

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – April 7, 2020

**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** appeals filed by Mitchell Hochhausen and Wavy Lake Enterprises Ltd. with respect to Enforcement Order No. WA-EO-2019/12-RDNSR issued under the *Water Act* by the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

Cite as: *Hochhausen and et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (7 April 2020), Appeal Nos. 19-044-045-ID1 (A.E.A.B.), 2020 ABEAB 14.

**BEFORE:**

Mr. Alex MacWilliam, Chair.

**SUBMISSIONS BY:**

**Appellants:** Mr. Mitchell Hochhausen, representing himself and Wavy Lake Enterprises Ltd.

**Director:** Ms. Shannon Keehn, Alberta Justice and Solicitor General, representing Mr. Todd Urquhart, Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

## EXECUTIVE SUMMARY

Mr. Mitchell Hochhausen and Wavy Lake Enterprises Ltd. (collectively, the Appellants) appealed an enforcement order (the Enforcement Order) issued by the Director, Alberta Environment and Parks (the Director). The Enforcement Order was the second order issued to the Appellants regarding the same land (the Lands), owned by the Appellants. The first order required the Appellants to take certain actions to stop the draining of water from wetlands on the Lands. The second order required the Appellants to cease all unauthorized activities on the Lands and prepare a plan to restore the wetlands. The Appellants appealed the second order to the Environmental Appeals Board (the Board).

The Director requested the Board dismiss the Appellants' appeal because, according to the Director, the Enforcement Order was not issued under provisions of the *Water Act* that allowed for an appeal.

After reviewing written submissions on the motion, the Board found the substance and effect of the Enforcement Order would require the Appellants to potentially complete work to restore the wetlands and that such an order is appealable. The Enforcement Order contained discretionary clauses the Director could activate without the Appellants being able to exercise a right to appeal. Therefore, the Board found the Enforcement Order was appealable under the *Water Act*.

The Board, therefore, dismissed the Director's motion, and determined the Appellants' appeals are properly before the Board.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's (the "Board") decision regarding the motion by the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director"), to dismiss the notices of appeal filed by Mr. Mitchell Hochhausen and Wavy Lake Enterprises Ltd. (collectively, the "Appellants").

## **II. BACKGROUND**

[2] Wavy Lake Enterprises Ltd. is the registered owner of lands legally described as S½-7-46-15-W4M, in Flagstaff County, Alberta (the "Lands"). Mr. Hochhausen is the sole director of Wavy Lake Enterprises Ltd.

[3] On April 27, 2018, after receiving information from a member of the public, Alberta Environment and Parks ("AEP") investigated activities occurring on the Lands. On April 27, 2018, AEP issued Water Management Order No. WMO 2018/04-RDNSR to the Appellants requiring the Appellants to take certain actions to stop the draining of water from wetlands on the Lands. The Appellants said the wetlands were being drained to make the Lands suitable for agricultural use.

[4] On October 10, 2019, the Director issued Enforcement Order No. WA-EO-2019/12-RDNSR (the "Enforcement Order") under the *Water Act*, R.S.A. 2000, c. W-3, to the Appellants, requiring the Appellants to do the following:

- (a) immediately cease all unauthorized activity on the Lands;
- (b) retain a professional to prepare a Wetlands Assessment Report detailing the condition prior to the Appellants' unauthorized activities and the current conditions of the wetlands;
- (c) retain a professional to prepare a Wetlands Restoration Plan to restore each of the wetlands to the condition prior to the Appellants' unauthorized activities;
- (d) the Wetlands Assessment Report and the Wetlands Restoration Plan must meet requirements set out by the Director in the Enforcement Order; and
- (e) when authorized to do so, the Appellants must implement the Wetlands Restoration Plan.

[5] On October 16, 2019, the Appellants filed Notices of Appeal with the Board, seeking to have the Enforcement Order repealed. On October 24, 2019, the Board wrote to the Director and the Appellants (collectively the “Parties”) acknowledging the Notices of Appeal and requesting the Director provide all documents and media he reviewed and that were available to him when making his decision, including any policy documents.

