property values, and property taxes are the jurisdiction of the local authority under the *Municipal Government Act*, R.S.A. 2000, c. M-26, and not the Board.

[95] The Director explained he does not have the authority to make decisions regarding enforcement or compliance issues. These matters are "...dealt with under separate parts of the *Act* and there is a separate and distinct Director in AENV [Alberta Environment] that deals with those decisions. Also these decisions, if made, are subject to their own separate appeal provisions."⁶⁰ The Director submitted the alleged contraventions do not seem to relate to the Approval at issue.

[96] The Director stated he does not have the authority to require an environmental assessment, as this authority is governed by different sections of the Acts, specifically Part 2, Division 1 of EPEA and Part 2, Division 1 of the *Water Act*.

⁶⁰ Director's submission, dated December 5, 2003, at paragraph 44.

[97] The Director submitted the issues must relate to the placement of fill adjacent to Dodd's Lake and the potential impacts on the Lake, and could be summarized as follows:

1. Should the Approval been issued given the concerns of the Appellants?
2. Are the terms and conditions of the Approval adequate?

[98] The Director stated the Approval issued to the Approval Holder does not set the levels for the Lake. The Director emphasized the Approval under appeal deals with placing fill on the Approval Holder's property at an elevation at or above 938.15 metres above sea level, which is above the operating levels of the storm water pond, and the Approval does not determine or affect the level of the water.

[99] The Director argued issues related to the approval and amending approval issued to the Town of Innisfail cannot be considered in the present appeals, as the Board has dismissed all of the appeals relating to these approvals.

B. Discussion and Analysis

[100] The Board can determine which matters included in the Notices of Appeal are properly before it and will be included as issues at the hearing. The Board is authorized to make this determination by sections 95(2), (3) and (4) of EPEA. These sections provide:

- “(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:
- (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;
 - (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act (Canada)*;
 - (c) whether the Director has complied with section 68(4)(a);

- (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
 - (e) any other criteria specified in the regulations.
- (3) Prior to making a decision under subsection (2) the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.
- (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

[101] The intent of section 95(2) is to permit the Board to identify those issues included in the Notices of Appeal that it is prepared to consider in the hearing of the appeal. The purpose for having the Board choose the issues that will be heard is to ensure the hearing will be efficient, effective, and fair. The Board’s power to choose which issues it will hear is binding in that section 95(4) prohibits parties from making representations on matters the Board has decided not to include.

[102] The issues before the Board regarding the Approval are limited to the effect adding fill to the site will have on the water quality in Dodd’s Lake. The Board’s principal concern is the uncertainty as to the location of the placement of the fill in relation to the lake levels and any potential impact it may have on the quality of the water in Dodd’s Lake. More information is required regarding the location of the fill, as well as information on any potential impact the fill may have on the water quality. Changes in water quality will affect the environment and will have an affect on those Appellants living on the shore of Dodd’s Lake.

[103] Therefore, the Board will hear arguments on the following issue:

“Has the Director properly considered the issue of water quality impacts in issuing the Approval to place the fill in the location specified in the Approval?”

[104] Most of the Appellants in these appeals also filed appeals in relation to an approval and amending approval that was issued to the Town of Innisfail. In determining the issues of this appeal, a clear distinction must be made between the present Approval and those

issued to the Town of Innisfail. The Board will only hear arguments on the issues pertaining to this Approval – specifically the effect of adding fill to the site.

[105] The Board does not believe there will be an impact of the storm sewers releasing into the Lake at this location, and therefore, it will not be considered as an issue at the hearing. Also, any concerns regarding the manner in which the Town of Innisfail has approached the issue is not a matter properly before the Board. The Board can only review the decision of the Director, and Town policies and behaviour are not issues governed by the *Water Act* or EPEA.

[106] The Appellants must realize the placement of fill and the aspen grove are not related, and therefore, the Board does not have jurisdiction to hear arguments regarding the aspen grove.

[107] Some the Appellants expressed concerns related to the potential of increased disaster costs should the lake flood the new development. Again, this is not a matter within the Board's jurisdiction.

