

ALBERTA  
ENVIRONMENTAL APPEALS BOARD  
  
Decision

Date of Decision: January 13, 2006

**IN THE MATTER OF** sections 91, 92, 93, 95, 97, 98, 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 Linda Covey and Elin Barlem, with respect to Approval No. 00076694-00-00 and Amending Approval No. 00076694-00-01 issued under the *Water Act* to the Town of Innisfail by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Covey and Barlem v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (13 January 2006), Appeal Nos. 05-022 and 023-D (A.E.A.B.).

## EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Water Act* on March 3, 2000, to the Town of Innisfail authorizing the construction of flood control works at Dodd's Lake in Innisfail, Alberta. The Approval was amended on April 24, 2003, to include an outlet improvement plan and a water level management plan.

On September 12, 2005, the Board received two appeals of the Approval and a request for a Stay. The time period in which an appeal may be filed with the Board with respect to an approval under the *Water Act* is seven days, unless the Board finds there is sufficient reason for extending this filing period. The Board requested the Appellants provide reasons as to why the Board should extend the time limit for filing the appeals.

After reviewing the reasons provided, the Board found the Appellants did not present sufficient reasons to demonstrate that special circumstances existed to warrant an extension of the time limit for filing the appeals. The appeals were filed more than five years after the original Approval was issued and the work authorized under this Approval was completed in 2002.

As there was no valid appeal before the Board, the Stay request could not be considered.

The Appellants also requested a reconsideration of the Board's decision regarding appeals previously filed with respect to the amendment of the Approval. The Board denied the reconsideration request, as the Appellants did not provide any new information that could have resulted in a different decision of the Board, and all of the documents provided by the Appellants were available at the time of the original appeals.

**BEFORE:**

Dr. Steve E. Hrudehy, Chair.

**PARTICIPANTS:**

**Appellants:** Ms. Linda Covey and Ms. Elin H. Barlem.

**Approval Holder:** Town of Innisfail.

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

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## **I. BACKGROUND**

[1] On March 3, 2000, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00076694-00-00 (the “Original Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Town of Innisfail (the “Approval Holder” or the “Town”), for the purpose of constructing flood control works at NW 28-35-28-W4M at Dodd’s Lake near Innisfail, Alberta. On April 24, 2003, the Director amended the Original Approval with Approval No. 00076694-00-01 (the “Amending Approval”) by including two plans relating to the control structure constructed at the outlet of Dodd’s Lake.

[2] On September 6, 2005, the Environmental Appeals Board (the “Board”) received Notices of Appeals from Ms. Linda Covey and Ms. Elin H. Barlem (collectively the “Appellants”) appealing the Original Approval. The Appellants also requested a Stay.

[3] As the normal appeal period for filing the appeals that are currently before the Board is seven days, the Appellants were asked whether they wanted to request an extension for filing their appeals and, if so, to provide reasons for extending the appeal period and an explanation as to why their appeals were filed outside of the seven day time limit. The Board received the Appellants’ response on September 27, 2005.

[4] The Board notes that the Appellants, along with a number of other residents of the Town, previously filed appeals in relation to the Amending Approval.<sup>1</sup> In both the current and previous appeals, the main concern of the Appellants is the water level in Dodd’s Lake, which they believe has been “artificially” lowered by the Town. They are of the view that the “artificial” lowering of Dodd’s Lake has harmed the lake and negatively impacted their use and enjoyment of their properties near the lake. They believe the Town has not adequately consulted with the local residents regarding the work undertaken under the Original Approval and the Amending Approval. The Appellants want the water level in Dodd’s Lake restored to what they believe is the “natural” level of the lake.

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<sup>1</sup> See: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-D (A.E.A.B.) and Reconsideration Decision: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-RD (A.E.A.B.).

