

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 4, 2012

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

-and-

IN THE MATTER OF an appeal filed by Mike Rudakewich with respect to *Water Act* Approval No. 00288056-00-00 issued to Clear Hills County by the Director, Northern Region, Operations Division, Alberta Environment and Water.

Cite as: *Rudakewich v. Director, Northern Region, Operations Division, Alberta Environment and Water*, re: *Clear Hills County* (04 April 2012), Appeal No. 11-019-ID1 (A.E.A.B.).

BEFORE:

Ms. A.J. Fox, Panel Chair;
Dr. Alan J. Kennedy, Board Member; and
Mr. Jim Barlishen, Board Member.

SUBMISSIONS BY:

Appellants: Mr. Mike Rudakewich.

Approval Holder: Clear Hills County, represented by Mr. Kevin Henshaw, Genivar.

Director: Mr. Gary Sasseville, Director, Northern Region, Operations Division, Alberta Environment and Water, represented by Ms. Jodie Hierlmeier, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment and Water issued an approval under the *Water Act* to Clear Hills County to re-route the flow of Jack Creek by installing a culvert diagonally at a local road intersection and realigning the channel upstream and downstream of the culvert.

Mr. Mike Rudakewich appealed the decision to issue the Approval. The participants were asked to provide submissions on the preliminary matters of whether Mr. Rudakewich is directly affected by the issuance of the Approval and what issues should be heard at the hearing, if one is held.

After reviewing and analyzing the submissions, the Board determined Mr. Rudakewich is directly affected given the location of his property with respect to Jack Creek and the highly erodible soils that exist in the area. The issue to be heard at the hearing will be:

Did the Director adequately consider the impact of erosion on Jack Creek and does the Approval mitigate all potential impacts?

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I. BACKGROUND

[1] On June 17, 2011, the Director, Northern Region, Operations Division, Alberta Environment and Water (the “Director”), issued Approval No. 00288056-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Clear Hills County (the “Approval Holder”). The Approval allows the Approval Holder to re-route the flow of Jack Creek from SE 29-84-4-W6M to NW 21-84-4-W6M by installing a culvert diagonally at a local road intersection and realigning the channel upstream and downstream of the culvert.

[2] On August 2, 2011, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Mike Rudakewich (the “Appellant”) appealing the Approval.¹

[3] On October 11, 2011, the Board wrote to the Appellant, Approval Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and Director of the appeal.

[4] A mediation meeting was held on November 17, 2011 in Peace River, Alberta. However, the appeal was not resolved.

[5] On January 31, 2012, the Board asked the Participants for preliminary issues that needed to be considered. Between February 13, 2012 and February 28, 2012, the Board received submissions on whether the Appellant is directly affected and the proposed issues for the hearing, if one is held.

II. SUBMISSIONS

A. Appellant

[6] The Appellant explained he was representing: (1) himself; (2) Mr. Marvin Rudakewich, who owns land through which Jack Creek flows; (3) Mr. Ed Mierzewski, who does

¹ The Board notes that, under the *Water Act*, the legislated time frame to file an appeal of an approval is 7 days. However, the Director’s letter to the Appellant notifying him the Approval was issued, indicated the Appellant had 30 days to file an appeal. The Appellant explained he received the notification on June 24, 2011. Neither the Approval Holder nor the Director raised the timing of the filing of the appeal as a preliminary matter.

not want to lose the portion of Jack Creek on his land; and (4) Mr. Derrick Meashaw, who owns property immediately downstream of the project. The Appellant stated the people he represents did not have the opportunity to express their concerns about the project because of the limited time and notice given for the project.

[7] The Appellant argued the proposed project is a diversion not a realignment, which will impact Jack Creek by: (1) affecting the riparian area; (2) removing the turn in the creek that dissipates energy in the creek flow; and (3) increasing the potential for erosion and flooding.

[8] The Appellant noted fish have been found in Jack Creek.

[9] The Appellant argued the level of public inconvenience needs to be considered. There will be a seven kilometre detour for himself and others in the area. There is no way to determine the time that will be required to complete the project.

[10] The Appellant argued there has not been sufficient study into alternatives.

B. Approval Holder

[11] The Approval Holder noted the Appellant did not provide any further information on how the project will cause a direct affect on him. The Approval Holder argued the Appellant is not directly affected by the Approval because he does not own land adjacent to the proposed project site or adjacent to Jack Creek.

[12] The Approval Holder stated the issues for the hearing should be limited to those described in the Appellant's Notice of Appeal that are related to environmental issues. Therefore, only the issue of erosion should be considered. New issues brought forward should not be considered.