[6] On November 1, 2019, the Director requested the Board reject the Appellants Notices of Appeal because the Enforcement Order was not appealable under the *Water Act*.

[7] The Board established a written submission process to address the Director’s motion, and received submissions from the Parties from November 13, 2019 until December 3, 2019.

[8] On February 4, 2020, the Board advised the Parties it had determined the Enforcement Order was appealable under the *Water Act*, and that the Board would provide its written reasons in due course. These are the Board’s reasons.

### **III. SUBMISSIONS**

#### **A. Director**

[9] The Director submitted the Board did not have jurisdiction to hear the Appellants’ appeals as none of the grounds for appeal listed in section 115(1)(p) of the *Water Act* applied to the Appellants’ situation. The Director stated section 115(1)(p) of the *Water Act* specified the type of enforcement orders that are appealable to the Board, and the Alberta Legislature chose deliberately to exclude other enforcement orders from an appeal.

[10] The Director noted the Board has stated in other appeals that the legislation determines the Board’s jurisdiction to hear an appeal.<sup>1</sup> The Director submitted the Board could not hear an appeal unless the legislation specifically includes a right of appeal.

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<sup>1</sup> *Cleanit Greenit Composting System and Kirsten Castro-Wunsch v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development* (06 August 2013) Appeal Nos. 11-177 and 12-041-D (A.E.A.B.).

[11] The Director noted section 115(1)(p) of the *Water Act* stated:

- “(p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing
- (i) the suspension or cancellation of an approval or licence or the cancellation of a preliminary certificate,
  - (ii) the stopping or shutting down of any activity, diversion of water or operation of a works if the activity, diversion or operation is the subject-matter of an approval or licence,
  - (iii) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking, if the works or undertaking is the subject of an approval, or
  - (iv) the removal or otherwise rendering ineffective of any works or obstruction.”

[12] The Director submitted the Enforcement Order does not require the Appellants to do any of the actions listed in section 115(1)(p) and does not impair the Appellants’ use of the Lands or interfere with any of the Appellants’ rights.

[13] The Director said the Appellants’ unauthorized activities on the Lands impacted or may impact the flow to, or level of water, in a water body. The Director noted the Appellants’ position is that they have already complied with the Enforcement Order by blocking the ditches they constructed. The Director stated he requires additional information prepared by a qualified professional to determine if the Appellants’ actions to comply have remedied the impacts on the water bodies, which is the focus of the Enforcement Order.

[14] The Director noted the Board stated in *Cherokee Canada Inc. et al. v Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (“Cherokee”),<sup>2</sup> that it is appropriate to determine whether an enforcement order is appealable by reviewing the effect it is having on the appellant and whether the effect falls under a provision in the legislation setting out which enforcement orders can be appealed. The Director submitted the Board should give the most importance and weight to the plain wording of the Enforcement Order, and it is

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<sup>2</sup> *Cherokee Canada Inc. et al. v Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (2 August 2018), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-ID2 (A.E.A.B.).

improper to speculate on the effects of the Enforcement Order.

[15] The Director stated that if the Board were to apply the “effects” test from *Cherokee*, the Director noted the following:

- (a) the Appellants did not apply for an approval, licence, preliminary certificate or any other authorization for the activities they conducted on the Lands;
- (b) at minimum, the Appellants’ unauthorized activities potentially or actually changed the flow, location and level of the water in the wetlands on the Lands;
- (c) the Enforcement Order does not suspend or cancel any approval, licence or preliminary certificate;
- (d) the Enforcement Order does not stop an activity, operation or diversion that is the subject of an approval or licence;
- (e) the Enforcement Order does not cease construction, operation, maintenance, repair, control, replacement, or removal of any works or undertaking that is the subject of an approval;
- (f) the order does not remove any works or obstruction;
- (g) the Enforcement Order requires that the actual and potential impacts on the water bodies from the Appellants’ unauthorized activities be assessed by a properly qualified individual and a plan be submitted and implemented to address the impacts; and
- (h) the wording and the effects of the Enforcement Order do not fall under section 115(1)(p) of the *Water Act* and, therefore are not circumstances for which an appeal can be submitted to Board.

