

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Hearing: April 13, 2004

Date of Report and Recommendations: May 12, 2004

IN THE MATTER OF sections 91, 92 and 94 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 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 Approval No. 00193447-00-00 issued under the *Water Act* to Hal Willis by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *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.).

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Water Act* to Mr. Hal Willis to place clean fill on property adjoining Dodds Lake in Innisfail, Alberta. The Environmental Appeals Board received 26 Notices of Appeal objecting to the Approval. For standing purposes, the Board accepted 7 of the Notices of Appeal (the Appellants), and dismissed the remaining 19 Notices of Appeal because the individuals that had filed the remaining Notices of Appeal were not directly affected.

The Board determined that the only issue to be considered at the hearing of these appeals was whether Alberta Environment properly considered the water quality impacts on Dodds Lake when issuing the Approval.

After reviewing all of the evidence and submissions provided by the parties, the Board concluded the real concern of the Appellants was the current water quality in Dodds Lake, which has no connection to the placement of fill allowed under the Approval. The Appellants also argued this Approval would interfere with their attempts to increase the water levels in the lake. The Board rejected this argument.

The Board found that Alberta Environment had adequately considered the potential impacts on the water quality of Dodds Lake prior to issuing the Approval. In the Board's view, the placement of fill as specified in the Approval will not affect the water quality in Dodds Lake.

Therefore, the Board recommended the Approval be confirmed, with variations. The expiry date of the Approval should be extended to June 30, 2005, and prior to the placement of any fill on the site, the beds and shores of the lake should be delineated to ensure that no fill is placed in these areas.

BEFORE:

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

PARTIES:

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	5
C.	DIRECTOR	7
III.	DISCUSSION AND ANALYSIS	8
A.	LAKE LEVELS	9
B.	WATER QUALITY	11
C.	BEDS AND SHORE	13
D.	OTHER MATTERS	16
IV.	ADDITIONAL EVIDENCE	17
V.	CONCLUSION AND RECOMMENDATIONS	18
VI.	COSTS	20
VII.	DRAFT MINISTERIAL ORDER	21

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 Dodds Lake at SW 28-35-28-W4M in Innisfail, Alberta. The purpose of placing the fill is to allow for the construction of a housing development.²

[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), and Mr. William and Ms. Doreen Thomsen (03-037) (collectively the “Appellants”) appealing the Approval.³ The Appellants also requested a Stay.

[3] The Board acknowledged the Notices of Appeal and requested a copy of the documents related to these appeals (the “Record”)⁴ from 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

¹ Director’s Record, Tab 7.

² The proposed subdivision would create six residential parcels as well as an environmental reserve and a municipal reserve. See: Approval Holder’s submission, dated December 3, 2003, Parkland Community Planning Services Subdivision Report.

³ The Board received Notices of Appeal from Ms. Davina Daly (03-020) and Mr. R.C. Sifton (03-028). Ms. Davina Daly withdrew her appeal on September 24, 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 letter, dated February 2, 2004.

⁴ The Board received a copy of the Record on August 28, 2003, and copies were forwarded to the other parties on September 8, 2003.

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

[5] On August 14, 2003, and September 19, 2003, the Board wrote to the Parties⁵ regarding the requests for a Stay and requested submissions.⁶ On October 24, 2003, the Board wrote to the Parties granting a temporary Stay on the basis that, *prima facie*, at least one of the Appellants was directly affected. The Stay was to remain in place until a decision was made on the matters heard at the preliminary meeting or until otherwise directed by the Board.

[6] 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.

[7] On November 26, 2003, the Board notified the Parties that a preliminary meeting would be held on December 16, 2003, on the following matters:

- “• The directly affected status of the Appellants (...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.

⁵ The “Parties” in these appeals are the Appellants, the Approval Holder, and the Director.

⁶ The Board requested the Parties address 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.”

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

[8] The Parties provided written submissions in preparation for the Preliminary Meeting, and the Preliminary Meeting was held on December 16, 2003, in Red Deer, Alberta.

[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.”⁷

[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?” The Board received the Parties’ submissions on this issue on April 2 and 5, 2004, and the Hearing was held on April 13, 2004.

