

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 25, 2022

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 appeals filed by Mary Jane Corrigan and Tristen Reiss, Wayne and Carmen Heinen, Lisa Huhn, Glen and Cindy Kerunsky, Jamie and Lindsey Kindrat, Jope and Karen Langejans, Judy Sproule, Jeff Williamson, Barb Wright, AgriTeam Canada Consulting Ltd., Teen Challenge Canada Inc., and Foothills Land Trust with respect to *Water Act* Licence No. 00396302-00-00 issued to Spruce Ridge Capital Inc. by the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks.

Cite as: *Corrigan and Reiss et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Spruce Ridge Capital Inc.* (25 February 2022), Appeal Nos. 19-112-122 & 20-001-D (A.E.A.B.), 2022 ABEAB 11.

BEFORE:

Ms. Meg Barker, Acting Board Chair.*

PARTICIPANTS:

Appellants:

Ms. Mary Jane Corrigan and Mr. Tristen Reiss, Mr. Wayne and Ms. Helen Heinen, Ms. Lisa Huhn, Mr. Glen and Ms. Cindy Kerunsky, Mr. Jamie and Ms. Lindsey Kindrat, Mr. Jope and Ms. Karen Langejans, Ms. Judy Sproule, Mr. Jeff Williamson, Ms. Barb Wright, AgriTeam Canada Consulting Ltd., and Teen Challenge Canada Inc., represented by Dr. David Swann and Mr. Ed Osborne of the Fish Creek Watershed Group; and Foothills Land Trust, represented by Mr. Sandy Bruce.

Licence Holder:

Spruce Ridge Capital Inc., represented by Mr. Davin MacIntosh.

Director:

Mr. Andun Jevne, Director, Operations Division, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

* Ms. Barker was Acting Chair of the Board at the time the decision was made.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued a Licence under the *Water Act* to Spruce Ridge Capital Inc. (Spruce Ridge) to operate a works and divert up to 95,583 cubic metres of water annually for irrigation purposes. The Licence was the transfer allocation of a Licence previously held by Cardel Holdings Ltd.

Members of the Fish Creek Water Group (FCWG) and the Foothills Land Trust filed Notices of Appeal with the Environmental Appeals Board (Board). AEP filed a motion to dismiss the appeals on the basis the appellants did not file Statements of Concern, a prerequisite to filing a Notice of Appeal.

The Board received submissions from the participants on whether valid Statements of Concern were filed and whether the FCWG members were directly affected.

Based on the submissions provided, the Board found none of the members of the FCWG nor the Foothills Land Trust filed valid Statements of Concern and, therefore, the appeals were dismissed.

The Board did not have to determine if any of the members of the FCWG were directly affected as none of the appeals were validly before the Board.

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I. BACKGROUND

[1] On February 27, 2020, the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks (the “Director”), issued Licence No. 00396302-00-00 (the “Licence”) to Spruce Ridge Capital Inc. (the “Licence Holder”) under the *Water Act*, R.S.A. 2000, c. W-3. The Licence grants the Licence Holder the right to operate a works and to divert up to 95,583 cubic metres of water annually at a maximum rate of diversion of 0.028 cubic metres per second from SE-22-22-03-W5M, at Fish Creek in Foothills County, for the purpose of irrigation at NE-01-22-03-W5M and SE-12-22-03-W5M. The Licence was a transfer allocation from a 1976 Licence held by Cardel Holdings Ltd.

[2] On March 23, 2020, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Ms. Mary Jane Corrigan and Mr. Tristen Reiss (Appeal No. 19-112), Mr. Wayne and Ms. Carmen Heinen (Appeal No. 19-113), Ms. Lisa Huhn (Appeal No. 19-114), Mr. Glen and Ms. Cindy Kerunsky (Appeal No. 19-115), Mr. Jamie and Ms. Lindsey Kindrat (Appeal No. 19-116), Mr. Jope and Ms. Karen Langejans (Appeal No. 19-117), Ms. Judy Sproule (Appeal No. 19-118), Mr. Jeff Williamson (Appeal No. 19-119), Ms. Barb Wright (Appeal No. 19-120), AgriTeam Canada Consulting Ltd. (Appeal No. 19-121), and Teen Challenge Canada Inc. (Appeal No. 19-122) (collectively, the “Fish Creek Watershed Group” or “FCWG”), appealing the issuance of the Licence.

[3] On March 30, 2020, the Board acknowledged receipt of the appeals and requested the Director provide a copy of all documents and all electronic media the Director reviewed and were available to him when making his decision, including policy documents.