## II. LATE FILED APPEALS

[5] The Appellants requested the Board reconsider its “recommendations” regarding the Original Approval issued to the Town of Innisfail on March 3, 2000, authorizing the installation of a culvert in the bed and shore of Dodd’s Lake. The Board interprets this statement as a request to appeal the Original Approval and a request to have the Board reconsider its previous decisions regarding the appeals of the Amending Approval. The Board previously dismissed the appeals of the Amending Approval because they were filed late.<sup>2</sup>

[6] The Appellants did not previously file appeals of the Original Approval; they only filed appeals of the Amending Approval. However, the Board notes that another resident of the Town filed an appeal of the Original Approval, and the Board dismissed that appeal because it was also filed late and the circumstances did not warrant extending the time period to accept a late filed appeal.<sup>3</sup>

[7] Therefore, the Board will first look at whether the appeals of the Original Approval are properly before it, and then it will look at the reconsideration request regarding the Amending Approval. The Board will then address the Stay of the Original Approval requested by the Appellants.

### A. Submission

[8] The Appellants argued the Original Approval is for a new outfall structure and not a control structure as described to the public, and as a result, there is no approval for a control structure. The Appellants suggested they were misled as to the type of structure that was being constructed. In the Appellants’ view, this makes the Original Approval “illegal” and therefore, they argued that all subsequent decisions based on the Original Approval have no legal standing.

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<sup>2</sup> See: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-D (A.E.A.B.) and Reconsideration Decision: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-RD (A.E.A.B.).

<sup>3</sup> See: *Biggart v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.).

[9] The Appellants stated the Town "...made an arbitrary decision to lower the water level in Dodd's Lake by 600mm."<sup>4</sup> They stated there was no public consultation by the Town, and the project involved the installation of a culvert to lower the water level by two feet.

[10] The Appellants argued Dodd's Lake was referred to as a Crown owned lake in 1985, 1992, and 1999, and the lake will have to be claimed as public land according to section 3 of the *Public Lands Act*, R.S.A. 2000, c. P-40.<sup>5</sup> According to the Appellants, documents issued in 1999 stated that Public Lands (a division of Alberta Sustainable Resource Development) had no record of any artificial interference with the outlet of Dodd's Lake. The Appellants stated that when there is an artificial interference that alters the water level, the pre-disturbance level is used to establish the boundary of the Crown owned land.

[11] The Appellants referred to the Code of Practice for Outfall Structures on Water Bodies (September 2003) (the "Code of Practice") stating: outlet improvements can only be made when an outlet already exists; amendments must be done to the former specifications; and new outfall structures are not allowed on "Class A Lakes." The Appellants argued that, since Public Lands does not have any record of any outlet improvement, this project is a new outfall structure. They stated the purpose of obtaining an approval under the *Water Act* is "...to ensure that decisions regarding Crown owned lakes are not made at a municipal level."<sup>6</sup>

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<sup>4</sup> Appellants' submission, dated September 27, 2005.

<sup>5</sup> 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 bed 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 of 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."

<sup>6</sup> Appellants' submission, dated September 27, 2005.

[12] The Appellants submitted the project is not in keeping with the purposes of the *Water Act*, and that Public Lands has no record of the project.

**B. Discussion**

1. Legislation

[13] Section 116(1) of the *Water Act* provides:

“A Notice of Appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after
  - (i) receipt of a copy of a water management order or enforcement order, or
  - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from, or
- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

Therefore, in the case of an approval issued under the *Water Act*, the normal time limit for filing a Notice of Appeal is seven days.

[14] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 116(2) of the *Water Act* states: “The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

[15] The Board has determined the appeals must be dismissed based on two grounds – the need for certainty in the regulatory process and for failing to meet the onus in applying for an extension. The legislation has provided the Board with some flexibility to allow for late filed appeals in certain circumstances, but the Board uses this authority in only limited situations.<sup>7</sup>