[108] The Appellants repeatedly expressed concern on the manner in which the Town of Innisfail made its decisions regarding the development and the lake levels. This is a political concern: it is not an *environmental* concern. Therefore, this is not a concern the Board has jurisdiction to hear. If the Appellants are concerned about the actions of those in Town council, they can express these concerns in the next local election.⁶¹

[109] The issues presented to the Board regarding the actual development of the site is a land use issue, a matter that is not within this Board's jurisdiction.⁶² In its July 25, 2003 letter, the Board specifically stated to the Parties that "...the Environmental Appeal Board does not have the jurisdiction to deal with the municipal planning issues of the Town of Innisfail."

[110] The Board will not hear any submissions regarding lake levels or the control structure, as these are *not* issues in these appeals.

⁶¹ See: *Paron et al. Director, Environmental Service, Northern East Slopes Region, Alberta Environment re: Parkland County* (1 August 2001) Appeal Nos. 01-045, 046, and 047-D (A.E.A.B.).

⁶² See: *Dzurny et al. v. Director, Northeast Boreal Region, Regional Services, Alberta Environment re: Shell Chemicals Canada Ltd.* (15 June 2002) Appeal Nos. 01-106 and 108-D (A.E.A.B.).

[111] Therefore, the Board will limit submissions to the issue of the placement of the fill and its effect on water quality in Dodd's Lake.

VI. CONCLUSION

[112] The Board commends all of the Parties in their approach to the matter at hand. None of the Parties expressed any animosity to the others, and in fact, they appreciated each others' viewpoints. The Approval Holder, as landowner adjoining the Lake, must also have concerns of the quality of the Lake; if the Appellants' were concerned about property values declining with the Lake deteriorating, the Approval Holder would share the same concerns. The Appellants recognized this, and it was apparent all of the Parties want to maintain a healthy lake in their community.

[113] A hearing will be held to hear the appeals of Ms. Margaret Baycroft, Ms. Margaret E. Medak, Ms. Laurie Ann Miller, Mr. Randy Miller, Ms. Leah Wile, Ms. Dixie and Mr. Kevin Ingram, and Ms. Doreen and Mr. William Thomsen, on the issue of whether the Director properly considered the effect adding the fill would have on the water quality in Dodd's Lake.

[114] As it is uncertain, without further submissions, to determine if there will be a detrimental effect on water quality, the Stay will remain in effect until the Minister releases his decision based on the Board's Report and Recommendations. The Board intends to hear these appeals as soon as possible.

VII. DECISION

[115] The Board has determined that:

1. The Appellants at the hearing will be: Ms. Margaret Baycroft, Ms. Margaret E. Medak, Ms. Laurie Ann Miller, Mr. Randy Miller, Ms. Leah Wile, Ms. Dixie and Mr. Kevin Ingram, and Ms. Doreen and Mr. William Thomsen.
2. The appeals of Ms. Linda Covey, Ms. Elin H. Barlem, Mr. J. Mark Barlem, Mr. Bill and Ms. Linda Biggart, Mr. Leo E. Carter, Ms. Judy Hudson, Mr. Robert R. Lewis, Mr. Ron Macdonald, Mr. Len Plummer, Ms. Karen Strong, Mr. Laurence

Strong, Ms. Laurie Zaleschuk, Mr. Robert J. Miller, Mr. Larry and Ms. Eleanor Brown, Mr. Sydney and Ms. Myrtle Quartly, Mr. William Froling, and Ms. Jean Veldkamp and Mr. Howard Milligan are dismissed.

3. The Stay will remain in place until the Minister of Environment releases his decision.
4. The issue to be heard at the hearing is: Has the Director properly considered the issue of water quality impacts in issuing the Approval to place the fill in the location specified in the Approval?

Dated on January 20, 2005, at Edmonton, Alberta.

“original signed by”

Dr. Steve E. Hrudey
Panel Chair

“original signed by”

Mr. Ron V. Peiluck
Board Member

“original signed by”

Dr. Alan J. Kennedy
Board Member