[13] The Approval Holder stated the only concern in the Notice of Appeal that directly impacts the Appellant is the temporary detour, but it is the Approval Holder that has the authority to make decisions regarding road closures and traffic accommodation. Therefore, it should not be an issue in the appeal.

C. Director

[14] The Director noted the Appellant claimed he was acting for Mr. Marvin Rudakewich, Mr. Mierzewski, and Mr. Meashaw, none of whom submitted Statements of Concern or Notices of Appeal. The Director submitted the appropriate way for these people to participate is to file intervenor requests.

[15] The Director noted the legislation requires an issue for a hearing to be raised in the Notice of Appeal and such issue must be within the Director's jurisdiction. The Director noted the Appellant raised a number of issues in his submission that were not included in his Notice of Appeal, and these issues should not be considered at the hearing.

[16] The Director stated he has no jurisdiction to regulate traffic or traffic disruption during construction, and since these issues are within the county's jurisdiction, they are outside the scope of the appeal. The Director submitted the Approval cannot be amended to include terms and conditions related to road closures or traffic accommodation when these issues are not related to public health and safety or environmental protection.

[17] The Director submitted the following as appropriate issues for the hearing:

1. Does the Approval adequately address the potential impact of erosion of Jack Creek?
2. Did the Director adequately consider the potential impact or likelihood of erosion on Jack Creek?

D. Rebuttal Submission

[18] The Appellant argued the Approval does not adequately address the impacts of erosion on Jack Creek, and there was inadequate consideration of the effects of the altered flow and the effects on the riparian areas.

[19] Attached to the Appellant's submission was additional information provided by Mr. Mierzewski. He stated realignment of Jack Creek would result in increased water velocity, significantly increasing the risk of erosion downstream. Mr. Mierzewski argued the Approval

should be revoked until a more thorough analysis of the project is completed by the Approval Holder.

III. DIRECTLY AFFECTED

A. Legal Basis

[20] The Board has discussed the issue of “directly affected” in numerous decisions. The Board received guidance on this issue from the Court of Queen’s Bench in *Court*.²

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

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant’s use of a natural resource. The greater the proximity between the location of the appellant’s use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is ‘extremely significant’ is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant’s use of a natural resource. The greater the proximity between the location of the appellant’s use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a

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

project is not the only way in which an appellant can show proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he ‘preponderance of evidence’ standard applies to the appellant’s burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm. The Board believes that the Department’s submission to the [A]EUB, together with Mr. Bildson’s own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area’s wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson’s factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”³

³ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“*Bildson*”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“*Mizera*”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.) (“*Vetsch*”).

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”⁴

[22] When the Board assesses the directly affected status of an appellant, the Board looks at how the person uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that there is a reasonable possibility the appellant will be directly affected by the decision of the Director. The effect must be plausible and relevant to the Board’s jurisdiction in order for the Board to consider it sufficient to grant standing.

[23] At this point in the appeal process, the Board does not have all of the evidence and arguments before it. The determination of directly affected is a preliminary matter. As a result, the test for standing cannot be based on whether there is certainty the appellant is directly affected. Without all of the evidence, that issue cannot be conclusively determined. An appeal before the Board is a quasi-judicial process. The appeals process must adhere to the principles of natural justice and must be fair to all of the participants. The Board considers it appropriate that, in assessing preliminary matters, the standard should be less onerous than those found in a court. Therefore, the Board considers it appropriate that appellants show on a *prima facie* basis there is a reasonable possibility they are directly affected by the Director’s decision.

[24] As stated, the effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant’s interests will not form the basis to find an appellant directly affected. Both the reasonableness and the possibility of the affect must be shown.

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

[25] The effect on the appellant does not have to be unique in kind or magnitude.⁵ However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.⁶ Under EPEA and the *Water Act*, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of appeal to a more limited class. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review for the Director's decision; it intended it be something narrower.

B. Analysis

[26] In order for the Appellant to be found directly affected, the information before the Board must demonstrate there is a reasonable possibility the Appellant will be impacted by the Approval. In this case, the information provided shows there may be an environmental impact, specifically erosion of the banks and riparian areas, and given the realignment of Jack Creek, there is a reasonable possibility erosion will occur due to increased flow velocity in Jack Creek. What is unknown and what will have to be determined at the hearing, is the extent or degree of erosion that might occur and its impact on Jack Creek.