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<sup>7</sup> See: *Town of Valleyview v. Director, Northern Region, Regional Services, Alberta Environment* (1 August 2003), Appeal No. 03-009-D (A.E.A.B.); Preliminary Motions: *Hanson et al. v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *Dyck v. Director, Southern Region, Regional Services, Alberta Environment re: Coyote Cove Golf Course Inc.* (14 February 2003), Appeal No. 02-137-D (A.E.A.B.); *Shennan et al. v. Director, Central Region, Regional Services, Alberta Environment re: Parkbridge Communities Inc.* (13 February 2003), Appeal Nos. 02-066 and 068-D (A.E.A.B.); *Seabolt Watershed Association v. Director, Central Region, Regional Services, Alberta Environment re: Mountain Creeks Ranch Inc.* (14 February 2003), Appeal No. 02-085-D (A.E.A.B.); *Seniuk v. Director, Enforcement and Monitoring, Parkland Region, Regional Services,*



The onus is on the Appellants to demonstrate to the Board that the time limit should be extended to allow the appeals.

[16] In this case, the appeal period ended on March 10, 2000, but the Appellants did not file their Notices of Appeal until September 6, 2005, approximately five and a half years later. The Board also notes that they could have filed their Notices of Appeal with respect to the Original Approval at the same time as they filed their Notices of Appeal with respect to the Appending Approval, but they did not.

## 2. Certainty

[17] One of the purposes of having deadlines incorporated into legislation, particularly regulatory legislation, is to bring some element of certainty to the regulatory process. In this case, the *Water Act* requires an applicant for an approval to go through an application process. This process provides for public notice, which allows anyone who may be directly affected by the proposed approval to submit their concerns to the Director in the form of a Statement of Concern. Once a decision is made to issue, or for that matter not to issue, the approval, then there is an appeal period in which the applicant or anyone who is directly affected (and who filed a Statement of Concern) can file an appeal. The time limit in which an appeal must be filed is legislated so that all parties – the applicant, the people who are directly affected, and the regulator – know when the process is complete. The time limits included in the legislation, and the certainty these time limits create, balances the interests of all the parties.

[18] Once this process is complete, the approval can be acted upon and all of the parties can move forward on that basis - the parties can carry on with their business affairs, making decisions based on the known terms and conditions of the approval. If there were no time limits placed on the appeal period, the applicant for an approval would never know when it could proceed with its project, as there would always be the possibility of an appeal that could

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*Alberta Environment* (4 June 2002), Appeal No. 01-112-D (A.E.A.B.); *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115-D (A.E.A.B.); *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (25 June 2002), Appeal No. 02-006-D (A.E.A.B.); and *Proft v. Director, Licensing and Permitting Standards Branch, Environmental Assurance, Environmental Operations Division, Alberta Environment re: Her Majesty the Queen in Right of Alberta* (1 October 2001), Appeal No. 01-037-D (A.E.A.B.).

result in changes to the approval. Approval holders need to know that decisions that are made that affect the way they are required to operate will not be susceptible to continuous change by those wanting to file appeals months or years after the approval was issued.

[19] This need for certainty is particularly important with respect to the management of water, where the resource is highly interconnected and each decision that is made within a water basin can have an impact on all of the subsequent decisions. The *Water Act* recognizes the importance of conserving and managing water and the need for balancing various interests.<sup>8</sup> The Director, and this Board, must remain cognizant of the purposes stipulated in the *Water Act* when making their decisions.

[20] When the Board asked the Appellants to provide an explanation as to why the appeals were filed late, the only explanation they provided was that "...since March 30, 2000, the project was explained to the public and referred to there after [*sic*] as a control structure..." and that Public Lands is under the impression that the project has raised the water level of Dodd's Lake. With respect, these arguments do not provide any basis for the Board to consider overriding the certainty provided by the time limits prescribed in the *Water Act*.

### 3. Public Lands

[21] The Appellants' statement that Public Lands had no record of the project is not supported by the information that has been provided. The control structure was constructed between 2000 and 2002 as allowed under the Original Approval. Therefore, it is logical that in 1999, Public Lands would have no record of an "artificial interference" with water levels in the

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<sup>8</sup> 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 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."

lake resulting from the outfall structure authorized by the Approval, because the outlet structure had not yet been constructed.

