

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 30, 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 the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF a notice of appeal filed by Regional Water Services Ltd. and Jeff Colvin with respect to the issuance of Water Management Order No. WMO-2012/02-SR to Regional Water Services Ltd. and Jeff Colvin under the *Water Act* by the Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Preliminary Matters: *Regional Water Services Ltd. and Jeff Colvin v. Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development* (30 November 2012), Appeal No. 12-014-ID1 (A.E.A.B.).

BEFORE:

Mr. Eric McAvity, Q.C., Panel Chair.

SUBMISSIONS BY:

Appellants: Regional Water Services Ltd. and Jeff Colvin, represented by Mr. Gavin Fitch, McLennan Ross LLP.

Director: Mr. Craig Knaus, Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Mr. Howard Samoil, Alberta Justice and Solicitor General.

Intervenor Applicants: Rocky View County, represented by Mr. Dennis Yasui, Q.C., Brownlee LLP; Mr. Philip Lemke, on behalf of himself and the Monterra on Cochrane Lakes Condominium Corporation Nos. 0513169 and 0810165; and Mr. Pat Hutchinson.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued a Water Management Order to Regional Water Services Ltd. and Jeff Colvin under the *Water Act*. The Order requires Regional Water Services Ltd. and Jeff Colvin to lower water levels in Cochrane Lake, mitigate health impacts the high water level poses to adjacent properties, and submit and implement a long term management plan for Cochrane Lake. Regional Water Services Ltd. and Jeff Colvin appealed the Order.

The Board scheduled a mediation meeting and hearing. In response to the Notice of Hearing, the Board received intervenor requests from Rocky View County, Mr. Pat Hutchinson, and Mr. Philip Lemke, on behalf of himself and as President of the Board of Directors of Monterra on Cochrane Lakes Condominium Corporations.

After reviewing and considering the submissions and the applicable legislation, the Board denied the intervenor applications of Mr. Hutchinson and Mr. Lemke on his own behalf. However, the Board allowed interevnor status to the Condominium Corporations and Rocky View County.

The Board determined the issues for the hearing will be:

1. Was the Water Management Order properly issued?
2. Are the Appellants responsible for actively maintaining water levels in Cochrane Lake?
3. Was Mr. Colvin properly named in the Order as a person responsible?

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision in relation to an appeal filed by Regional Water Services Ltd. and Jeff Colvin (the "Appellants"). Alberta Environment and Sustainable Resource Development ("AESRD") issued a water management order to the Appellants to lower the water level in Cochrane Lake. The Environmental Appeals Board (the "Board") received an appeal of the order under the *Water Act*, R.S.A. 2000, c. W-3.

[2] The Board scheduled a mediation meeting and hearing. In response to the Notice of Hearing, the Board received three intervenor requests.

[3] The Board received and considered submissions on whether the applicants should be granted intervenor standing pursuant to section 95(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, E-12 ("EPEA").

[4] The Board also received and considered submissions on the issues for the hearing.

II. BACKGROUND

[5] On July 25, 2012, the Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued Water Management Order No. WMO-2012/02-SR (the "Order") to the Appellants with respect to a licence held by the Appellants. The Order requires the Appellants to lower water levels in Cochrane Lake, mitigate health impacts the high water level poses to adjacent properties, and submit and implement a long term management plan for Cochrane Lake near Cochrane, Alberta.

[6] On August 2, 2012, the Board received a Notice of Appeal and a stay request from the Appellants.

[7] On August 2, 2012, the Board wrote to the Appellants and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board asked the Director for his position on the stay application and if he would be prepared to consent to a stay or undertake not to enforce some or all of the deadlines in the Order. The Appellants submitted their stay application on August 8, 2012.

[8] On August 22, 2012, the Director notified the Board that he was not prepared to consent to a stay, but he was willing to not enforce some of the deadlines in the Order. The

Director provided additional clarification on September 18, 2012. On September 24, 2012, the Appellants notified the Board that it did not have to rule on the stay request at that time.

[9] The Parties requested the Board expedite the mediation meeting and hearing. The hearing was scheduled for November 15 and 16, 2012.

[10] A mediation meeting was held on October 12, 2012 in Calgary. An interim resolution was reached. As a result of the interim resolution, on October 15, 2012, the Parties requested the hearing scheduled for November 15 and 16, 2012, be adjourned. The Board granted the adjournment.

