

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision: January 20, 2005

IN THE MATTER OF sections 91, 92, 95, and 101 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 appeals filed by Margaret Baycroft, Margaret E. Medak, Laurie A. Miller, Randy K. Miller, Leah Wile, Dixie and Kevin Ingram, and William and Doreen Thomsen, with respect to *Water Act* Approval No. 00193447-00-00 issued to Hal Willis by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Reconsideration Decision: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (20 January 2005), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-RD (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 determined the Appellants at the hearing would 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. The other appeals were dismissed.

The issue to be determined at the hearing was whether the Director properly considered the issue of water quality impacts when issuing the Approval to place the fill in the location specified in the Approval.

The Board confirmed the Approval with variations. The expiry date of the Approval was extended to June 30, 2005, and Mr. Willis was required to delineate the beds, banks, and shores of the site prior to placing any fill.

The Appellants filed a reconsideration request with the Board regarding its decision.

After reviewing the submissions from the parties, the Board determined there were no grounds to reconsider its previous decision, and the request was denied. The appellants did not provide any new evidence that was not available at the time of the original decision and no error of law was identified.

BEFORE:

Dr. Steve E. Hrudehy, Panel Chair,
Mr. Ron V. Peiluck, Board Member, and
Dr. Alan J. Kennedy, Board Member.

WRITTEN SUBMISSIONS:

Appellants:

Ms. Margaret Baycroft, Ms. Margaret E. Medak,
Ms. Laurie A. Miller, Mr. Randy K. Miller, Ms.
Leah Wile, Ms. Dixie and Mr. Kevin Ingram, and
Mr. William and Ms. Doreen Thomsen, represented
by Ms. Linda Covey, Ms. Elin H. Barlem, and Mr.
Ray Cerniuk.

Approval Holder:

Mr. Hal Willis.

Director:

Mr. David Helmer, Director, Central Region,
Regional Services, Alberta Environment,
represented by Mr. Grant D. Sprague and Ms.
Shannon Keehn, Alberta Justice.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	SUBMISSIONS	4
A.	APPELLANTS	4
B.	APPROVAL HOLDER	8
C.	DIRECTOR	9
III.	DISCUSSION AND ANALYSIS.....	10
A.	LEGISLATION	10
B.	APPLICATION	12
IV.	CONCLUSION.....	20

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] On July 22 and 23, 2003, the Environmental Appeals Board (the “Board”) received Notices of Appeals from Ms. Margaret Baycroft (03-017), Ms. Margaret E. Medak (03-024), Ms. Laurie Miller (03-025), Mr. Randy K. Miller (03-026), Ms. Leah Wile (03-031), Ms. Dixie and Mr. Kevin Ingram (03-033), Mr. William and Ms. Doreen Thomsen (03-037) (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 that all Parties⁴ provide available dates for a mediation meeting or a hearing.

[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.

¹ Director’s Record, Tab 7.

² The Board also received Notices of Appeal from Ms. Davina Daly (03-020) and Mr. R.C. Sifton (03-028). 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.).

The Board also received Notices of Appeal from Ms. Linda Covey (03-014), Ms. Elin H. Barlem (03-015), Mr. J. Mark Barlem (03-016), 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), Mr. Len Plummer (03-027), Ms. Karen Strong (03-029), Mr. Laurence Strong (03-030), Ms. Laurie Zaleschuk (03-032), Mr. Robert J. Miller (03-034), Mr. Larry and Ms. Eleanor Brown (03-035), Mr. Sydney and Ms. Myrtle Quartly (03-036), Mr. William Froling (03-038), and Ms. Jean Veldkamp and Mr. Howard Milligan (03-082). The Board dismissed these appeals. See: Board’s February 2, 2004 letter.

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.

[5] On August 14, 2003, the Board wrote to the Parties regarding the Stay applications. The Board requested the Appellants answer the specific questions regarding the Stay application,⁵ and the Director and the Approval Holder to respond to the Appellants' submissions. The Appellants provided their final response on October 10, 2003.

[6] 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 was directly affected. The Stay remained in place until a decision was made on the matters to be heard at the preliminary meeting or until otherwise directed by the Board.

[7] 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.

[8] On November 26, 2003, the Board notified the Parties that a preliminary meeting would be held on December 16, 2003, and the matters to be determined were:

- 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

⁵ The questions asked were:

- “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.”

appeals.

- The issues to be heard at a hearing should one be held.”