⁷ In its preliminary decision, the Board determined that the matters included in the Notices of Appeal have not been the subject of a review under the *Canadian Environmental Assessment Act*, and therefore section 95(5)(b)(ii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) is not applicable. This provision states: “The Board shall dismiss a notice of appeal if in the Board’s opinion ... 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 notice of appeal.” In their submissions prepared for the Hearing and in the Hearing, the Appellants repeatedly referred to federal agencies and boards that may have an interest in these matters. At the Hearing, the Board questioned each of the Parties on this matter and is satisfied no other federal process has been engaged that would impact the Board’s jurisdiction pursuant to section 95(5)(b)(ii) of EPEA.

II. SUBMISSIONS

A. Appellants⁸

[11] The Appellants stated the area they are concerned with is a large low-lying area that is a naturally occurring wetland, floodplain, and drainage path. They explained that Dodds Lake has a natural outlet level at 938.252 metres, the full supply level is at 938.483 metres, and the flood level is at 938.685 metres. The Appellants stated the fill will be placed to a level of 938.15 metres, and therefore it is in the beds and shores of Dodds Lake. They argued that the placement of fill in the beds and shores of a lake is not authorized pursuant to policies adopted by Alberta Environment.

[12] They also stated the fill would make it impossible to restore the water levels in the lake. Their argument was not that the fill would, *per se*, make it physically impossible to restore the water levels in the lake. Rather, the Appellants advised that they are trying to force the Town of Innisfail, through other processes, to change the operating plan for its control structure on the lake, and thereby raise the levels of the lake. The Appellants stated the placement of fill by the Approval Holder was predicated on the lower lake levels. As a result, the Appellants were concerned the fill would make it more difficult, or impossible, for the Town to obtain the appropriate approvals to raise the lake levels, because the impacts of increased lake levels on the fill would have to be taken into consideration.

[13] Further, according to the Appellants, the fill has the potential to divert and alter the flow of the water. The Appellants stated that fluctuating water levels is important in maintaining biological diversity and healthy water. They stated wide varieties of flora in and around the lake are sustained by natural fluctuating water levels, and this process is key to maintaining the health of Dodds Lake. They argued there would be increased adverse environmental effects "...with the destruction of a vast portion of a wetland area on a lake already suffering from an overload of nitrates and phosphorus."⁹ They stated there has been an

⁸ The Board notes that at the end of the hearing, the Appellants provided the Board staff with the documents they used to make their presentation to the Board. The Board has reviewed these documents and is satisfied the documents are effectively the oral presentation the Appellants provided and contains no new evidence or submissions.

⁹ Appellants' submission, dated March 30, 2004.

increase in scum and algae on the floodplain of the southeastern shoreline, resulting in foul smells from the lake. The Appellants stated disturbing the natural vegetation would result in permanent changes to the water quality.

[14] The Appellants submitted the Director did not take any measures to protect water quality in the lake. They recommended a pre-development assessment be done to determine the effects on the water quality and the aquatic environment in Dodds Lake, and the pending review by the Federal Navigable Waters Protection Branch be completed before the Approval is granted.

[15] The Appellants argued that Dodds Lake is a lake under the terms of the *Water Act* and Alberta Environment's Administrative Guide for Approvals to Protect Surface Water Bodies under the *Water Act*, December 2001 (the "Administrative Guide"). They stated surveyor's reports from 1893 clearly show Dodds Lake as a natural body of water, and since it is not an artificial body of water, it cannot be considered a storm water retention pond under the terms of the Administrative Guide. The Appellants submitted, "...Dodds Lake and the surrounding area are entitled to the full protection intended by the Act and the Guide."¹⁰

B. Approval Holder

[16] The Approval Holder stated the Director notified him of the concerns expressed by the neighbours, and the Director left no matter unchecked or tested, including water quality.

[17] The Approval Holder explained he would be placing clean fill on the site. According to the Approval Holder, this has been done before in the area, including on the property west of his and at the east end of the lake, and the fill did not cause any problems with lake water quality.

[18] The Approval Holder stated the fill would not be placed near the edge of the water, and a Municipal Reserve and an Environmental Reserve would be between the fill and the water. He stated the reserves would "...act as natural filters for water crossing the filled area prior to entering the lake."¹¹ He also stated the main inflow to the lake is on the easterly end of

¹⁰ Appellants' submission, dated April 5, 2004.

¹¹ Approval Holder's submission, dated April 1, 2004.

the lake, well away from the fill area, and therefore, the natural flow of the drainage would not be restricted.