[11] The Notice of Hearing was published in the Cochrane Times, Calgary (Rural) Rocky View Weekly, and Cochrane Eagle. A copy was provided to Rocky View County to place on the public bulletin board or website. Notice of the hearing was also posted on the Government of Alberta and Board websites. In response to the Notice of Hearing, the Board received intervenor requests from Rocky View County, Mr. Pat Hutchinson, and Mr. Philip Lemke, on behalf of himself and as President of the Board of Directors of Monterra on Cochrane Lakes Condominium Corporation Nos. 0513169 and 0810165 (“Condominium Corporations”).

[12] The Board received comments from the Director on the intervenor requests on November 2, 2012, and the Appellants provided comments on the issues on October 29, 2012, and on the intervenor requests on November 2, 2012.

III. INTERVENORS

A. Legal Basis

[13] Under section 95 of EPEA, the Board can determine who can make representations before it. Section 95(6) states:

“Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

[14] Section 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), requires the Board to determine whether a person submitting a request to make

representation should be allowed to do so at the hearing. Sections 9(2) and (3) of the Regulation provide:

- “(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[15] The test for determining intervenor status is stated in the Board’s Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

B. Rocky View County

1. Rocky View County

[16] Rocky View County stated it has a tangible interest in the matter, and its participation will materially assist the Board without unnecessarily delaying the appeal. Rocky View County explained it took action to offset the impacts of the rise in water levels of Cochrane Lake. Rocky View County stated that between October 2011 and July 2012, it funded overland drainage pumping to ensure water levels were controlled, and investing \$250,000.00 to mitigate the potential for contamination of the lake by paying for a septic removal company to empty the septic tank of some residents before sewage was released into Cochrane Lake. Rocky View

County stated it also hired a contractor to pump down Cochrane Lake, resulting in the diversion of approximately 332,510,570 litres from Cochrane Lake.

2. Appellants

[17] The Appellants accepted the participation of Rocky View County would materially assist the Board by providing evidence regarding steps taken by Rocky View County to lower the level of Cochrane Lake, and the evidence would likely not duplicate evidence presented by the Parties.

[18] The Appellants noted Rocky View County opposed the appeal on the basis it should not have to pay anything more related to lowering the water level in Cochrane Lake. The Appellants questioned whether this is a valid basis for participating in the Board process, because a successful appeal may not necessarily result in Rocky View County being liable to pay anything more. The Appellants stated that, if the appeal is successful, it would be up to the Director to determine whether a new water management order should be issued.

[19] The Appellants submitted that Rocky View County's participation should be limited to giving evidence on its involvement in the matter of Cochrane Lake's water levels.

3. Director

[20] The Director supported the inclusion of Rocky View County in the process and its intervenor application.

4. Analysis

[21] The Appellants and Director acknowledged there would be value in having Rocky View County participate in the hearing. From the submissions provided, the Board understands that Rocky View County has tried to lower water levels in Cochrane Lake to help alleviate flooding issues. Information regarding what Rocky View County has done, its success or limitations, and what it suggests should be done to resolve and prevent further issues would be valuable to the Board in making its recommendations to the Minister. The evidence Rocky View County will bring forward will not duplicate the evidence of the Parties. Therefore, the Board

grants Rocky View County intervenor status. It will be given the opportunity to provide a written submission, present opening comments and direct evidence at the hearing, and will be subject to cross-examination by the Appellants and questioning by the Board. It will also be allowed to provide closing submissions.

C. Mr. Philip Lemke

1. Mr. Lemke

[22] Mr. Philip Lemke requested to intervene on his own behalf and on behalf of the homeowners in the Monterra on Cochrane Lakes subdivision. He explained he owns an adjacent residence in the Monterra subdivision, and as president of the Board of Directors of Monterra on Cochrane Lakes Condominium Corporation, he has been authorized to represent the condominium owners in the Condominium Corporations.

[23] Mr. Lemke stated the greatest concern is the potential adverse effect on the quality of the potable water supplied by Regional Water Services. This would depend on the design and operation of the infrastructure ultimately used to manage water levels in Cochrane Lake. Mr. Lemke stated he understood that under no circumstance should Cochrane Lake water enter the Regional Water reservoir, because coliform levels in Cochrane Lake are a concern.