[9] On February 2, 2004, the Board notified the Parties that:

- “1. the Stay of the Approval will remain in place until the Minister of Environment releases his decision;
2. the matter was not the subject of a *Canadian Environmental Assessment Act* review;
3. the following appeals and Appellants have been dismissed: Ms. Linda Covey 03-014, Ms. Elin H. Barlem 03-015, Mr. J. Mark Barlem 03-016, 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, Mr. Len Plummer 03-027, Ms. Karen Strong 03-029, Mr. Laurence Strong 03-030, Ms. Laurie Zaleschuk 03-032, Mr. Robert J. Miller 03-034, Mr. Larry and Ms. Eleanor Brown 03-035, Mr. Sydney and Ms. Myrtle Quartly 03-036, Mr. William Froling 03-038, and Ms. Jean Veldcamp and Mr. Howard Milligan 03-082; and
4. the following appeals and Appellants are directly affected and their appeals will proceed to a hearing: Ms. Margaret Baycroft 03-017, Ms. Margaret E. Medak 03-024, Ms. Laurie A. Miller 03-025, Mr. Randy Miller 03-026, Ms. Leah Wile 03-031, Ms. Dixie and Mr. Kevin Ingram 03-033, and Mr. William and Ms. Doreen Thomsen 03-037.”

[10] On March 23, 2004, the Board notified the Parties that the only issue to be heard at the Hearing would be:

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

[11] The Hearing was held on April 13, 2004.

[12] The Board provided the Report and Recommendations to the Minister on May 12, 2004, and the Minister released his decision on May 17, 2004, upholding the Approval and extending the expiry date to June 30, 2005.⁶

[13] On June 5, 2004, the Board received a reconsideration request from Ms. Linda Covey on behalf of the Appellants.

[14] Between June 17 and July 27, 2004, the Board received the Parties’ submissions.

⁶ See: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.).

[15] On August 18, 2004, the Board notified the Parties it was denying the reconsideration request.

[16] The following are the Board's reasons.

II. SUBMISSIONS

A. Appellants

[17] The Appellants claimed they did not receive the complete affidavits from the Director.

[18] The Appellants submitted the Director had incorrectly stated Public Lands had identified the lake's bank. They argued the bed and shore had been located based on artificial influences, and water quality had been assessed based on the location of the bank. The Appellants requested the Board revoke the Approval and have the Director properly assess the lake as a natural water body and give no consideration to artificial influences. The Appellants also requested a Stay of the proceedings until the natural bank had been properly located, surveyed, and delineated and not the edge of the lake according to the Management Plan.⁷

[19] The Appellants asked for the opportunity to submit their own survey and supporting evidence of the natural bank, and any discrepancies between their survey and the Approval Holder's survey would be addressed prior to the placement of fill.⁸

[20] The Appellants argued lake parameters that do not apply have been used. According to the Appellants, Ms. Angela Fulton, witness for the Director, testified Mr. Felix Gebbink from Public Lands had visited the site and identified the bank and boundaries of the lake. They stated Mr. Gebbink later wrote a letter saying he had not identified the bank and a qualified surveyor would have to do it. The Appellants further stated Mr. Gebbink explained the bank is likely below the existing water line because the Lake has artificial influences, and they argued this assumption was based on the Lake no longer being natural.

⁷ The "Management Plan" refers to the plan used by the Town of Innisfail for the control of the lake levels and the operation of Dodd's Lake as a water retention pond.

⁸ See: Appellant's submission, dated June 5, 2004.

[21] The Appellants argued the Director's testimony was based on Mr. Gebbink's assumption the Lake was no longer natural, which is a mistake as the Lake is natural. They submitted artificial influences should not be included when locating the bank. The Appellants argued, "...artificial water levels have been used to identify the bank and indicate that the proposed fill is not in the bed and shore. The current water level can only be maintained by an artificial influence. Take away the artificial influences and the fill is being placed in the bed and shore."⁹

[22] The Appellants stated the operation of the control structure is not relevant to locating the bed and shore, and based on an already existing survey identifying the boundary of Dodd's Lake, the fill is within the boundary.

[23] The Appellants argued the original plan was to have the lake level adjusted to the natural outlet level. They stated no evidence was presented to support that the bank had been identified by any other means than the Management Plan, and the bank identified can only be maintained by operation of the control structure.