[16] The Director said the Board, in its decision in *Cherokee*, found that “in addition to the effects test for determining jurisdiction, the Board also must have regard to whether the clear inability to appeal some types of enforcement orders is consistent with the scheme of the legislation.”<sup>3</sup> The Director stated the Board indicated in *Cherokee* “that its jurisdiction to hear appeals of enforcement orders is also determined by the fact that the Minister has final decision-making authority on appeals of enforcement orders.”<sup>4</sup>

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<sup>3</sup> Director’s Submission, November 27, 2019, at paragraph 28.

[17] The Director submitted the Legislature intended that certain enforcement orders are not appealable to the Board and may only be challenged by a judicial review application to the court. The Director stated the Minister can only exercise his final decision-making authority if the order is appealable under section 115(1)(p) of the *Water Act*. The Director said the Legislature intended that the Minister should not have authority to confirm, reverse, or vary an enforcement order unless it is issued under section 115(1)(p).

[18] The Director stated there are no circumstances in the *Water Act* under which the Enforcement Order is appealable to the Board and, therefore, the Board has no jurisdiction to hear the appeals. The Director requested the Board dismiss the Appellants' Notices of Appeal.

**B. Appellants**

[19] Mr. Hochhausen stated he had worked cooperatively with AEP since 2018 to ensure he was not breaking any rules. He said he was unaware the work he did on the Lands was problematic. Mr. Hochhausen noted he complied with instructions from AEP's Environmental Protection Officer, and he believed he had done a sufficient job of returning the land to its intended use of agricultural production.

[20] Mr. Hochhausen submitted the *Water Act* must provide flexibility for farmers and balance between economic prosperity and environmental stewardship. Mr. Hochhausen stated dismissing the appeals would be inconsistent with the intent of the Legislature.

[21] Mr. Hochhausen stated the Enforcement Order specified that he must cease any activity or undertaking that would interfere with the restoration of the water bodies. Mr. Hochhausen said to comply with the Enforcement Order, he would have to stop all farming activities in the areas identified in the Enforcement Order. He said to deliver the Wetlands Restoration Plan as specified by the Enforcement Order would require the stopping or shutting down of an activity that is subject to an approval, which is appealable under section 115(1)(p) of the *Water Act*.

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<sup>4</sup> Director's Submission, November 27, 2019, at paragraph 28.

[22] Mr. Hochhausen submitted the opportunity to appeal the Enforcement Order to the Board provides him with a fair administrative process, as compliance with the Enforcement Order would result in financial harm. Mr. Hochhausen stated the financial viability of his farm might be in peril if he is unable to plant areas of the field. Mr. Hochhausen said that without an appeal, he was concerned the Wetlands Restoration Plan would include areas of his farm he has not impacted, and he would have no input into the Director's decisions that would affect the non-impacted areas of his land.

[23] Mr. Hochhausen submitted he already complied with the Enforcement Order. He stated he viewed the Enforcement Order as an amendment to the unofficial direction from an Environmental Protection Officer.

[24] Mr. Hochhausen stated the cost of complying with the Enforcement Order's requirement to deliver a Wetlands Restoration Plan by an authenticated professional was approximately \$16,000.00. He said the cost to avoid the wetlands in his farming activities, including the loss of use and adverse effect, is \$14,000.00 a year. Mr. Hochhausen stated he fears the Wetlands Restoration Plan may confirm the wetlands were incorrectly identified, which would still burden him with the time and expense of complying with the Enforcement Order.

[25] Mr. Hochhausen submitted the Enforcement Order is not remedial, but rather it is punitive. Mr. Hochhausen stated he wanted the opportunity to argue why the Board should dismiss the Enforcement Order.

#### **IV. ANALYSIS**

[26] Section 115(1)(p) of the *Water Act* lists enforcement orders that are appealable to the Board. However, determining whether an enforcement order is appealable requires more than just reviewing a list. The Board reviews the substance of an order to determine what is required of the person named in the order. The Board also examines the effect the order has on the appellant. If the substance and effect of the order is analogous to orders under the provisions of section 115(1)(p), the Board has the jurisdiction to hear an appeal of the order.