[19] The Approval Holder stated the fill would not affect water quality should the water levels fluctuate since the material used will be clean fill, and the Director has specifically stated where the fill can be placed and has included conditions to deal with environmental concerns while the work is taking place.

[20] The Approval Holder stated he received permission from the Town of Innisfail to place the fill and also received the required approvals from the Department of Fisheries and Oceans. The Approval Holder referred to the letter he received from the Department of Fisheries and Oceans in which it stated that it had concluded "...the proposed works are not likely to result in the harmful alteration, disruption or destruction of fish habitat provided that the work is carried out as proposed and the following mitigation measures are implemented..."¹²

[21] The Approval Holder stated he contacted Alberta Public Lands, and after an on-site visit, the representative from Public Lands was satisfied all Public Lands concerns were dealt with.

[22] 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 it would not block the flow of the water into the lake. The Approval Holder submitted that, since all of the other government bodies did not have a concern with the project, it supports the fact the Director did not find any concerns.

¹² Approval Holder's submission, dated April 1, 2004. The mitigation measures referred to in the letter are:

- “1. All spoil materials should be disposed of above the high water mark and located such that they do not re-enter watercourses.
2. Effective temporary and permanent erosion and sediment control measures to minimize introduction of sediment from the construction right-of-way should be implemented, both during and after construction.
3. Any disturbance of the right-of-way approaches to the drainage, associated with activity related to the project, should be kept to a minimum and stabilized, reclaimed, and revegetated to the natural conditions that existed before construction as soon as possible.
4. Cleaning, refueling and servicing of equipment should be conducted at least 100m away from the water and appropriate precautions should be taken to ensure that deleterious substances do not enter any watercourse. Equipment operating near any watercourse should be free of external grease, oil and mud. An emergency spill response kit should be kept on-site during construction.”

[23] The Approval Holder stated the control structure that is now in place limits the highest permitted operating water level for the lake at 937.85 metres. He explained the fill area is well back from the waters' edge even when the lake level was measured at 938.0 metres, a level higher than the allowable operating level. The Approval Holder submitted "...there is no risk whatsoever that water quality may be endangered."¹³

[24] The Approval Holder argued the lake sits in and is contained by clean dirt, and therefore, placement of clean fill as planned would not cause a problem with water quality.

[25] The Approval Holder requested the Board rule that the Director had properly considered the issue of water quality impacts when issuing the Approval. He also requested the Board extend the expiry date on the Approval to June 30, 2005, from the current expiry date of June 30, 2004, because of the time involved in the appeal process.

C. Director

[26] The Director submitted he "...properly considered whether the deposition of fill in the specified area would have any impact on water quality."¹⁴

[27] The Director stated the Town of Innisfail initially had concerns the fill might impact the Town's ability to use Dodds Lake as part of its storm water management system, but the Town subsequently determined the fill would not affect its use of the lake.

[28] The Director explained that Public Lands (part of Alberta Sustainable Resource Development) was contacted to determine whether or not the proposed fill placement site encroached onto the beds and shores of Dodds Lake, and he was advised the fill area did not overlap the beds and shores of the lake. The advice provided to the Director was given after a site inspection was conducted by Mr. Felix Gebbink of Public Lands.

[29] The Director stated potential impacts on water quality were identified, in particular, if fill was to be directly deposited into the lake or if it eroded into the lake over time. He explained direct deposit or erosion could degrade the water quality by increasing turbidity in the water and increasing siltation, and if the fill is not clean, it may contain substances that could

¹³ Approval Holder's submission, dated April 1, 2004.

¹⁴ Director's submission, dated April 2, 2004, at paragraph 9.

impact the water quality. The Director stated that he considered the topography of the site, the existing 1:100 year flood plain, and the type and location of the fill.¹⁵ The Director determined that, "...with appropriate conditions, the deposition of fill at this location should present little or no harm to Dodds Lake."¹⁶ According to the Director, the conditions included in the Approval protects the water quality by restricting the area of fill to the Approval Holder's property, requiring clean fill, and requiring the Approval Holder to prevent siltation and erosion by stabilizing the slopes and soils and seeding to vegetation.

[30] The Director stressed the proposed fill placement area is not part of a water body, and it is adjacent to, but not part of, the beds and shores of the lake. He stated the area is solely within the Approval Holder's property.