[24] The Appellants argued Mr. Gebbink, at the onsite visit attended by representatives of the Appellants as well as Alberta Environment, stated that, if they could prove it is a natural lake, Public Lands would take another look at locating the bank. They argued that, since the Board has determined it to be a natural lake, the "...operation of the control structure and water levels that it achieves are not issues to be addressed when assessing a water body under the Water Act or Public Lands Act."¹⁰

[25] The Appellants submitted the Lake has been assessed as a water retention pond and the bank incorrectly located as the upper limit of the Management Plan. The Appellants argued the bank identified by the Director was the upper level of the Management Plan. They referred to a letter sent by Mr. Felix Gebbink in which he stated the bank is likely below the existing level of the lake, but they argued this "...assumption is based on speculation of an 'unnatural' (*sic*) nature."¹¹

⁹ Appellant's submission, dated June 5, 2004.

¹⁰ Appellants' submission, dated June 5, 2004.

¹¹ Appellants' submission, dated July 5, 2004.

[26] The Appellants stated water quality has been addressed by way of proximity of the fill to the bed and shore, but the bank must first be properly located. They submitted that until information regarding the location of the bank becomes available, the Board should reconsider its decision and recommend to the Minister the Approval be reversed, since it is based on speculation.

[27] The Appellants argued the delineation that is being done is incorrect, as the bank is being located pursuant to the Management Plan. The Appellants requested an additional clause be added to Condition 13 of the Ministerial Order, stating, ““The survey and report prepared by the approval holder shall be in accordance with The (*sic*) Public Lands Act and Water Act.””¹²

[28] The Appellants requested the following clause be added to Condition 14 of the Ministerial Order:

“Should the approval holder submit a survey that identifies the bank in a different location to the existing 1999 survey and the Director approves this survey, the public is entitled to written notification that the bank as they know it has been moved. The public is entitled to appeal this decision.”¹³

[29] In their rebuttal submission, the Appellants argued they, and the Board, were unaware that Public Lands had not located the bank. They stated they provided new evidence that was not available at the time of the Hearing showing the location of the bank is unknown, even though the Director identified a bank at the Hearing. They stated the initial assessment by Public Lands had been made on the basis of the Lake being an artificial water body.

[30] The Appellants stated the Director testified the Lake was assessed as a natural water body and natural sources were used to determine the bank, but the bank identified by the Director was the setting of the control structure. They stated the Approval Holder’s submission

¹² Appellants’ submission, dated July 5, 2004. Clause 13 of the Ministerial Order provides:

“13. Prior to any fill material being placed on the site, the approval holder shall complete a survey, prepare a report delineating the bed and shore of the water body adjacent to SW 28-35-28-W4M, and mark the area in which fill will be added. The approval holder should consult the Public Lands Division of Alberta Sustainable Resource Development in preparing the report.”

¹³ Appellants’ submission, dated July 5, 2004. Clause 14 of the Ministerial Order provides:

“14. The approval holder shall provide the survey and report to the Director for approval. No fill is to be added to the site until the Director accepts the survey and report.”

validates this fact, and they argued the bank was not surveyed. The Appellants submitted these are errors of a serious and compelling nature, and the Board based its decision on these errors.

[31] In their rebuttal submission, the Appellants reiterated that Mr. Gebbink had not located the bank, and his assessment of where the bank will likely be is based on artificial influences.

[32] The Appellants argued the Director identified a bank that is consistent with the Management Plan and inconsistent with applicable legislation. They stated that, based on Mr. Gebbink's statement, "...any proposal on the bank's location is based on speculation. There is no evidence to substantiate any other conclusion."¹⁴ They argued the proposal to survey a bank that has not been located does and will not help locate the bank.

[33] The Appellants stated the sources of information for reconsideration comes from testimony at the hearing, the letter from Mr. Felix Gebbink, the Approval Holder's submission, and the Board's Report and Recommendations.

[34] The Appellants argued the Board was mistaken when it stated physical and biological parameters had been used to determine the bank. They also claimed the Director was wrong in his explanation of accretion, as accretion is not a phenomenon that happens over a time span of a few days. They argued the Board was incorrect in stating the first part of Mr. Gebbink's letter is merely a statement of law, as it is specific to Dodd's Lake. The Appellants also argued statements by the Board were contradictory.¹⁵

[35] The Appellants stated they are not re-arguing the appeals, as the appeals were restricted to issues of water quality, and their present arguments are concerned with speculation of ownership due to an incorrect assessment. They argued the Approval Holder does not understand the survey is to be done according to applicable legislation and not the Management Plan. They argued the Management Plan is irrelevant.