[24] Mr. Lemke also referred to two independent submersible pump and pipeline systems that run between Cochrane Lake and the natural pond that are referenced in the Licence. He explained one system that discharges water upstream of the weir between Cochrane Lake and the natural pond did not function properly or at all, and without the system, the channel connecting Cochrane Lake and the natural pond has experienced algae growth due to little or no water flow. Mr. Lemke stated this system needs to be repaired when any infrastructure to remediate Cochrane Lake water levels is installed. According to Mr. Lemke, the second system, a pipeline system, has never been in service. This system was to: (1) stabilize water levels in the natural pond; (2) improve water quality by reducing algae growth; (3) accelerate water evaporation, particularly regarding Cochrane Lake; and (4) ensure environmentally acceptable water quality conditions in Cochrane Lake and the natural pond. Mr. Lemke argued these two

systems were included in the rate base used to determine user rates for potable water, and he took exception to the Appellants not having properly maintained or commissioned the two systems.

2. Appellants

[25] The Appellants submitted Mr. Lemke's participation on behalf of the property owners in the Monterra at Cochrane Lake development and condominiums may assist the Board by providing a view from those persons whose water rates would be affected by the Appellants having to add additional costs to its rate base.

[26] The Appellants noted it is unclear whether Mr. Lemke and the property owners support or oppose the appeal.

[27] The Appellants noted Mr. Lemke's concern regarding the operation or non-operation of the re-circulation system is not a matter that forms part of the appeal and, therefore, Mr. Lemke's participation in the appeal should be restricted to those matters properly within the scope of the appeal.

3. Director

[28] The Director took no position with the intervenor applications of Mr. Lemke.

4. Analysis

[29] Mr. Lemke filed the intervenor application on behalf of himself and the Condominium Corporations. In his intervenor application, Mr. Lemke did not explain how he would be impacted by the Order or what evidence he would bring forward that would be different from the evidence he intends to bring forward on behalf of the Condominium Corporations, which he also represents. Therefore, the Board denies the intervenor application of Mr. Lemke on his own behalf.

[30] With respect to the intervenor application of the Condominium Corporations, their major concern is the quality of potable water provided by Regional Water Services. The Condominium Corporations want to ensure any plan to control water levels in Cochrane Lake does not impact the quality of the water provided to the residents of the Condominium

Corporations. They have raised a valid concern, and without knowing what the actual plan to control the water levels will look like, the Board considers it appropriate that it hear from the Condominium Corporations. Therefore, the Board will allow the Condominium Corporations to participate in the hearing process as intervenors. They will be allowed to provide a written submission and will be given 15 minutes after opening comments are presented at the hearing to present the important factors they want the Board to consider. They will also be subject to cross-examination by the Appellants and questioning by the Board. However, they will not be allowed to cross-examine the Parties or Rocky View County or provide opening and closing comments.

D. Mr. Pat Hutchinson

1. Mr. Hutchinson

[31] Mr. Pat Hutchinson stated his interest in the appeal was as a concerned Rocky View County taxpayer. He offered to provide information on the history of Cochrane Lake, including water levels.

2. Appellants

[32] The Appellants took no position with respect to Mr. Hutchinson's participation in the process, but the Appellants questioned whether Mr. Hutchinson's participation would materially assist the Board. The Appellants stated information on the historic water levels of Cochrane Lake may be of some assistance. However, the Appellants argued Mr. Hutchinson's participation as a concerned taxpayer would not meet the usual requirements to obtain intervenor standing.

3. Director

[33] The Director took no position with the intervenor application of Mr. Hutchinson.

4. Analysis

[34] Mr. Hutchinson stated his interest in the appeal is as a county taxpayer. He stated he would be able to provide a history on lake levels. In reviewing the Appellants' Notice of Appeal, they refer to historic water levels of Cochrane Lake and provided a map indicating historic surveyed water levels. Therefore, the Board anticipates the Appellants will bring forward evidence regarding water levels in Cochrane Lake, both historically and current levels. Therefore, the intervenor application filed by Mr. Hutchinson is denied, because the evidence he intended to bring forward would duplicate the evidence the Board anticipates will be brought forward by the Parties and Rocky View County.

E. Summary

[35] The Board does not accept the intervenor applications of Mr. Hutchinson and Mr. Lemke on his own behalf. However, the Board will allow Mr. Lemke to provide a written submission and brief comments at the hearing on behalf of the Condominium Corporations. The Condominium Corporations will be subject to cross-examination by the Appellants and questioning by the Board.