[22] In their submissions, the Appellants referred to correspondence between Mr. Jerry Fularz and Ms. Angela Fulton, an Alberta Environment employee. Mr. Fularz is employed by Alberta Sustainable Resource Development, in the Public Lands Division. In his email, Mr. Fularz refers to discussions he had with “Felix,” presumably Mr. Felix Gebbink, another employee of Public Lands and someone who has been closely involved with the works on Dodd’s Lake. Mr. Fularz requested information on permits and licences issued to the Town of Innisfail. (Permits and licences are different and distinct from the approvals issued under the *Water Act* that the Appellants are appealing.) However, simply because someone from Public Lands is querying as to whether a licence has been issued does not automatically infer Public Lands is not aware of any approvals that have been issued. The Appellants also explained they had talked with representatives from Public Lands early in the process. Therefore, in the Board’s view, it is clear that Public Lands is aware of the project, and the Appellants’ claim that Public Lands was not aware of the project is not supported by the information provided. Regardless, whether Public Lands was aware of the project or not, this does not provide a basis for extending the time period for filing an appeal.

[23] The Appellants also referred to section 54 of the *Public Lands Act* as a reason the Original Approval should not have been issued.<sup>9</sup> However, they failed to explain further why this section was relevant in these appeals when proper approvals had been issued.

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<sup>9</sup> Section 54 of the *Public Lands Act* states:

- “54(1) No person shall cause, permit or suffer
- (a) the accumulation of waste material, debris, refuse or garbage on public land,
  - (b) the existence on public land of any structure or excavation of any kind that is undesirable,
  - (c) the existence on public land of any condition which may cause danger by fire to life, property or forest growth,
  - (d) the doing of any act on public land that may injuriously affect watershed capacity,
  - (e) the disturbance of any public land in any manner that results or is likely to result in injury to the bed or shore of any river, stream, watercourse, lake or other body of water or land in the vicinity of that public land, or
  - (f) the creation of any condition on public land which is likely to result in soil erosion.
- (2) A person lawfully carrying out any activity on public land in accordance with
- (a) the terms and conditions of a disposition or authorization issued under this Act, and
  - (b) any other applicable Acts and regulations
- shall not, by reason of that fact alone, be considered to have contravened this section.”

[24] The Appellants submitted additional documents from Sustainable Resource Development and the Department of Fisheries and Oceans to support their position. This information might relate to their concerns regarding water levels in Dodd's Lake, but it does not explain why the appeals were filed late.

#### 4. Code of Practice

[25] The Appellants also made reference to section 9(1) of the Code of Practice for Outfall Structures on Water Bodies (September 2003) in order to argue that construction of a new outfall structure is not allowed on a "Class A water body."<sup>10</sup> Before this section of the Code of Practice can apply, it is necessary to determine if Dodd's Lake is actually a Class A water body. The onus is on the Appellants to demonstrate to the Board that Dodd's Lake is considered

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<sup>10</sup> Section 9(1) of the Code of Practice for Outfall Structures on Water Bodies provides:

"9(1) In addition to complying with the requirements for restricted activity periods under section 10, any person carrying out an outfall structure activity shall comply with the following requirements:

(a) each outfall structure activity must comply with the requirements of:

- (i) clause (a), and
- (ii) clause (b)

in Part 1 of Schedule 2;

(b) for an outfall structure activity that takes place in a Class A water body:

- (i) the construction of a new outfall structure is not allowed,
- (ii) the repair or maintenance of an existing outfall structure must be done:
  - (A) using the isolation method; or
  - (B) in accordance with the written specifications of a qualified aquatic environment specialist;

unless the water body is dry or frozen to the bed of the water body at the time of the outfall structure repair or maintenance activity, and

(iii) where the replacement of a section of the outfall structure is required, the discharge capacity of the replacement outfall structure must not exceed the discharge capacity of the outfall structure that existed before the replacement outfall structure activity occurred;

(c) for an outfall structure activity that takes place in a Class B, C or D water body, the following construction methods and conditions for carrying out the outfall structure activity must be followed:

(i) for a method other than the isolation method, Part 2 of Schedule 3 shall be followed,

(ii) for the isolation method:

(A) the conditions in the applicable part of Schedule 3 shall be followed; and

(B) the isolation method shall be carried out in accordance with the written specifications of a qualified aquatic environment specialist, as determined in accordance with subsection (2) of this section; or

(C) carried out in accordance with Part 5 of Schedule 3, if the water body is dry or frozen to the bed of the water body at the time of the outfall structure activity."

a Class A water body as outlined in the Code of Practice. The Appellants have not provided any information on this matter. From the Board's review of the Code of Practice and the relevant maps, it appears Dodd's Lake is not a Class A water body, and none of its tributaries flow directly into a Class A water body.