[31] According to the Director, the terms and conditions of the Approval indicate he considered the approved activity and any potential impacts it might have on water quality and included appropriate safeguards. The Director submitted the Approval and its conditions are consistent with the purpose of the *Water Act* and the Administrative Guide.

III. DISCUSSION AND ANALYSIS

[32] The Appellants are property owners who live around Dodds Lake. They are concerned about the health of Dodds Lake, which they have observed declining in the last number of years. They are generally concerned about the water quality in the lake, but their main concern is the low water levels, which they attribute to the operation of a control structure owned by the Town of Innisfail.

[33] The Town of Innisfail holds an approval under the *Water Act* for the operation of the control structure. The Appellants filed separate appeals of the *Water Act* approval and the associated amendments for the control structure.¹⁷ However, the Board did not accept the appeals of the approval and amending approvals for the control structure because they were filed outside the time limit set by the *Water Act* for accepting such appeals. As a result, the operation

¹⁵ See: Director's submission, dated April 2, 2004, Affidavit of Mr. David Helmer.

¹⁶ Director's submission, dated April 2, 2004, at paragraph 17.

¹⁷ See: Appeal Nos. 03-040-058 and 03-60-081.

of the control structure, and the effects that it has on lake levels, are not matters that will be considered in the appeals currently before the Board.

[34] The only issue in the appeals currently before the Board is whether the Director properly considered the issue of potential water quality impacts on Dodds Lake when issuing the Approval allowing the Approval Holder to place clean fill adjacent to the lake. As part of addressing this issue, the Board must determine if there is a potential the clean fill, placed in accordance with the Approval, will have a detrimental affect on the quality of water in the lake.

[35] Throughout these appeals, the Appellants have essentially brought forward three major concerns:

1. adding fill to this site will make it difficult to have the lake levels increased;
2. the existing water quality of the lake is poor; and
3. the placement of fill on the beds and shores of the lake should not be permitted.

A. Lake Levels

[36] With respect to the placement of the fill making it difficult to increase lake levels, the Appellants advised that they are trying to force the Town of Innisfail to change the operating plan for the control structure on the lake and raise the water level of the lake. Their concern is that the placement of fill by the Approval Holder is predicated on the lower lake levels. As a result, the Appellants are concerned the fill will make it more difficult, or impossible, for the Town to obtain the appropriate approvals to raise the lake levels, because the impacts of increased lake levels on the fill will have to be taken into consideration.

[37] The Board rejects the argument that the placement of fill will prevent or interfere with their efforts to have the lake levels increased. The Approval Holder acknowledged that if the lake levels are increased, he might be required to take steps to minimize any potential effects that may occur, such as placing riprap to prevent erosion. No evidence was presented to prove an increase in the lake levels could not be done even with the fill added. In all likelihood additional steps would have to be taken to minimize the effects, if any, which would occur, but this can be dealt with in the conditions included in any approval issued to the Town of Innisfail dealing with the matter of water levels in Dodds Lake.

[38] According to the evidence presented by the Parties, the fill will be added to an area well back from the edge of the water if the lake level was 938.0 metres. This is above the current allowable operating level of 937.85 metres, so there is some allowance for an increase in lake level. The actual level that could be reached before reaching the fill is a matter the Town of Innisfail and Alberta Environment would have to determine should they consider raising the lake level. In any event, these are matters that would have to be dealt with in any approval that may be issued to increase lake levels, which at this point, is only speculative.

[39] The concerns regarding the ability or non-ability to change the water levels of the lake are based on speculation. The Board is being asked to wait on its decision until the issue of lake levels is dealt with in a different forum, but it is not even certain as to whether the issue of lake levels will ever be heard in any other forum. The Board cannot base a decision on speculation. If decisions by any decision-maker, whether it is the Director, the Board or some other agency, could not be made on the chance of another forum making a decision that might affect the result, development would be paralyzed within the maze of approvals and their interconnectedness.

[40] Further, the Director stated he expressly contemplated the possibility of the water levels increasing, and he assessed the possible impacts on the water quality if this was to occur. The Board accepts his view that if there is a potential of the water quality being affected should the water levels rises, the impacts would be manageable and would have to be addressed as part of any future approval process.

[41] The Board finds the real argument being presented by the Appellants is “What is the natural water levels of the lake?” First, as is discussed below and as the Director testified, the “natural” water levels of a lake change over time.¹⁸ 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.