[36] The Board allows Rocky View County to participate in the hearing process as an intervenor. It will be allowed to provide written submissions and participate fully at the hearing by providing opening and closing comments and direct evidence, being subject to cross-examination by the Appellants, and having the opportunity to cross-examine the Appellants. Both Mr. Lemke and Rocky View County will also be subject to questioning by the Board at the hearing.

IV. ISSUES

A. SUBMISSIONS

1. Appellants

[37] The Appellants referred to their Notice of Appeal, noting all five identified grounds of appeal raise issues properly before the Board and specific to the Order. The five grounds of appeal were:

1. The Order was improperly issued under section 97(1)(h) of the *Water Act* because the Appellants' diversion of water and operation of works under the Licence has not caused a significant adverse effect on human health, property, or safety. The Order was unreasonable because it was not based on any evidence that the diversion of water or operation of the works caused elevated water levels above the maximum permitted under the BSEI Municipal Consulting Engineers letter. The cause of the elevated water levels is above average precipitation in preceding years, a high water table, and saturated ground surface.
2. If the operation of the works was the cause of the high water levels in Cochrane Lake, the resulting adverse effect on human health, property, or safety has not been significant. Only two lots in the Hamlet of Cochrane have been impacted, and these are the only two where septic fields were developed within the natural flood plain and below the historical high water mark of Cochrane Lake.
3. The Order is unreasonable and without proper legal foundation, because it imposes a positive obligation on the Appellants to lower the level of Cochrane Lake when no such obligation is required in the Licence. Under the Licence, the Appellants are to discontinue pumping water from the Bow River when the level in the raw water reservoir reaches the maximum of 1285.0 m. The level in the reservoir has never reached 1285.0 m, and the Appellants' diversion or operation of the system never resulted in water over-topping the reservoir into Cochrane Lake and the natural pond. There is no evidence the operation of the water

system has been out of compliance, therefore there is no legal basis for issuing the Order.

4. The Order is unreasonable because it required the Appellants to reduce the water level in Cochrane Lake to 1281.0 m by October 1, 2012, which the Director knew or ought have known was not capable of being fulfilled. To comply with the Order, the Appellants would be required to pump 1.4 million cubic metres of water from the lake. The Appellants noted that, from May 1 to June 23, 2012, Rocky View County attempted to lower the water level, but after 54 days of pumping, Rocky View County had no success in materially lowering the level of the lake. The Appellants stated this was likely due to the higher elevation of the surrounding areas, saturated ground surface, and high water table, all of which caused ground and surface water to flow into the lake, replacing the pumped out water.
5. Mr. Colvin is improperly named as a “person responsible” in the Order. Regional Water Services is the licensee under the Licence, not Mr. Colvin. Regional Water Services has diverted water and operated a works under the Licence. There is no evidence that Mr. Colvin caused or contributed to an adverse effect on the aquatic environment, natural water body, human health, property, or safety that resulted from the diversion of water or operation of the works. Therefore, the Director acted unreasonably in naming Mr. Colvin as a person responsible.

2. Director

[38] The Director had no additional issues to add.

B. ANALYSIS

[39] Under section 95 of EPEA, the Board has the authority to set the issues for a hearing.¹ The Board has reviewed the submissions of the Parties to determine the issues for the hearing in this case.

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

[41] The Appellants referred to their Notice of Appeal when recommending the issues that should be heard by the Board. The first issue raised by the Appellants was whether the Order was properly issued given there is no proof the diversion of water and operation of the works has caused the elevated water levels, and there has not been a significant adverse effect on human health, property, or safety. The determination of whether the Order was properly issued is a matter that can be heard by the Board. It is directly relevant to the decision of the Director that is under appeal. Therefore, the Board will accept as an issue for the hearing: Was the Order properly issued?

[42] Also, as part of this issue, the Parties can address whether all of the prerequisites were met to warrant the issuance of the Order. This would incorporate the second issue raised by the Appellants. The Appellants argued that, even if their works caused the water levels to rise, any adverse effect on human health, property, or safety has not been significant because only two lots have been impacted. The Appellants raised this argument because of the wording of section 97(1)(h) of the *Water Act*.² This argument relates to whether the Order was properly issued given the wording of the *Water Act* and whether impacting two lots constitutes a "significant

¹ Section 95 of EPEA states:

- (2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal....
- (4) "Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."