[26] The Code of Practice defines the Class of a water body as "...the class of a water body that is specified in section 7, or that is designated by a class symbol on a map that is listed in Schedule 5." In looking at the Red Deer Management Area Map, April 1, 2000, there are only two areas along the Red Deer River Basin that are Class A. The nearest site is west of Innisfail, at Township 36, Range 2, W5M, by the Dickson Dam. It is considered Class A as it is sturgeon habitat. Under section 7 of the Code of Practice,<sup>11</sup> if a mapped Class B, C, or D tributary enters a

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<sup>11</sup> Section 7 of the Code of Practice for Outfall Structures on Water Bodies provides:

"7(1) A map that is listed in Schedule 5 forms part of this Code of Practice and:

- (a) designates the class of a mapped water body as Class A, B, C or D;
- (b) specifies the restricted activity period for each class of water bodies;
- (c) provides the location of Class A and B water bodies; and
- (d) specifies special conditions for some water bodies

for the purposes of this Code of Practice, subject to subsection (5).

(2) The class of a mapped water body is the class that is designated by a class symbol on a water management area map except:

- (a) where a mapped Class C water body is a tributary to a Class A water body, that portion of the water body for a distance of 2 kilometres upstream from the point where it enters the Class A water body is Class A;
- (b) where a mapped Class C water body is a tributary to a Class B water body, that portion of the water body for a distance of 2 kilometres upstream from the point where it enters the Class B water body is Class B;
- (c) where a mapped Class B water body is a tributary to a Class A water body, that portion of the water body for a distance of 2 kilometres upstream from the point where it enters the Class A water body is Class A; and
- (d) where a mapped Class D water body is a tributary to a Class A, B or C water body, that portion of the tributary water body for a distance of 2 kilometres upstream from the point where it enters the Class A, B or C water body is the same class as the water body that is entered.

(3) The class of an uncoded water body is as follows:

- (a) Class D, unless otherwise specified in clause (b); and
- (b) where an uncoded water body is a tributary to a Class A, B or C water body, that portion of the uncoded water body for a distance of 2 kilometres upstream from the point where the uncoded water body enters the Class A, B or C water body is the same class as the Class A, B or C water body that is entered.

(4) The class of an unmapped water body is as follows:

(a) where an unmapped water body enters a mapped Class A water body, the unmapped water body:

- (i) is Class A along that portion of the unmapped water body that is within a distance of 2 kilometres upstream from the mouth of the unmapped water body, including where the unmapped water body is dry or frozen to the bed of the water body at the time of the outfall structure activity, and
- (ii) is Class B for any other portion of the unmapped water body;

Class A water body, then that portion of the tributary within two kilometres upstream of where the tributary enters the Class A water body would be considered as Class A. If a Class C water body enters a Class B water body, then that portion of the tributary within two kilometres upstream of where the tributary enters the Class B water body would be considered as Class B. The same principle would apply if a Class D water body entered a Class A, B, or C water body, and the two kilometres of the Class D water body would have the same class as the water body it enters. If it is an unmapped water body entering a Class A water body, only the two kilometres of the tributary that is upstream from the mouth of the unmapped water body would be considered a Class A water body; the remaining part of the unmapped water body would be considered Class B.

[27] The nearest Class A water body is more than two kilometres from Dodd's Lake. The Red Deer River that flows near Innisfail is a Class B water body. Other tributaries to the Red Deer River in the area are classed as Class B, so even if Dodd's Lake was part of these mapped tributaries, it is a Class C entering a Class B water body. This does not make Dodd's Lake a Class A water body.