[36] The Appellants stated natural processes, such as siltation and vegetation growth, have raised the shoreline and therefore the Crown boundary. They stated the boundary still

¹⁴ Appellants' submission, dated July 26, 2004.

¹⁵ See: Appellants' submission, dated July 26, 2004.

exists today as the fill would cover a large area of cattails, and as these are strictly aquatic plants, they are within the bed and shore.

[37] The Appellants stated it would not be possible to have the bank under water and be in accordance with the applicable legislation, as water body means any location where water flows or is present, whether or not the flow or presence of water is continuous, intermittent, or occurs only during a flood.

[38] The Appellants stated they are not trying to re-argue their case, as "...the issues raised have not been addressed at all, other than stating the topic of location of the bank was discussed at some length at the hearing. This topic related to Public Lands and was not an argument put forward by the Appellants."¹⁶ They argued no evidence was presented by the Director to substantiate his testimony that the bank had been located. The Appellants stated they submitted new evidence that proves ownership of the land had not been established by the Director in accordance with the applicable legislation.

[39] The Appellants stated they provided the letter from Mr. Gebbink to the Board after the Hearing, and it had "...in part been considered by the board, by way of the survey. However the letter identifies discrepancies that have not been addressed by the board, and were not argued at the hearing."¹⁷

[40] The Appellants submitted their evidence demonstrate errors in law that, once corrected, would change the original decision. They argued if Dodd's Lake is assessed as a natural water body, the site for the proposed fill is on Crown land.

B. Approval Holder

[41] The Approval Holder stated he opposed any review of the Board's decision regarding the Approval, and the Appellants did not provide any evidence indicating the Board made any error in law.

¹⁶ Appellants' submission, dated July 26, 2004.

¹⁷ Appellants' submission, dated July 26, 2004.

[42] The Approval Holder argued the Appellants did not present anything that resembled new evidence, and it is a rehash of all that was heard at the Hearing and was clearly spoken to in the Board's Report and Recommendations.

[43] The Approval Holder stated it is his intent "...to cooperate with Alberta Environment and Public Lands to establish an appropriate bank that reflects the now controlled water levels even though it means that I am giving away some of our land in doing so."¹⁸

[44] The Approval Holder argued the idea of the natural bank being much further up on his property is erroneous, as the evidence made it clear that in 1960, none of his property was covered with water. He stated the water level was not anywhere near the height the Appellants said it has always been, and the siltation and vegetation growth in the Lake's outflow channel has been the main factor contributing to a higher lake level that has caused problems for the Town of Innisfail's storm water drainage and the flooding of much of his property.

[45] The Approval Holder referred to a report completed by Tagish Engineering in which it refers to "...draining the lake to historical levels...", thereby supporting his argument the lake would have to be drained, not raised, to reach historical levels. He submitted the "...historic lake level is much lower than that which is envisioned by the appellants and in fact it is even lower than the maximum operating level set out in the operating agreement between the Town and Alberta Environment."¹⁹

C. Director

[46] The Director stated the Appellants emphasized two aspects in their reconsideration submission – the location of the bank and the conditions to be implemented through the Ministerial Order. He argued the location of the bank was discussed at length at the Hearing, and the Board found the "...*Public Lands Act*, not the *Water Act*, addresses the question of the location and use of the bed and shore and that the determination of where the *Public Lands*

¹⁸ Approval Holder's submission, dated June 17, 2004.

¹⁹ Approval Holder's submission, dated June 17, 2004.

Act applies rests with Alberta Sustainable Resource Development.”²⁰ The Director respectfully submitted that none of the information provided by the Appellants was new.

[47] The Director argued the letter referred to by the Appellants was provided to and considered by the Board, and it appeared the Appellants wished to re-argue evidence that was already before the Board.

[48] Regarding the implementation of the conditions in the Ministerial Order, the Director submitted the Appellants did not provide any new information, and they wanted to re-argue evidence and the sufficiency of the Board’s recommended conditions.

[49] The Director argued the Appellants did not demonstrate any exceptional or compelling basis on which the Board should exercise its extraordinary power of reconsideration. He submitted the Appellants simply wished to re-argue the evidence from the Hearing, and the Appellants have not provided any new evidence or provided any compelling evidence or arguments on how the public interest may be served by reconsidering the Board’s decision.

[50] The Director submitted the application for reconsideration be dismissed.²¹

III. DISCUSSION AND ANALYSIS

A. Legislation

[51] Under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), the Board can reconsider a decision made by it. Section 101 provides: “Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.”