¹⁸ The concepts of diluvion and accretion are entrenched in our property laws. Diluvion occurs when the water’s edge encroaches onto adjoining land, whereas accretion occurs when there is a permanent recession of the

B. Water Quality

[42] The Board accepts that the Appellants have a legitimate concern regarding the water quality in Dodds Lake. However, in the Board's view, the potential impacts on water quality have been adequately considered by the Director. (The Board strongly encourages Alberta Environment, as it has done in this case, to assess water quality in lakes when it receives an application for all licences or approvals under the *Water Act*.)

[43] The concern of the Appellants is the water quality of the lake as it is now. In their closing comments, the Appellants stated:

“We keep talking about water quality and it won't affect water quality. We haven't got any water quality right now. That's our concern; is what do we do about the water quality right now? That's where we would like some reassurance.”¹⁹

Since the Approval Holder has not placed the fill onto the site, it is clear that the activity allowed under the Approval, specifically the placement of fill, has not caused or contributed to the existing water quality concerns. Other concerns raised by the Appellants, such as water levels in the lake and the resulting odours and algae growth, are all pre-existing conditions and are not connected to the issuance of the Approval.

[44] The Board appreciates the Appellants' concerns that they do not want any activities that will cause further deterioration of the water quality. However, upon reviewing the Approval, and providing the conditions are met, the Board has concluded that the addition of fill onto the Approval Holder's property will not impact the current water quality of the lake. If properly engineered, the placement of fill onto the Approval Holder's property will not affect water quality, since the site is upland from the edge of the water. It is clear that the Approval Holder is aware of the importance of preventing erosion, not only for the sake of the water quality in the lake, but also for the development itself.

[45] The Appellants failed to demonstrate to the Board that placement of the fill, under the terms and conditions of the Approval, would cause any direct physical impact on the lake

water and an increase in the adjoining lands. These natural processes result in a change in the area of land that is actually described on the deed.

¹⁹ Hearing tapes, April 13, 2004.

that would affect water quality. The terms and conditions included in the Approval provide protection to the lake. In particular, the following conditions must be met by the Approval Holder:

- “3. The approval holder shall confine the activity to the work area designated on the plans or to the areas as prescribed in the approval.
5. The approval holder shall not deposit any substance that will adversely affect the water body.
6. The approval holder shall prevent siltation and erosion of the water body resulting from the activity.
7. The approval holder shall ensure the fill material is free [of] debris and material that may be deleterious to the aquatic environment.
8. The approval holder shall ensure reclamation, including, but not limited to debris disposal, cleanup, slope/bank and topsoil stabilization or replacement and reseeding, shall be done in conjunction with construction activities.”

[46] Under these conditions, the Approval Holder must take the necessary steps to minimize any siltation or erosion of the site, any fill used must be clean, and he is confined to working only on the specified area. The Board believes the Approval Holder understands the conditions and appreciates what must be done in order for him to comply. In the Board’s view, he was a credible witness, and if he carries out the project as required under the terms and conditions of the Approval, there should not be an impact on the water quality in the lake.

[47] The Board notes that in this particular situation, there are two conservation areas separating the proposed site of the fill and the edge of the water. This area not only increases the distance from the lake and the fill, but it also acts as a buffer from the eroding action of the water and as a catchment area for silt. Both of these factors will assist in preventing degradation of the water.

[48] The Appellants also raised concerns that an area of cattails (*typha latifolia*) will be destroyed, and they explained the cattails were important to maintain the water quality of the lake. While the Board generally accepts the important role that shoreline vegetation plays in protecting the water quality of a lake, the Board does not accept the Appellants’ argument in this case. With respect, the Appellants argument is not properly based on the facts. The Approval Holder has stated that fill will not cover all of the cattails, and since the area of cattails that will be covered is upland, the filtering capacity of this particular stand is limited at best. Considering

the size of the area of cattails that will be covered compared to the size of the lake, the cattails that will be covered by the fill contribute little to the filtering process within the aquatic ecosystem. Therefore, in the Board's view, the impact on the lake of removing these plants on the site would be negligible.

C. Beds and Shore

[49] The Appellants also advanced the argument the placement of fill in this area is not permitted according to Alberta Environment policy.²⁰ Specifically, the Appellants stated that it not permissible to place fill on the beds or shores of a water body. In support of this argument, the Appellants called Dr. William C. McKay as an expert witness.