[28] Therefore, based on the arguments presented and the Board's review of the Code of Practice, the Board finds the Code of Practice regarding construction on a Class A water body does not apply to Dodd's Lake and provides no basis for extending the time limit to file the appeal.

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- (b) where an unmapped water body enters a mapped Class B water body, the unmapped water body:
    - (i) is Class B along that portion of the unmapped water body that is within a distance of 2 kilometres upstream from the mouth of the unmapped water body, including where the unmapped water body is dry or frozen to the bed of the water body at the time of the outfall structure activity, and
    - (ii) is Class C along any other portion of the unmapped water body;
  - (c) where an unmapped water body enters a mapped Class C water body, the unmapped water body:
    - (i) is Class C along that portion of the unmapped water body that is within a distance of 2 kilometres upstream from the mouth of the unmapped water body, and
    - (ii) is Class C along any other portion of the unmapped water body, and the requirements regarding restricted activity periods under section 10(5)(b) apply;
  - (d) where an unmapped water body enters a mapped Class D water body, the unmapped 7(1) A map that is listed in Schedule 5 forms part of this Code of Practice; and
  - (e) where an unmapped water body enters a fish bearing water body, whether or not the fish bearing water body is mapped, the entirety of the unmapped water body is Class C, and the requirements regarding restricted activity periods under section 10(6) apply....”

5. Extension of Time

[29] These appeals were filed considerably past the allowed appeal period as stipulated in the legislation. Before the Board will consider extending a legislated time frame, the Appellants must provide reasons to explain how extenuating circumstances prevented them from filing within the time period required. The Board has stated in numerous other decisions, including those involving the Appellants, that there must be special or extenuating circumstances that prevented them from filing on time. The Appellants in this case provided documents from Sustainable Resource Development and aerial photographs. These documents do not provide any reason as to why their appeals were filed late or provide any evidence to indicate that extenuating circumstances existed. Most of the documents provided are dated prior to 2000, and therefore were in existence at the time the application for the Approval was made. The exception is an email from 2004 and a copy of an excerpt from the Board's Report and Recommendations relating to appeals of a different matter.<sup>12</sup> Neither of these documents provide an explanation of why the appeals were filed late or of the special circumstances needed to warrant an extension of the appeal period.

[30] The Approval was issued on March 3, 2000. The appeals were filed on September 12, 2005, almost five and a half years after the expiry of the seven day appeal period. The Appellants failed to provide evidence that would warrant the Board extending the deadline to file an appeal, particularly so long after the allowed appeal period. As the Board has stated, certainty is required in business and governance, and to be able to raise appeals so late in the process would deter orderly development, because there would always exist the potential for an appeal and the possibility that the terms and conditions an approval holder is operating under would be changed. This would not be a stable background for economic development, which must be taken into account by the Board considering the purposes of the *Water Act*.

[31] To allow an extension of time, the Appellants must be able to show that extenuating or special circumstances existed that prevented them from filing within the legislated timeframe. The onus is on the Appellants to demonstrate there are exceptional circumstances

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<sup>12</sup> *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.).

that warrant an extension of time to file an appeal. The Appellants have not provided any evidence to the Board that indicates that there are any exceptional circumstances in this case.

## 6. Conclusions

[32] The Board exists because of the legislation. The Board's jurisdiction is clearly explained in this legislation. One of the conditions that must be met before an appeal can be heard is that the Notice of Appeal is filed within the legislated timeframe. The legislators included specific time limits to file an appeal. In this case, the appeal period is seven days. The legislators determined this was a reasonable amount of time to file an appeal of an approval under the *Water Act*. The Board did not determine this time limit. The statutes bind the Board. Even though the legislation does allow the Board the right to extend the time limit, it is only willing to consider an extension when compelling reasons are provided by the appellant. Certainly, in the circumstances of this case as presented by the Appellants, an extension of five years cannot be justified. The Board may consider extending time limits by a few days in certain circumstances, but the appellant must be able to give the Board sufficient reasons to justify the action.

