

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 04, 2016

IN THE MATTER OF sections 91, 92, 94, 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 Ian Sandeman with respect to the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks, to issue Enforcement Order No. WA-EO-2015/06-SSR under the *Water Act* to Ian Sandeman.

Cite as: Intervenor Decision: *Sandeman v. Director, South Saskatchewan Region, Alberta Environment and Parks* (04 May 2016), Appeal No. 15-031-ID1 (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Board Chair.

PARTICIPANTS:

Appellants: Mr. Ian Sandeman, represented by Mr. R. Frank Llewellyn, Stringam Denecky LLP.

Director: Mr. Stephen Mathyk, Compliance Manager, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, represented by Ms. Erika Gerlock, Alberta Justice and Solicitor General.

Applicant: Dr. Allan Garbutt.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Enforcement Order under the *Water Act* to Mr. Ian Sandeman regarding a berm and alleged unauthorized works in the Oldman River.

Mr. Sandeman (the Appellant) appealed the decision to issue the Enforcement Order.

In response to the Notice of Hearing, the Environmental Appeals Board (the Board) received an application from Dr. Allan Garbutt to participate in the appeal as an intervenor. Dr. Garbutt owns property adjacent to the Oldman River downstream of the site at issue.

After reviewing the application and comments provided by Mr. Sandeman and AEP regarding the application to intervene, the Board allowed Dr. Garbutt to participate in the appeal by providing a written submission and attending the hearing to provide a five-minute presentation and be subject to questioning by Mr. Sandeman and the Board.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's reasons for its decision on the intervenor application in respect of an appeal of Enforcement Order No. WA-EO-2015/06-SSR (the "Order") issued under the *Water Act*, R.S.A. 2000, c. W-3. The Order was issued to Mr. Ian Sandeman by Alberta Environment and Parks ("AEP") for constructing a berm and other alleged unauthorized works in the Oldman River. The site is located at SE-21-08-01-W5M within the Municipal District of Pincher Creek (the "Site"). Mr. Sandeman (the "Appellant") appealed the decision to issue the Order.

[2] In response to the Notice of Hearing that was published in local newspapers and posted at various locations, the Environmental Appeals Board (the "Board") received an application from Dr. Allan Garbutt to participate at the hearing as an intervenor.

[3] Based on his application and the comments provided by the Appellant and AEP, the Board allowed Dr. Garbutt to intervene in a limited capacity.

II. BACKGROUND

[4] On November 12, 2015, the Director, South Saskatchewan Region, Alberta Environment and Parks (the "Director"), issued the Order to the Appellant.

[5] On November 18, 2015, the Board received a Notice of Appeal from the Appellant appealing the Order.

[6] On November 18, 2015, the Board wrote to the Appellant and Director (collectively, the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal. The Board asked the Director for a copy of the documents upon which the Director made his decision (the "Record").

[7] On November 27, 2015, the Board proposed the following issues for the hearing:

1. Was the Enforcement Order properly issued?
2. Are the conditions in the Enforcement Order reasonable?

The Parties were asked to notify the Board if they had any objections to the identified issues.

[8] On December 11, 2015, the Board noted the Parties had no objections to the issues as stated by the Board.

[9] On December 16, 2015, the Board confirmed that, based on the Parties' available dates, the hearing would be held on February 4, 2016, in Lethbridge.

[10] The Board published a Notice of Hearing in the Pincher Creek Echo and the Shootin' the Breeze, and provided the Notice to the Municipal District of Pincher Creek to post on its public bulletin board. A news release was forwarded to the Government of Alberta Public Affairs Bureau for distribution to media throughout the Province, and the news release was posted on the Board's website. The Notice of Hearing provided an opportunity for persons who wanted to make a representation to the Board to apply to intervene.

[11] On January 7, 2016, the Board received an application to intervene from Dr. Allan Garbutt (the "Applicant"). The Board requested the Parties provide comments on Dr. Garbutt's application to intervene. The Board received comments from the Appellant and Director on January 11 and 12, 2016, respectively.

[12] On January 14, 2016, the Board notified the Parties and the Applicant that Dr. Garbutt could participate in the appeal as an intervenor.

III. SUBMISSIONS

A. Applicant

[13] The Applicant explained he owns property adjoining the Oldman River and immediately downstream of the Site. He confirmed he would be speaking in favour of the Order.