[52] The Board has stated in previous decisions that its power to reconsider “...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.”²² The Board uses its discretion to reconsider a decision with caution. The power

²⁰ Director’s submission, dated July 9, 2004.

²¹ See: Director’s submission, dated July 9, 2004.

²² *Whitefish Lake First Nation* Request for Reconsideration, re: *Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment* re: *Tri Link Resources Ltd.* (September 28, 2000), Appeal No. 99-009-RD (A.E.A.B.); Reconsideration Request: *Blodgett v. Director, Northeast Boreal Region, Regional Services,*

to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for parties to reargue the same issues a second time.

[53] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.²³ The factors the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.²⁴

[54] A substantial error in law may be a sufficient ground for reconsideration. An example of when a substantial error in law has been made is when a new decision from the courts reveals an error. Generally, a party's failure to cite an existing authority will not be a ground to reopen a matter, but new decisions not reasonably available for the original proceedings can provide an exception. It is important for the parties to realize that to justify a reconsideration, the decision of the courts must demonstrate an error in law that, once corrected, would change the original result. The evidence does not have to, on the grounds of probability, result in a change of the original decision, but there must be a reasonable possibility that the decision could be altered.²⁵

[55] The applicant must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made but was available at the time of the hearing is not relevant for purposes of reconsideration. However, information that was not available at the

Alberta Environment (14 June 2002), Appeal No. 01-074-RD (A.E.A.B.).

²³ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment* re: *TransAlta Utilities Corporation* (April 17, 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

²⁴ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment* re: *TransAlta Utilities Corporation* (April 17, 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

²⁵ Request for Reconsideration: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* re: *Laidlaw Environmental Services (Ryley) Ltd.* (April 7, 1998), Appeal No. 96-059 (A.E.A.B.).

time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.²⁶

B. Application

[56] As stated before, the factors the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest; delays; the need for finality; whether there was a substantial error of law that would change the result; and whether there is new evidence not reasonably available at the time of the previous decision.

[57] Basically, in their reconsideration request, the Appellants are asking for the bank to be delineated to their satisfaction, and until that is done, they do not want the Approval Holder to proceed with his project. The Appellants must remain aware the Board will not make any decision or recommendation that will cause the Director to fetter his decision-making abilities.

[58] The Board can consider new arguments if the information was not available to the Parties at the time of the Hearing. The arguments presented by the Appellants in their reconsideration were essentially the same as those arguments they presented at the Hearing. The Appellants argued Dodd's Lake was a natural lake and not a water retention pond. In its Report and Recommendations, the Board agreed. It stated at paragraph 56:

“The Appellants raised the issue of Dodds Lake being considered a storm water retention pond. The Board rejects this conclusion. Dodds Lake is a lake. Dodds Lake is not man made, even though structures have been placed on the lake to control water levels. The Parties provided evidence showing the lake has been in existence for decades. It was not constructed as a storm water retention pond. It was there long before structures were added to control the lake levels, and it is irrelevant that these structures are now on the lake. It is still a naturally occurring water body, and any work done on the lake or abutting the lake must comply with the applicable legislation for water bodies.”²⁷

Therefore, that argument was not new and was dealt with by the Board.

²⁶ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment* re: *TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

²⁷ *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment* re: *Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.).

[59] Dodd's Lake is a managed water body, and although there may be a legal distinction between a managed water body and a natural lake, there are not different rules for determining the bed and shore. Whether it is a managed water body or a natural lake, the Crown owns the bed, bank, and shore. What Dodd's Lake is not, is a storm water retention pond.

[60] The bed and shore have changed due to the fact it is a managed Lake. The water level is higher than the natural condition, and the bed and shore needs to be established based on the present conditions. Therefore, the delineation will be even more conservative than what would be required under natural conditions.

[61] The Appellants raised the matter of lake levels in their reconsideration request. Again, the Board dealt with this matter in its Report and Recommendations. At paragraph 41, the Board stated:

“Second, determining the ‘natural’ water levels of the lake is not a matter that is properly before the Board. While all Parties have agreed that water quality is linked to water levels, and the Board accepts this concept, the Approval before the Board does not control or even actually relate to the water levels. The Board’s role is restricted to determining whether the Director’s decision was correct when issuing *this* Approval.”²⁸

Therefore, this was not an issue properly before the Board at the Hearing and it cannot be the basis of a reconsideration.