[27] Determining the substance and effect of the order is consistent with Section 10 of the *Interpretation Act*, R.S.A. 1980, c. I-8, which states: “[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.”

[28] The Director stated it is inappropriate for the Board to review the substance and effect of the Enforcement Order to determine if it is appealable. The Director would have the Board refuse appeals of any of the Director’s enforcement orders not issued under section 115(1)(p). Such a strict interpretation runs contrary to the rules of natural justice and would effectively let the Director decide whether an enforcement order is appealable. Respectfully, that is the Board’s jurisdiction and not the Director’s.

[29] The Board notes section 6 of the Enforcement Order requires the Appellants to provide a Wetlands Restoration Plan prepared by an “Authenticating Professional.” Section 7(a) states the Wetlands Restoration Plan must include a detailed plan to restore the wetlands to the condition they were in before the Appellants’ unauthorized activities. The plan must include the restoration of wetland size, classification, zones of wetland function, topography and slopes, hydrology, and vegetation.

[30] Section 7(b) of the Enforcement Order requires the Wetlands Restoration Plan to include a detailed plan to restore the flow of water into each of the wetlands, restoration of the elevation of each inflow and outflow, and the permanent decommissioning of each of the unauthorized ditches. Section 7(c) requires the Wetlands Restoration Plan to include a complete list of equipment, methods, and materials used to implement the plan. Section 7(d) requires the plan to include a detailed description of the measures used to prevent erosion, siltation and other adverse effects during the work to implement the Wetlands Restoration Plan. Section 7(e) requires a detailed monitoring proposal for each of the wetlands. Section 7(f) requires a proposal for verification of the work done on each of the wetlands.

[31] The Director submitted the Enforcement Order only requires the submission of a plan to accomplish the work and does not require the work to be done. On the face of the Enforcement Order that may seem correct, however, other sections of the Enforcement Order address the implementation of the Wetlands Restoration Plan:

- (a) section 8 requires the Appellants to include a schedule of implementation for the work proposed in the Wetlands Restoration plan with a completion date no later than October 30, 2020;
- (b) section 9 requires the Appellants to implement the Wetlands Restoration Plan on the Director's authorization;
- (c) section 10 requires the Appellants to provide 5 days' notice to the Director before beginning work on the Wetlands Restoration Plan;
- (d) section 11 requires the Appellants to implement a monitoring proposal when the Director authorizes it; and
- (e) section 12 requires the Appellants to implement the verification proposal when the Director gives his authorization.

[32] The substance of the Enforcement Order is to restore the wetlands, which potentially includes work to decommission the ditches and control the outflow and inflow of water. The Director has prepared the Enforcement Order with discretionary clauses that, if activated, would require the Appellants to complete some or all of the work in the Wetlands Restoration Plan. The Board finds the work required in the Wetlands Restoration Plan would be appealable under section 115(1)(p)(iv),<sup>5</sup> as it would involve "the removal or otherwise rendering ineffective of any works or obstruction."

[33] If the Board adopted the Director's position that only orders issued under 115(1)(p) of the *Water Act* are appealable, the Appellants would lose their right to appeal, even though the Enforcement Order could require them to undertake work that would otherwise be appealable. The Board finds the Director's approach goes against the intent of the legislation.

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<sup>5</sup> Section 115(1)(p)(iv) states:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:...

(p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing...

(iv) the removal or otherwise rendering ineffective of any works or obstruction."

**V. CONCLUSION**

[34] The Board finds the overall consequence and effect of the Enforcement Order would potentially require the Appellants to complete the work detailed in the Wetlands Restoration Plan. Such work would fall under section 115(p)(iv) of the *Water Act*, which is appealable to the Board.

[35] The Board, therefore, dismisses the Director's motion, and has determined the Appellants' appeals are properly before the Board.

Dated on April 7, 2020, at Edmonton, Alberta.

A handwritten signature in black ink, appearing to read 'Alex MacWilliam', written over a horizontal line.

Alex MacWilliam  
Board Chair