[50] The Board notes that Dr. McKay lives in the area of the project and previously identified himself as being opposed to the project.²¹ Although the Board appreciated Dr. McKay making himself available for questioning and the comments he provided, the Board cannot consider him a truly *independent* expert. By previously identifying himself as being opposed to the project, he demonstrated that he has a vested interest in the outcome of these appeals, thereby giving the perception of a potential for presenting biased data.

[51] Dr. McKay acknowledged the placement of fill on the site would not necessarily result in an impact to the lake providing the appropriate Approval conditions are met, and he agreed there is no physical connection between the site for the fill and the edge of the lake. Dr. McKay stated the concern is that by allowing the fill to be placed on the site, it would make it more difficult to change the lake level. (As the Board has discussed above, the Board does not accept this argument.) He indicated that, based on his understanding, the fill is being placed on

²⁰ Alberta Environment's Administrative Guide for Approvals to Protect Surface Water Bodies under the *Water Act*, December 2001.

²¹ During the Hearing, the Board asked Dr. McKay to verify if he gave permission to have his name included on a list filed by the Concerned Citizens of Innisfail. Dr. McKay stated he had given permission to have his name included. He stated:

"I don't live in the Town of Innisfail, so I'm not a resident of the Town of Innisfail. I live in the country.

Ms. Covey contacted me a couple of years ago, I guess, because she knew that it was my business to deal with water quality, and I expressed concern to her at that time. And I'm still concerned to see that happen."

Hearing tapes, April 13, 2004.

the beds and shores of Dodds Lake. Dr. McKay acknowledged he is not an expert at determining the beds and shore of a water body, and therefore, his evidence on this matter is not determinative and cannot be accepted by the Board.

[52] The Appellants argued the definition of beds and shores are not necessarily the same under the *Water Act* and the *Public Lands Act*, R.S.A. 2000, c. R- 40, and therefore, the Director should not have relied on the advice given by public lands. The Appellants are concerned whether or not the site is part of the beds and shores of Dodds Lake, or in fact Crown land. The definition of beds and shores does not vary between these acts. The *Public Lands Act* states that title to the beds and shores of all naturally occurring water bodies belongs to the Crown in right of Alberta.²² As this is an issue for Public Lands delegates to deal with on a regular basis, it seems reasonable that these people would have the knowledge and expertise to be able to delineate between crown, or public, lands and private lands. Therefore, the Director was justified in using their expertise to assist in clarifying the edge of the beds and shores of Dodds Lake.

[53] The Board accepts the evidence of the Director that the fill is not being placed on crown land, specifically the beds or shore. He consulted with experts from Public Lands to determine if the fill was in fact going to be placed on the beds or shores of the lake. Ms. Angela Fulton, a water technologist with Alberta Environment, attended at the site with Mr. Felix

²² Section 3 of the *Public Lands Act* states:

“(1) Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of

- (a) all permanent and naturally occurring bodies of water, and
- (b) all naturally occurring rivers, streams, watercourses and lakes,

is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before, on or after May 31, 1984 does not convey title to those beds or shores.

(2) Subsection (1) does not operate

- (a) to affect a grant referred to in subsection (1) that specifically conveys by express description a beds or shore referred to in subsection (1) or a certificate of title founded on that grant,
- (b) to affect the rights of a grantee from the Crown or of a person claiming under the grantee, when those rights have been determined by a court before June 18, 1931, or
- (c) to affect the title to land belonging to the Crown in right of Canada.

(3) For the purposes of subsection (1), a river, stream or watercourse does not cease to be naturally occurring by reason only that its water is diverted by human act.”

Gebbink of Public Lands, and Ms. Linda Covey, a representative of the Appellants. It was an actual inspection of the site and not simply an analysis on paper. As stated by Dr. McKay, there are physical and biological indicators that are used to demarcate the beds and shores of wetlands. Using these types of parameters, Ms. Fulton and Mr. Gebbink determined the proposed site for the fill was not on Crown land.

[54] The Director explained how a wetland will change over time; it is a natural cycle, and the beds and shores will move with the levels of the lake. This phenomenon is recognized in law, as the concepts of diluvion and accretion are entrenched in our property laws. Diluvion occurs when the water's edge encroaches onto adjoining land,²³ whereas accretion occurs when there is a permanent recession of the water and a gradual and imperceptible increase in the adjoining lands by natural causes.²⁴ These natural processes result in a change in the area of land that is actually described on the deed.