[62] The Appellants requested a Stay until the natural bank had been properly located. Under the conditions included in the recommendations, and approved by the Minister, the Approval Holder is required to delineate the bed, bank, and shore prior to the placement of fill to the area. This essentially places a Stay on any further work on the site until that condition is fulfilled. Although the Appellants continued to argue the Lake is at an artificial level, the natural level would actually be lower than what it is at now. They fail to distinguish between an artificial water body and a controlled water body. The Board agreed with the Appellants that Dodd's Lake is a natural water body, not an artificial water body, but it is also a controlled water body.

²⁸ *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.).

[63] Though the line of demarcation may not be where the Appellants want it, the people doing the work have the expertise to distinguish between the bed and shore. As an additional precaution, the Director has to accept the delineation before the Approval Holder can proceed.

[64] The documents attached to the Appellants' reconsideration request were all documents available at the time of the Hearing and were included as part of the Director's Record. The Board also had the letter from Mr. Felix Gebbink of Sustainable Resources Development when it made its recommendations, and the letter was specifically addressed in the Report and Recommendations.

[65] Mr. Gebbink's April 22, 2004 letter states:

"The government owns the bed and shore of Dodds Lake in SW28 and W1/2 29 by exception from the original grant. It does not have ownership of the bed and shore of Dodds Lake in NW28.

The water level in the lake has been affected by storm water inflow and a structure at the outlet. This has resulted in the lake no longer being 'natural'. The storm water inflow and outlet structure has likely had the effect of raising the level of the lake and submerging some of the upland area adjacent to the lake. The location of the bank of the lake before the disturbance is likely below the existing level of the lake. A qualified surveyor would have to determine this location, if it is needed, taking into account the artificial influences."

[66] The Board dealt with Mr. Gebbink's letter in its Report and Recommendations.²⁹ The Appellants certainly cannot claim this is new information or evidence. If the Board dealt

²⁹ See: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.) at paragraphs 60 and 61. The Board stated:

"[60] On May 7, 2004, after the close of the hearing, the Board received an e-mail from Ms. Covey, on behalf of the Appellants. This e-mail stated in part that:

"Mr. Helmer and Ms. Fulton submitted and testified that it was Mr. Felix Gebbink, of Public Lands and Forest Division, who had made the determination of where the line was drawn in the sand, so to speak.

Since then we have been in touch with Mr. Gebbink and he has stated, that he has drawn no such line in the sand, and that he is not qualified to do so, and he has written a letter to this effect. It is also clear that the criteria that he presumed a surveyor would use to make that decision are contrary to the requirements of the Water Act and the Administrative Guide for Approvals.

The effect of this is to nullify all previous assumptions of ownership, therefore ownership of this land has yet to be established, as per Guideline for Approvals requires."

with the information in its Report and Recommendations, and the content of the letter has not changed and no additional information has been provided, the Appellants have no grounds to argue this information is new and could change the outcome of the recommendations.

[67] In response to the Appellants' concerns, the Board recommended a survey be completed to delineate the bank prior to fill being added to the site. As part of the Ministerial Order, the Approval was amended to include the following conditions:

- “13. Prior to any fill material being placed on the site, the approval holder shall complete a survey, prepare a report delineating the bed and shore of the water body adjacent to SW 28-35-28-W4M, and mark the area in which fill will be added. The approval holder should consult the Public Lands Division of Alberta Sustainable Resource Development in preparing the report.
14. The approval holder shall provide the survey and report to the Director for approval. No fill is to be added to the site until the Director accepts the survey and report.”

[68] The survey has to be done in consultation with Public Lands and the Director has to accept the survey and report before any fill is added to the site. This provides additional checks and balances to ensure the bank is delineated correctly.

Ms. Covey attached Mr. Gebbink's letter. This letter states:

“The government owns the beds and shores of Dodds Lake in SW28 and W1/2 29 by exception from the original grant. It does not have ownership of the beds and shores of Dodds Lake in NW28.

The water level in the lake has been affected by storm water inflow and a structure at the outlet. This has resulted in the lake no longer being “natural”. The storm water inflow and outlet structure has likely had the effect of raising the level to the lake and submerging some of the upland area adjacent to the lake. The location of the bank of the lake before the disturbance is likely below the existing level of the lake. A qualified surveyor would have to determine this location, if it is needed, taking into account the artificial influences.”