[4] On April 2, 2020, the Board received a Notice of Appeal from the Foothills Land Trust (Appeal No. 20-001).

[5] On April 7, 2020, the Director raised a preliminary issue of whether some or all of the Fish Creek Watershed Group had standing to appeal the decision. The Director explained he only received a Statement of Concern on behalf of the Fish Creek Watershed Group, but none of the members of the Fish Creek Watershed Group submitted individual Statements of Concern.

He also questioned whether any of the individual members of the Fish Creek Watershed Group were directly affected.

[6] On April 8, 2020, the Board acknowledged the appeal filed by the Foothills Land Trust and notified the Fish Creek Watershed Group, the Director, and the Licence Holder of the appeal. In this same letter, the Board requested the Fish Creek Watershed Group and the Foothills Land Trust (collectively, the “Appellants”), the Licence Holder, and the Director to provide submissions on the following matters:

1. Did each of the Appellants file a Statement of Concern with the Director?
2. How are the Appellants directly affected by the Licence?

[7] The Board requested Dr. Swann, representative of the Fish Creek Watershed Group, to provide a copy of the Statement of Concern filed by the Fish Creek Watershed Group and advise if any of the Appellants were included in that Statement of Concern.

[8] The Board provided the Appellants, Licence Holder, and Director (collectively, the “Participants”) with the schedule to submit written submissions on whether the Appellants filed Statements of Concern and whether the Appellants were directly affected by the Director’s decision to issue the Licence. In response to the Director’s request to be given the opportunity to respond to the submissions from the Appellants and the Licence Holder, the Board provided a revised schedule on May 20, 2021.

[9] On April 10, 2020, the Fish Creek Watershed Group provided its initial submission. On April 15, 2020, the Foothills Land Trust filed its initial submission.

[10] On April 15, 2020, the Director noted the Notice of Appeal filed on behalf of the Foothills Land Trust was filed outside of the legislated timeframe in the *Water Act*, and no Statement of Concern had been submitted to the Director.

[11] On May 5, 2020, the Licence Holder and Director provided their response submissions on the Statement of Concern and directly affected issues.

[12] On May 16 and 18, 2020, the Appellants provided their rebuttal submissions.

[13] On January 20, 2021, the Board notified the Participants of a decision released by the Court of Appeal, *Normtek Radiation Services Ltd. v. Alberta Environmental Appeals Board*,¹ which addressed the Board's directly affected test. The Board asked the Participants to provide comments on how the *Normtek* decision related to the directly affected status of the Appellants.

[14] Between January 28 and February 5, 2021, the Board received comments from the Appellants and Director. The Licence Holder did not provide comments on the *Normtek* decision.

II. SUBMISSIONS

A. Appellants' Initial Submissions

1. Fish Creek Watershed Group

[15] The FCWG explained its members are from the Priddis area, Priddis Greens, and the proposed Foothills Potable Water distribution area. Its concerns were with the long-term health of the Fish and Priddis Creeks watershed, including the aquatic and environmental health and sustainability of the watershed and potable water supplies for their homes and businesses.

[16] The FCWG stated it discovered the advertisement regarding the Licence application late and hastily submitted its Statement of Concern on behalf of its members. It noted one board member, Ms. Barb Wright, subsequently submitted a Notice of Appeal. The FCWG explained it was unable to obtain a response from each member who later showed an interest in the issuance of the Licence. The FCWG said after the Licence was issued, the FCWG received formal letters from 11 residents who were directly affected by the Director's decision to issue the Licence.

[17] The FCWG stated the individual members who filed appeals requested the FCWG represent their interests. The FCWG said some of its members individually qualified as valid participants in the appeal process. The FCWG said two of its members who filed appeals were directly affected, specifically Ms. Barb Wright and Teen Challenge.

¹ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 ("*Normtek*").

[18] The FCWG stated the environment and individual members' concerns for the management of the watershed should outweigh any administrative oversight on the part of the FCWG.

2. Foothills Land Trust

[19] Foothills Land Trust confirmed it had not filed a Statement of Concern as it only became aware of the requirement on March 17, 2020.

[20] Foothills Land Trust believed it was directly affected by the issuance of the Licence since it holds a conservation easement on NE 26-22-03-W5M and most of SE 35-22-03-W5M. The southern border of this property is about two kilometres downstream of the point of diversion. Foothills Land Trust explained the conservation easement is intended to protect a major portion of the riparian habitat between Priddis and the Tsuu T'ina First Nation.