[27] In his submission, the Appellant explained the soils in the area of the proposed project are highly erodible. The Appellant also explained how removal of a bend in Jack Creek will result in increased water velocities, increasing the potential of erosion of the banks and riparian areas along Jack Creek. He cited a 2010 culvert replacement on Jack Creek which resulted in increased erosion as evidenced in the photographs provided. The Board took this into

⁵ See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

⁶ See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

consideration in determining directly affected. Soils in this part of Alberta are generally known for being highly erodible and this is a significant concern to the Board.

[28] There was limited information included in the Approval Holder's application for the Approval to indicate the anticipated erosion rates as a result of the proposed project. The Appellant provided pictures to demonstrate the erodibility of the soils in the area. The Board understands the pictures were not specific to the site of the proposed project, but they are demonstrative of the erosion that can occur in the area. Additional technical information can be brought forward in a hearing where it may be determined the soils of the particular project location are not as erodible as those pictured, but based on the information in front of the Board at this point in time, it is reasonable to assume similar soils exist in the area of the proposed project and erosion is a concern.

[29] In reviewing the information included in the application, some uncertainty was raised as to how close Jack Creek is to the Appellant's property. In the map prepared by Genivar, it appears Jack Creek may cut across the Appellant's land located at SE 20-84-4 W6M. Even if this is inaccurate, other maps indicate Jack Creek flows less than one kilometre from that quarter section. Given the lack of information in the Director's record regarding erosion, the change of flow rates that may result from the realignment of Jack Creek, and the erodibility of the soils in the area, the Board believes there is the potential of the erosion impacting the Appellant's lands.

[30] It is unclear as to how far the erosion and flow rates could be transmitted upstream. The Appellant also owns property in S½ 27-84-4 W6M. Maps indicate these lands drain into tributaries of Jack Creek. It is uncertain whether there could be an impact on these lands should the re-routing of Jack Creek increase flow velocities significantly. Again, it is unclear from the Director's record as to how far the impacts of the project will be transmitted.

[31] Given these uncertainties and the concern the Board has for erosion in the area, the Board finds the Appellant is directly affected because there is a reasonable possibility the Appellant's lands may be impacted by the proposed work allowed under the Approval.

[32] The Appellant stated he was representing three other individuals in the area. There was no indication that he was acting as an agent for the other individuals in his Statement

of Concern or Notice of Appeal. The Appellant's Statement of Concern was signed by the Appellant and Mr. Marvin Rudakewich, but the Notice of Appeal did not refer to Mr. Marvin Rudakewich. In reviewing the Director's record, the Board notes Mr. Mierzewski sent a letter to the Director, but it was not considered a valid Statement of Concern. If Mr. Marvin Rudakewich, Mr. Mierzewski, and Mr. Meashaw so choose, they can make an application to participate in the hearing as intervenors.

IV. HEARING ISSUES

[33] In order for a concern expressed by an appellant to an appeal to be considered by the Board as an issue at a hearing, the concern expressed must have been included in the Notice of Appeal, be specific to the approval being appealed, and be within the Board's jurisdiction.

[34] The Appellant raised concerns regarding traffic during construction, erosion, and the effects the realignment of Jack Creek would have on other people in the area.

[35] Traffic concerns during construction cannot be regulated by the Director or the Board. Flow of traffic and traffic interruptions are within the jurisdiction of the County. Therefore, traffic concerns related to the implementation of the Approval will not be considered at the hearing.

[36] The Director and Approval Holder agreed the issue of erosion is properly before the Board. The Board concurs. The Appellant is concerned the proposed project will cause erosion of the soils as a result of increased water velocity in the area where the proposed culvert is to be installed. This is a valid issue that was raised in the Notice of Appeal and relates directly to the potential impacts resulting from the issuance of the Approval. Therefore, at the hearing, the Board will hear submissions on the following:

Did the Director adequately consider the impact of erosion on Jack Creek and does the Approval mitigate all potential impacts?

[37] The third concern raised by the Appellant, the effect of the realignment of Jack Creek on others in the area, was presented by the Appellant as a general concern. The Appellant did not elaborate on this position so the Board was unable to define it as a specific issue for the hearing.

V. CONCLUSION

[38] The Board finds the Appellant directly affected by the Director's decision to issue the Approval. The issue that will be heard at the hearing is:

Did the Director adequately consider the impact of erosion on Jack Creek and does the Approval mitigate all potential impacts?

Dated on April 4, 2012, at Edmonton, Alberta.

“original signed by”

A.J. Fox
Panel Chair

“original signed by”

Alan J. Kennedy
Board Member

“original signed by”

Jim Barlishen
Board Member