² Section 91(1)(h) of the *Water Act* states:

"An inspector or the Director may issue a water management order to a person responsible for an activity, diversion of water or operation of a works, if the inspector or Director is of the opinion that the activity, diversion of water or operation of a works caused, causes or may cause a significant adverse effect on human health, property or public safety...."

adverse affect.” Therefore, this is caught in the first issue on whether the Order was properly issued.

[43] The timelines in the Order have not been enforced by the Director pending the outcome of this appeal. Although all of the timelines have now passed, if the Board should recommend the Order be confirmed, the timelines would have to be changed. The length of time to complete any required work under the Order would then have to be adjusted. Suggestions of appropriate timelines could be included in the issue of whether the Order was properly issued. This takes into consideration whether the timelines included in the Order were reasonable given the work required to be undertaken under the Order.

[44] The Appellants raised the issue of whether they have a positive obligation under the existing Licence to lower the water level in Cochrane Lake. This is a valid issue before the Board. The Appellants are required under the Order to take action to lower the water level, but they argued the Licence does not stipulate the Appellants must take this form of action if the water level rises past the maximum level. This issue is directly related to the Order and within the Board’s jurisdiction to hear. Therefore, the second issue for the hearing is: Are the Appellants responsible for actively maintaining water levels in Cochrane Lake?

[45] The remaining issue raised by the Appellants is whether Mr. Colvin should be named in the order as a person responsible. This is relevant to the Order, was identified as an issue in the Notice of Appeal, and is within the Board’s jurisdiction. Under section 91(1)(h) of the *Water Act*, a water management order can be issued to a “person responsible.” Under section 1(1)(II) of the *Water Act*, a person responsible is defined as “...a person responsible within the meaning of the regulations.” Section 1(5) of the *Water (Ministerial) Regulation*, Alta. Reg. 205/1998, defines a “person responsible.”³ The Director’s decision to include Mr. Colvin as a

³ Section 1(5) of the *Water Act* provides:

“A person responsible for an activity, diversion of water or for a works or operation of a works is any or all of the following:

- (a) an owner of the land on which the activity is or was carried out, the water is or was diverted or the works is or was located;
- (b) a previous owner of the land on which the activity was carried out, the water was diverted or the works was located, if the previous owner owned the land while the activity was carried out, the water was diverted or the works was located on the land;

person responsible in the Order is an appealable decision. Therefore, the Board will hear arguments on the issue: Was Mr. Colvin properly named in the Order as a person responsible?

[46] The Board notes the Condominium Corporations raised concerns regarding the operation of two recirculation systems that run between Cochrane Lake and the natural pond. These recirculation systems are not issues in the Order and, therefore, are not issues before the Board. The Board will not hear submissions on these concerns.

[47] Therefore, the issues that will be heard at the hearing, should one be held, are:

1. Was the Water Management Order properly issued?
2. Are the Appellants responsible for actively maintaining water levels in Cochrane Lake?
3. Was Mr. Colvin properly named in the Order as a person responsible?

V. DECISION

[48] The Board denies the intervenor applications of Mr. Hutchinson and Mr. Lemke on his own behalf. However, the Board will allow Mr. Lemke to provide a written submission and brief comments at the hearing on behalf of the Condominium Corporations. The Board allows Rocky View County to participate in the hearing process as a full intervenor by providing written submissions, opening and closing comments, and direct evidence, and having the

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- (c) a person who carries out or has carried out an activity;
 - (d) a person who diverts or has diverted water;
 - (e) an owner and a previous owner of the works;
 - (f) any other person whom the Director considers caused or contributed to an adverse effect on the aquatic environment, natural water body, human health, property or public safety that resulted from the activity, diversion of water or works;
 - (g) a successor, assignee, executor, administrator, receiver, receiver-manager, liquidator or trustee of a person referred to in any of clauses (a) to (f);
 - (h) a person who acts as the principal or agent of a person referred to in any of clauses (a) to (g);
 - (i) a person responsible for a dam or canal.”

opportunity to cross-examine the Appellants. The intervenors who have been granted intervenor status will be subject to cross-examination by the Appellants and questioning by the Board.

[49] The issues for the hearing will be:

1. Was the Water Management Order properly issued?
2. Are the Appellants responsible for actively maintaining water levels in Cochrane Lake?
3. Was Mr. Colvin properly named in the Order as a person responsible?

Dated on November 30, 2012, at Edmonton, Alberta.

“original signed by”

Eric McAvity, Q.C.
Panel Chair