[21] Foothills Land Trust was concerned the diversion could negatively impact the ecological values the conservation easement was intended to protect. It stated studies of Fish Creek indicate water levels and quality have declined due to water extraction and reduced water flow. Foothills Land Trust believed the new point of diversion could decrease water levels, resulting in additional damage to water quality, aquatic habitat, wildlife, and riparian vegetation.

B. Licence Holder

[22] The Licence Holder argued the FCWG did not have legal status and was, therefore, ineligible to file a Statement of Concern. The Licence Holder stated the author of the Statement of Concern, Dr. David Swann, did not establish nor claim he was directly affected.²

[23] The Licence Holder explained it, as well as the Director, met with Dr. Swann on October 31, 2019. At the meeting, Dr. Swann did not say he was directly affected or that he represented anyone directly affected.

² The Board notes the Statement of Concern was submitted on behalf of the FCWG by Dr. David Swann and Mr. Ed Osborne.

[24] The Licence Holder argued allowing the appeal would undermine the purpose of the Statement of Concern process as set out in the *Water Act*, which was designed to allow the applicant the opportunity to address concerns and for the Director to consider alleged effects prior to making a decision.

[25] The Licence Holder stated the Statement of Concern did not establish the FCWG was directly affected, and it did not reference Ms. Wright, Teen Challenge, or any of the other Appellants. The Licence Holder argued it would be unfair and unreasonable to allow a Statement of Concern on behalf of an undefined group of people and then assemble the group later.

[26] The Licence Holder did not believe any extenuating circumstances existed that would justify the recognition of a non-person or accept appeals where no Statements of Concern were filed.

[27] The Licence Holder stated it did not receive notice of any Statement of Concern filed by the Foothills Land Trust and, at no time, did Foothills Land Trust express specific concerns regarding the Licence.

C. Director

[28] The Director stated the FCWG and Foothills Land Trust raised laudable environmental concerns, but they did not meet the legal prerequisites to proceed with the appeals.

[29] The Director noted the filing of a Statement of Concern is a prerequisite to filing an appeal as set out in section 115(1)(r) of the *Water Act*.³ The Director explained he uses Statements of Concern to identify and address concerns early in the application process.

³ Section 115(1)(r) of the *Water Act* states:
“(1) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances...
(r) if the Director approves or refuses a request for a transfer of an allocation of water, the applicant and any person who submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision.”

[30] The Director noted none of the members of the FCWG who filed Notices of Appeal filed Statements of Concern. The Director said he only received one Statement of Concern, from the FCWG.

[31] The Director explained he received two letters from Dr. Swann⁴ on behalf of the FCWG, but only Dr. Swann was identified as a member of the FCWG in the Statement of Concern. The Director found Dr. Swann was not directly affected by the water transfer and, as no members of the FCWG were identified, they could not be found to be directly affected.

[32] The Director stated none of the persons who filed appeals submitted Statements of Concern, and none of the FCWG members provided evidence to support why their appeals should proceed without having filed Statements of Concern.

[33] The Director argued none of the FCWG members who appealed meet the Board's threshold to be found directly affected.

[34] The Director noted only Ms. Wright and Teen Challenge were identified by the FCWG as being directly affected and, therefore, the remaining eight appeals should be dismissed as they were not directly affected.

[35] The Director stated Ms. Wright and Teen Challenge were not directly affected by the decision to issue the Licence. The Director said Ms. Wright indicated she is 1.3 kilometres from the point of diversion, and she expressed a general concern about the impact the Licence might have on her water well. She provided no evidence to show the flow in Fish Creek is connected to her water well or the aquifer, and most of her concerns about water flow and impacts on fish or wildlife were general interests that all Albertans have in protecting the environment.

[36] The Director stated no information was provided about the distance from the point of diversion to the water wells for the Teen Challenge Centre. The Director said Teen Challenge presented only general concerns about impacts to fish which did not meet the threshold for being directly affected.

⁴ Mr. Ed Osborne, President of the Ranchers Hill Water Co-op, was also a signatory to one of the letters provided to the Director and was identified as a member of the FCWG.

[37] The Director noted the Foothills Land Trust admitted it did not file a Statement of Concern, and the Director confirmed he did not receive a Statement of Concern from the Foothills Land Trust. The Director stated the Foothills Land Trust did not provide evidence to show this was an unusual or exceptionally rare case where the appeal should proceed without a Statement of Concern being filed.