[55] In his cover letter to the Approval Holder, the Director states the Approval Holder is to "...survey and mark the area to be filled and advise [Public Lands] ... so that Public Lands can field verify the crown boundary. This must be done prior to any placement of fill material." What the Board does not understand is why the Director did not include this as a condition of the Approval. He was very aware the Appellants, and others in the area, had concerns regarding the site and whether it was in fact part of the beds and shores of Dodds Lake. This step would certainly leave the Appellants with some reassurance their concerns were heard and were considered when the Approval was made. The purpose of the *Water Act* clearly states that Albertans have a "...role in providing advice with respect to water management planning and decision-making."²⁵ The Appellants, as do all Albertans, have a responsibility to become

²³ B. Ziff, *Principles of Property Law*, 2d ed. (Toronto: Carswell, 1996) at 97.

²⁴ *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota: West Publishing, 1990).

²⁵ Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water

involved in matters concerning water management, but unless the Director and others involved in the process listen and consider the concerns, the purpose of the *Water Act* cannot be achieved. Therefore, while the Board will be recommending that the Approval be confirmed, it will also be recommending that this provision included in the letter, to delineate the beds and shores before the placement of the fill and to mark the area to which fill will be added, should be added to the Approval.

D. Other Matters

[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.

[57] The Appellants also expressed concerns regarding the trees and other vegetation on the Approval Holder's property being affected. The trees and other vegetation are not subject to the Approval and are therefore not within the jurisdiction of the Board. Even though the neighbours may value the aesthetics of the vegetation, it is still on the Approval Holder's land and he can do with it what he pleases, within legal limitations. The Parties in these appeals have been very cooperative and have acknowledged the other Parties' views. Perhaps the Approval Holder and the Appellants can work out some arrangement to protect as many of the trees as possible in the development of the lands, but this is not a matter this Board can decide.

[58] Further, if the Town of Innisfail and the Director had taken a better approach to public consultation regarding the appropriate lake level, storm water issues, and the potential

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- and their role in providing advice with respect to water management planning and decision-making;
 - (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
 - (f) the important role of comprehensive and responsive action in administering this Act.”

water quality impacts, many of the concerns expressed before the Board in these appeals would have been addressed. It was apparent throughout the proceedings that all those owning property around Dodds Lake, including the Appellants and the Approval Holder, are concerned with the health of the Lake. Although the Appellants were not successful in these appeals, they have brought their concerns to the attention of the Director. Both the Town of Innisfail and Alberta Environment are in positions that require listening to and responding to Alberta citizens. If the people are not satisfied with decisions made by the Town, they have the option of showing their dissatisfaction at the local polls; if they are dissatisfied with the Director's decision, they have the option of filing an appeal with this Board. What the Board has found in many of its hearings and mediations is that many of the issues would not have resulted in appeals if only the Director, and in this particular situation also the Town of Innisfail, had taken greater effort to communicate effectively with those people who presented legitimate concerns. A little time spent at the start of the process would avoid the need of spending extensive time later, not only in dealing with issues in formal appeal processes, but also to re-establish respect and confidence.

[59] Finally, the Board notes the Approval Holder's concern of the expiry date on the Approval. At present, the term expires on June 30, 2004. The Board realizes it will be extremely difficult for the Approval Holder to complete the work by the expiry date. The Approval was issued approximately one year ago, and the Director considered it reasonable to have a one-year effective date. The Board will, therefore, recommend the effective date be extended by one year, and the Approval would expire June 30, 2005.

IV. ADDITIONAL EVIDENCE

[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.”

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.

V. CONCLUSION AND RECOMMENDATIONS

[62] As the Appellants have failed to show that the intended project will have a negative impact on the water quality in Dodds Lake, the Board is recommending the appeals be dismissed and the Approval upheld, subject to certain variations.

[63] First, the delineation of the beds and shores of the site is of particular concern to the Appellants. No fill should be placed on the beds and shores of the lake. Therefore, it is reasonable to require the Approval Holder have the beds and shores of the lake delineated prior

to the fill being added to the site. Public lands should verify the demarcation, but the Director has the final authority as to whether to accept the delineation. The Approval Holder should also mark where the fill would be added to ensure it does not encroach onto the beds and shores.