[61] The Board has reviewed this additional information and has concluded that it does not change the conclusions reached by the Board. First, the Board rejects Ms. Covey's characterization of Mr. Gebbink's letter. The first part of Mr. Gebbink's letter is merely a statement of the law; pursuant to the *Public Lands Act*, subject to a specific grant to the contrary (as with NW28), the Crown owns the beds and shores of water bodies. The second part of Mr. Gebbink's letter suggests that the boundary between the beds and shores (the bank) is likely currently submerged as a result of higher than “natural” lake levels. If this is the case, then given where the Approval Holder intends to place the fill, this merely goes to support that it will not be placed on the bed and shore of the lake. In any event, the condition that the Board is recommending, that the bed and shore be delineated prior to any fill being placed on the site, adequately deals with this additional evidence.”

[69] The Appellants asked for the ability to appeal the Director's decision should he accept the bank is in a different location than what is demarcated on the 1999 survey. The Approval Holder is required under the Ministerial Order to have someone determine the bank of Dodd's Lake. That is what the issue has been for the Appellants throughout this Hearing process. The Minister added a condition to the Approval to ensure the bank is determined prior to any fill be added to the site. The Appellants wanted this to occur, but now they want the opportunity to raise the issue again should it be determined the bank is not where they want it to be. A neutral third party has the responsibility of assessing the site and delineating the bank. The Director must review the report to ensure it is reasonable and accurate. Essentially, this provides a further check to ensure the condition is completed properly. The Director is also neutral party, and his role is to protect the environment; he has nothing to gain by supporting either the Appellants or the Approval Holder.

[70] The Appellants raised the issue of the Director's testimony in regards to the representative from Public Lands identifying the bank. The Approval requires the Approval Holder have the bank delineated, therefore it is irrelevant as to whether or not Public Lands has identified the bank. In his letter, Mr. Gebbink stated the bank is likely below the existing level. He was not in a position to state with absolute certainty where the bank was without further analyses of the site.

[71] "Likely" is defined in the *Merriam-Webster Dictionary* as "...having a high probability of occurring or being true." In other words, Mr. Gebbink, without the benefit of a complete site assessment, determined it was more likely than not, that the bank was below the present water level. Therefore, the controlled water level is to the benefit of the Appellants, as more of the Approval Holder's land is under water, raising the height of the bank and the placement of the fill.

[72] The Appellants argued there was no other evidence to indicate where the bank is actually located. The document from Land Titles indicates the Approval Holder's property did extend further towards the Lake. Photographs and other historical information indicate the lake level was lower in the past.

[73] If Mr. Gebbink had made his determination of where the bank may be on artificial influences, he would have identified the bank nearer to the existing water level or above. Instead, he determined the bank to be below the current water level, thereby not considering the “artificial influences.”

[74] The Board knew the Director was aware that Public Lands had not done a complete study of the site (as were the Appellants), but the Director based his decision on other available information, including the reports completed by Tagish Engineering, historical information, and the site visit itself.

[75] The Appellants continue to argue the bank had not been identified and the issues was not argued at the Hearing. Representatives for the Appellants were present at the time representatives for Alberta Environment and Public Lands assessed the site. They knew what was looked at and what was done to determine where the bank was. This was information known at the time of the Hearing, and if they had concerns about how it was done, that was the time to cross-examine the Director and the Approval Holder and present their concerns. The argument is not new, and the Board will not accept it as a ground for reconsideration.

[76] The purpose of the survey required under the Ministerial Order is to identify where the bank is. It is not based on what Mr. Gebbink reported or on the Management Plan. The Appellants attempted to argue a survey was needed, but on the other hand, a survey would not be helpful as the bank has not been located. In this circumstance, the Board believed, and still believes, a survey would be useful to identify the bank, not only for the Approval Holder, but also the Appellants and other residents in the area.

[77] The Approval Holder recognizes the water levels have increased since he acquired the property and he is not attempting to place fill up to the original bank. Fill would only be added to the identified bank, as it is now, as a consequence of diluvion³⁰ encroachment of water onto his property and water management. This level is higher up onto his property than the so-called natural level. As stated in the Board’s Report and Recommendations, the fill would be added to an area well back from the edge of the water if the lake level was 938.0 metres, and

³⁰ Diluvion occurs when the water’s edge encroaches onto adjoining land. See: B. Ziff, *Principles of Property Law*, 2d ed. (Toronto: Carswell, 1996) at 97.

the current allowable operating level is 937.85 metres.³¹ The fill will not be placed to the edge of the operating level.