[14] The Applicant stated the actions occurring upstream may impact his land, so he wanted to ensure the river was protected and applicable laws were enforced. In addition, the Applicant believed there are societal issues that require the ordinary citizen to speak up and ensure public goods, such as rivers, are protected.

[15] The Applicant said he would present the view of what a "reasonable person" would have done in this case.

B. Appellant

[16] The Appellant took the position that intervenor status should not be granted to the Applicant.

[17] The Appellant argued that any evidence or representations the Applicant might make would be irrelevant to the issues identified by the Board. The Appellant said it was unlikely the Applicant had any information regarding whether the Order was properly issued or whether the conditions imposed by the Order were reasonable.

[18] In response to the Applicant's statement that he intends to offer the view of the "reasonable person," the Appellant noted the term "reasonable person" is a legal term that could not be represented by any one particular person. The Appellant stated the Applicant could have provided information when the Director was considering whether to issue an approval to conduct work on the river and adjoining lands.

[19] The Appellant argued any contribution by the Applicant on the issues of whether the Order was properly issued or whether the terms of the Order were reasonable would be of little or no use and would only distract from the issues and take away from the limited time available to the Appellant and Director at the hearing.

C. Director

[20] The Director had no objections to the proposed intervention.

[21] The Director noted the Applicant owns land immediately downstream of the Site, and the Applicant had concerns regarding the potential impacts to his property as a result of the works conducted by the Appellant. The Director stated the Order sets out concerns that construction of the berm and unauthorized works would, or would have the potential to, alter the flows, level, location of water and may cause further erosion and sedimentation. The Director noted the Order also expressed the opinion that the berm and unauthorized works may cause adverse effects to the bed and shore or hydrology of the Oldman River and impact the aquatic environment of the Oldman River and other property owners.

[22] The Director stated the Order requires the decommissioning, removal, or remediation of the berm be completed in a manner that prevents adverse effects to other property owners. In issuing the Order, the Director contemplated the actual or potential impacts of the berm and unauthorized works on the Oldman River and the impacts on downstream property owners.

[23] The Director's view was the Applicant, as a potentially impacted property owner directly downstream of the Site, has a direct and tangible interest in the subject matter of the Order and the appeal and may provide additional information and evidence at the hearing which would assist the Board. The Director believed the Applicant's interests were directly relevant to the issues of whether the conditions in the Order were reasonable in providing the required protection of the Applicant's property from adverse impacts from the berm and unauthorized works.

IV. Analysis

[24] Under section 95 of EPEA, the Board can determine who can make representations on a matter 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.”

[25] 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 representations 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.”

[26] 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....”

[27] At this point in the appeal process, the Board must determine if the intervention application should be allowed based on the limited information provided. If the application to intervene is allowed, the Board must then determine the extent to which the intervenor may participate in the appeal.

[28] In order for the Board to accept a person as an intervenor, the applicant must provide an indication of the type of evidence he or she intends to present to the Board. The evidence should not duplicate the evidence presented by the Parties and it should assist the Board in determining the best recommendations to make to the Minister on the issues identified by the Board.

[29] The issues before the Board in this appeal relate to the Order issued to the Appellant for alleged unauthorized works in the Oldman River.

[30] As an adjacent downstream landowner, the Applicant supports the issuance of the Order. The Applicant stated he has concerns regarding the berm and alleged unauthorized works and how it could impact his property. The Board considers it reasonably likely the Applicant will be able to provide additional information on whether he considers the conditions in the

Order are adequate to protect his lands. This demonstrates a tangible interest in the subject matter of the appeal.

[31] As an adjacent downstream landowner, the Applicant will have first-hand knowledge of the area and an additional perspective on the potential impacts the works might have on the Oldman River and his lands.

[32] The Board is of the view the Applicant has met the test for determining intervenor status and accepts the Applicant's application to intervene in this appeal.

[33] The Board will allow the Applicant limited participation in the hearing. The Applicant may provide a written submission in accordance with the schedule to be set by the Board and may attend the hearing to provide a five-minute presentation at the beginning of the hearing after opening statements from the Parties. The Applicant will be subject to cross-examination by the Appellant and questioning by the Board.

V. Conclusion

[34] The Board grants Dr. Garbutt's application to intervene in this appeal on the basis set out above.

Dated on May 4, 2016, at Edmonton, Alberta

"original signed by"

Alex MacWilliam
Board Chair