[64] Second, the Approval expires June 30, 2004, and it is obvious the work allowed under the Approval cannot, in all likelihood, be completed in such a short timeframe. Therefore, the Board recommends the Approval be extended to June 30, 2005.

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

[66] The Board also orders that the Stay that was granted be lifted as of the date of the Minister's Order.

[67] Finally, with respect to sections 100 and 103 of EPEA, the Board recommends that copies of this Report and Recommendations and any decision by the Minister be sent to the following parties:

1. Ms. Margaret Baycroft;
2. Ms. Margaret E. Medak;
3. Ms. Laurie Ann Miller;
4. Mr. Randy Miller;
5. Ms. Leah Wile;
6. Ms. Dixie and Mr. Kevin Ingram;
7. Ms. Doreen and Mr. William Thomsen;
8. Mr. Hal Willis;
9. Mr. Grant D. Sprague and Ms. Shannon Keehn, Alberta Justice on behalf of Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment;
10. Ms. Linda Covey;
11. Ms. Elin H. Barlem;
12. Mr. J. Mark Barlem;
13. Mr. Bill and Ms. Linda Biggart;
14. Mr. Leo E. Carter;
15. Ms. Judy Hudson;
16. Mr. Robert R. Lewis;
17. Mr. Ron Macdonald;
18. Mr. Len Plummer;
19. Ms. Karen Strong;
20. Mr. Laurence Strong;
21. Ms. Laurie Zaleschuk;
22. Mr. Robert J. Miller;

23. Mr. Larry and Ms. Eleanor Brown;
24. Mr. Sydney and Ms. Myrtle Quartly;
25. Mr. William Froling;
26. Ms. Jean Veldkamp and Mr. Howard Milligan;
27. Ms. Davina Daly; and
28. Mr. R.C. Sifton

VI. COSTS

[68] The Board did not receive any requests for costs from the Parties and, as a result, no costs will be awarded in this matter.

Dated on May 12, 2004, at Edmonton, Alberta.

“original signed by”

Dr. Steve Hruddy
Panel Chair

“original signed by”

Mr. Ron V. Peiluck
Board Member

“original signed by”

Dr. Alan Kennedy
Board Member

VII. DRAFT MINISTERIAL ORDER

Ministerial Order

/2004

Environmental Protection and Enhancement Act

R.S.A. 2000, c. E-12;

Water Act

R.S.A. 2000, c. W-3.

**Order Respecting Environmental Appeals Board
Appeal Nos. 03-017, 024, 025, 026, 031, 033, and 037**

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal Nos. 03-017, 024, 025, 026, 031, 033, and 037.

Dated at the City of Edmonton, in the Province of Alberta this _____ day of _____, 2004.

Honourable Dr. Lorne Taylor
Minister of Environment

Draft Appendix

With respect to the decision of Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment (the “Director”), to issue Approval No. 00193447-00-00 (the “Approval”) dated June 30, 2003, under the *Water Act*, to Mr. Hal Willis (the “Approval Holder”), I, Dr. Lorne Taylor, Minister of Environment, order that:

1. The decision of the Director to issue the Approval is confirmed, subject to the following variations.
2. The expiry date of the Approval is varied by deleting on the cover page the phrase “2004 06 30” and replacing it with “2005 06 30”.
3. The Approval is varied in clause 11 by deleting the phrase “June 30, 2004” and replacing it with the phrase “June 30, 2005”.
4. The Approval is varied by adding immediately after clause 11 the following:
 - “12. The approval holder shall ensure that no fill material is placed on the bed or shore of the water body.
 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.”



ALBERTA ENVIRONMENT

Office of the Minister

Ministerial Order

08/2004

Environmental Protection and Enhancement Act

R.S.A. 2000, c. E-12;

Water Act

R.S.A. 2000, c. W-3.

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Dated at the City of Edmonton, in the Province of Alberta this 17 day of May, 2004.

- original signed by-

Honourable Dr. Lorne Taylor
Minister of Environment

Appendix

With respect to the decision of Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment (the “Director”), to issue Approval No. 00193447-00-00 (the “Approval”) dated June 30, 2003, under the *Water Act*, to Mr. Hal Willis (the “Approval Holder”), I, Dr. Lorne Taylor, Minister of Environment, order that:

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