[78] The Appellants continued to argue the Management Plan should be irrelevant in assessing the bank of the Lake. The Management Plan has resulted in an increase in lake levels from where it was when the Approval Holder purchased the property. If the Appellants want the level back to its “natural level” at that time, the control device would have to be lowered further to allow more water out of the Lake. The Appellants need to consider what they are actually seeking with their arguments.

[79] The Appellants stated the sources of information for reconsideration comes from testimony at the Hearing, the letter from Mr. Felix Gebbink, the Approval Holder’s submission, and the Board’s Report and Recommendations. If issues arose in the testimony during the Hearing, the Appellants should have raised their concerns during cross-examination or in rebuttal. Once the Hearing is closed, the Parties cannot think about the evidence presented and then decide they had further questions. If this occurred, there would never be any finality in the Board’s process, which contravenes all principles of natural justice.

[80] In their reconsideration submissions, the Appellants requested the opportunity to have someone of their choosing to delineate the bank. This should have been done prior to the Hearing. That was the type of evidence the Appellants were free to bring into the Hearing. Deciding after the Hearing that it would have been useful to bring that information in does not assist anyone. There was nothing stopping the Appellants from obtaining a survey prior to the Hearing, and therefore, the Board cannot accept the proposal, and even if the Appellants now bring in such a survey, the Board would not consider it as new evidence as it was obtainable prior to the Hearing.

[81] A reconsideration request is not to be used as an opportunity for parties to re-argue their appeal. It is the parties’ responsibility to be prepared for the hearing and to have their arguments and evidence organized and ready to present to the Board.

³¹ See: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.) at paragraph 38.

[82] Even with the Appellants' additional arguments, the Board would not change its decision. The surveyor will be delineating the bed and shore, not Mr. Gebbink. As no fill can be added to the bed and shore, there can be no affect on the water quality in Dodd's Lake, which was the issue at the Hearing. The intent in the Board's Report and Recommendations was to ensure fill would not get into the water, and requiring the delineation prior to fill being added, will ensure the lake will not be affected. There is nothing in the Appellants arguments that would change the Board's decision.

[83] What the Appellants are attempting to do in this reconsideration request is to have the Board assess water levels, which, as stated at the Hearing, is not the issue currently before the Board.

[84] As for the Appellants' claim they did not receive the complete affidavits from the Director, the Board provided all of the Parties with a copy of the submissions, including affidavits. The Board's record indicates the Director sent the affidavits directly to the Appellants by courier on April 1, 2004, and the courier company indicated they were delivered on April 3, 2004. The Board emailed copies of the Director's submission, including affidavits, to the Appellants on April 7, 2004. At no time did the Appellants indicate they did not receive the email or were unable to open the documents. The Board couriered the Approval Holder's submission to the Appellants on April 5, 2004. If they did not receive the complete copy, they should have notified the Board as soon as they became aware of it. If there were substantial parts missing, it could also have been brought up at the Hearing, and the Board could have dealt with it at that time. However, raising it after the Hearing, after all of the arguments have been heard, does not provide grounds for asking for a reconsideration. If the affidavits were incomplete, the Appellants were aware of it well before the time of the Hearing, so it cannot be considered as new information or a new matter.

[85] An important aspect of any proceeding before the Board is certainty and finality. Unless there has been a substantial error in law or new evidence that was not available at the time of the hearing, the Board will not reconsider its decision. The appellants in these appeals have presented nothing new and have not shown any error in law. The public interest in this case favours providing finality for the Approval Holder, allowing him to proceed as allowed under the Approval, and therefore, the Board dismisses the reconsideration request.

[86] The real concerns of the Appellants are the development and the water levels of Dodd's Lake. The development is a municipal issue and is not within this Board's jurisdiction. The water level was determined in a previous decision of the Director. The Appellants failed to provide a Notice of Appeal concerning that decision within the legislated timeframe, and they are now attempting to circumvent their oversight by filing an appeal on a decision that does not affect water levels in the Lake. The Board's process cannot be used as means of circumventing the proper process or forum.

IV. CONCLUSION

[87] The Board finds the Appellants did not provide any compelling evidence or arguments for a reconsideration of the Board's decision, and therefore, their request for reconsideration is denied.

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

"original signed by"

Dr. Steve E. Hrudehy
Panel Chair

"original signed by"

Mr. Ron V. Peiluck
Board Member

"original signed by"

Dr. Alan J. Kennedy
Board Member