[33] The Appellants were aware of the project, whether it was called an outfall structure or a control structure, when the original application was made in 2000. It was then that all concerns should have been expressed, and if persons who filed Statements of Concern still had concerns when the Original Approval was issued, then an appeal should have been filed with Board at that time.

[34] The Appellants did not provide any compelling reason to warrant an extension of time to file an appeal. They were fully aware of the project being constructed, whether it was called a control structure or an outfall structure; the intent of the structure was always known – to control the level of water in Dodd's Lake.

[35] There is no doubt the Appellants are generally concerned about the water quality in Dodd's Lake. The Original Approval expires in 2010. At that time, the Approval Holder will have to make an application to the Director to renew the Original Approval. Depending on whether conditions are changed, it is possible the Appellants may be able to file an appeal



providing the pre-requisites are followed, including filing valid Statements of Concern and adhering to the legislated time frames.

[36] Therefore, the Board dismisses the appeals pursuant to section 95(5)(a)(iii) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, (“EPEA”), which provides the Board may dismiss a Notice of Appeal if “... for any other reason the Board considers that the notice of appeal is not properly before it....”

### **III. RECONSIDERATION OF AMENDING APPROVAL**

#### **A. Submission**

[37] Regarding the reconsideration of the Amending Approval, the Appellants argued the two plans included in the Amending Approval are to be part of a control structure, but there is no approval for a control structure and no control structure exists.

[38] The Appellants stated the structure was explained as a “control structure.” They are now trying to argue the Original Approval was actually for “flood control works,” which they perceive to be different types of structures.

#### **B. Discussion**

[39] The Appellants requested the Board reconsider its decision regarding the Amending Approval. When determining whether the Board should grant a reconsideration request, the Board looks at the relevant legislation and the basis for the reconsideration request.

[40] Under section 101 of EPEA, the Board can reconsider a decision made by it. Section 101 states: “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.”

[41] 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.”<sup>13</sup> The Board uses its discretion to reconsider a decision with caution, as the power to reconsider is the exception to the general rule that decisions of the Board are intended

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<sup>13</sup> *Whitefish Lake First Nation Request for Reconsideration, re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-

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, or as in this case, a third time.

[42] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.<sup>14</sup> The factors the Board will consider in deciding a reconsideration request 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.<sup>15</sup>

[43] The Appellants provided a brief history of the public consultation and public concerns expressed since July 2000, including their attendance at Town council meetings and writing letters and making telephone calls to Alberta Environment, Public Lands, the Town of Innisfail, and the Ministers of Environment and Sustainable Resource Development. The Appellants stated they attended a meeting with the Director and attended many local public meetings.

[44] The Board dismissed the original appeals of the Amending Approval because they were filed more than 80 days past the legislated deadline.<sup>16</sup> The Appellants requested a reconsideration of the Board's initial decision, and the Board determined the Appellants had not provided sufficient information to warrant extending the deadline for receiving a Notice of Appeal.<sup>17</sup>

[45] Before the Board will consider extending the deadline, the Appellants need to demonstrate sufficient circumstances that prevented them from filing the Notices of Appeal on time. What the Board needed was information that relates to why the appeals were filed late, not

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009-RD (A.E.A.B.).

<sup>14</sup> 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.).

<sup>15</sup> 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.).

<sup>16</sup> See: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-D (A.E.A.B.).

<sup>17</sup> See: Reconsideration Decision: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-RD (A.E.A.B.).

information that might relate to the substantive arguments that the Appellants would like to present if the Notices of Appeal were accepted.

[46] In support of the Appellants' request to have the Board reconsider its previous decision regarding the Amending Approval, the Appellants argued the Amending Approval does not make sense, as the two plans referred to in the Amending Approval are to be included as part of the control structure, but there is no approval for a control structure. They stated the Amending Approval is misleading and incorrect.

[47] There is a structure on Dodd's Lake. No one disagrees with that statement. The Appellants, however, are arguing over the proper nomenclature for the structure: Is it a control structure or an outfall structure? The Original Approval clearly states it is "flood control works," and the Original Approval only refers to an "outlet" when referencing the report provided in support of the application for the Original Approval. It was neither the Director nor the Approval Holder that named the report; it was the engineering firm that prepared the report. In the Amending Approval, the Director referred to a control structure located at the outlet of Dodd's Lake. He does not refer to the structure as an outlet nor an outfall. In the Board's view, what is in place is a flood control structure; it is a control structure as it controls the water levels in Dodd's Lake to minimize the potential for flooding of adjacent properties during major rainfall events.

[48] The name of the structure is not an issue in this case, regardless of how the Appellants want to argue the matter. The Appellants were involved in the application process from the start. They highlighted the conversations they had with representatives from Alberta Environment and Sustainable Resource Development, as well as the Town of Innisfail. They were aware of the project and the purpose of the project. If they had concerns, they should have been raised at the application stage; they should not have waited for several years before raising these concerns.

[49] The Appellants explained most of the documents referred to are already on file with the Board. Therefore, no new documents were provided to support a reconsideration of the Board's previous decisions.

[50] In support of their appeal of the Original Approval and the reconsideration request of the Amending Approval, the Appellants referred to five documents. They explained all of the documents were already in the Board's files. The documents referred to include letters and memos dating back to 1985, and aerial photographs from 1985, 1990, and 2002. The most recent document referred to, excluding the excerpt from the Board's Report and Recommendations, is an email dated July 12, 2004, from Mr. Jerry Fularz of the Public Lands Division of Alberta Sustainable Resource Development to Ms. Angela Fulton of Alberta Environment. In this email Mr. Fularz explains that redirecting stormwater into the lake and the control structure would "...have the effect of raising the water level of the lake thereby resulting in flooding of some of the privately owned upland bordering the lake." It is clear the Appellants' real concern remains the levels of water in the lake. They have continually argued the control structure has resulted in the lowering of the lake levels, but Mr. Fularz stated in his email that the control structure allowed under the Original Approval, along with the use of the lake for stormwater retention, would increase the lake levels. There is no question that redirecting stormwater into Dodd's Lake will increase water levels. Whether the control structure affects lake levels depends on how it is operated.

[51] The Amending Approval allowed for improvements on the control structure as well as incorporating the management plan for the structure into the Original Approval. If the Amending Approval was revoked, the management plan could not be implemented, potentially causing further concerns to the Appellants and those living around Dodd's Lake. The management plan is in place to ensure the structure is operated as intended.

[52] The Appellants did not provide any new information that would result in the Board coming to a different conclusion: the appeals were filed late and no evidence of circumstances that warrant an extension was provided. Therefore, the reconsideration request of the Board's decisions regarding the Amending Approval is denied.

#### **IV. STAY REQUEST**

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

“(1) Subject to subsection (2), submitting a notice of appeal does not operate to

stay the decision objected to.

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

[54] As provided for in section 97, only a party to an appeal can make an application for a Stay. As there is no valid appeal before the Board, the Board cannot consider the Stay applications, and the Appellants’ request for a Stay of the Original Approval is denied.

## V. DECISION

[55] The Appellants have not provided any evidence to the Board to demonstrate that there are reasons to extend the time limit for filing their appeals. Their appeals were filed out of time. Therefore, pursuant to section 95(5)(a)(iii) of EPEA and the above, the Board dismisses the appeals.

[56] The Appellants did not provide sufficient evidence of the extraordinary circumstances required to reconsider its previous decisions regarding the Amending Approval in *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (5 January 2005), Appeal Nos. 03-040-058 and 03-060-081-D (A.E.A.B.) and Reconsideration Request: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (5 January 2005), Appeal Nos. 03-040-058 and 03-060-081-RD (A.E.A.B.). Therefore, the reconsideration request is denied.

[57] As there are no valid appeals before the Board, the Stay cannot be considered.

Dated on January 13, 2006, at Edmonton, Alberta.

“original signed by”  
Dr. Steve E. Hrudey, D.Sc. (Eng.), P.Eng.