[38] The Director also noted the Foothills Land Trust appeal was filed outside the 30-day legislated timeline under section 116(1)(b) of the *Water Act* and, therefore, the appeal should be dismissed.⁵ As the Foothills Land Trust did not file a Statement of Concern, it did not receive notice of the Director's decision. The Director said the 30-day time period started with the last provision of notice of the decision, which was February 28, 2020, but the Foothills Land Trust did not file its appeal until April 2, 2020, outside the 30-day time period. The Director stated the Foothills Land Trust did not provide evidence to show special or extenuating circumstances that would warrant the Board extending the appeal period.

[39] The Director explained that, under the Approved Water Management Plan for the South Saskatchewan River Basin, he is required to consider, among other things:

- effects on the aquatic environment (including fish);
- effects on water flows/levels (instream objectives or water conservation objectives); and
- hydraulic effects (flows/impacts to the river), hydrology (water cycle/availability), and hydrogeological (groundwater) impacts.

[40] The Director stated the threshold to approve a transfer of water allocation is high since it requires no significant adverse effect. The Director pointed out clauses in the Licence restrict diversion of water from Fish Creek when water flows are below instream objectives, thereby mitigating impacts on the aquatic environment and surface and subsurface flows.

[41] In response to the Board's questions regarding the *Normtek* decision, the Director noted *Normtek* broadened the Board's consideration beyond the appellant's use of a natural

⁵ Section 116(1)(b) of the *Water Act* provides:

“(1) A notice of appeal must be submitted to the Environmental Appeals Board...

(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.”

resource to include social, economic, cultural, safety, or human health effects, or adverse effects on property rights.

[42] The Director said he did not initially determine if Ms. Wright or Teen Challenge were directly affected by the Licence. He noted the Notices of Appeal filed by Ms. Wright and Teen Challenge were based on the impact the Licence could have on water flows, water wells, and fish, which are environmental impacts. The Director did not believe the *Normtek* decision should alter the Board's decision on whether Ms. Wright or Teen Challenge were directly affected.

[43] The Director noted that, in *Normtek*, the meaning of "directly affected" was considered under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), but the general principles from *Normtek* would also apply to persons appealing a Director's decision under the *Water Act*.

[44] The Director said he did not find Dr. Swann directly affected and no other members of the FCWG were found directly affected as no other members were identified at the application stage. The Director did not decide if Ms. Wright or Teen Challenge was directly affected at the application stage, because they were not personally identified as members of the FCWG.

[45] The Director noted the *Normtek* decision modified the Board's directly affected test in two ways: (1) evidence of harm to a natural resource the appellant uses may show the appellant is directly affected, but it is not a prerequisite to establish standing; and (2) if the direct effect on the person filing the Notice of Appeal is economic, cultural, safety, or health related, or is on a property right, then standing may be available whether or not there is any connection to an environmental impact to a natural resource proximate to the site of the approval.

[46] The Director stated the onus is on the appellant to demonstrate there is a reasonable possibility they will be directly affected by the Director's decision. The effect must be reasonable and possible, and an effect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis of finding an appellant directly affected.

D. Appellants' Rebuttal Submissions

1. Fish Creek Watershed Group

[47] The FCWG explained it had been meeting and discussing the health and sustainability of the Fish Creek watershed since 2019, and it currently has 45 members. The FCWG said registration as a society is pending.

[48] The FCWG said it prepared its Statement of Concern within a few days of discovering the public notice of the Licence application, but it was unaware it was a prerequisite to filing an appeal. The FCWG felt it was responsible to its members, and the protection of the integrity of Fish Creek, to represent them. The FCWG said the river basin has been historically over allocated, and this was an opportunity to hold back withdrawals from a tributary of the Bow River. The FCWG explained it did not have access to the land descriptions of its members.

[49] The FCWG stated two of its members own or manage property directly downstream of the Priddis Fish Creek diversion point, specifically Ms. Wright and Teen Challenge. They identified themselves soon after the Statement of Concern was filed and submitted their Notices of Appeal.

[50] The FCWG stated it had concerns about the quantity and quality of water in Fish Creek given the low flows in summer and fall and the resulting severe decline in fish habitat and numbers. The FCWG asked for a more focused approach to watershed management of Fish Creek.

[51] The FCWG said the following elements of sustainability were not well assessed or understood:

- cumulative withdrawals from various land uses are not reliably reported or analyzed;
- groundwater impacts on surface water and well water withdrawals have not been assessed and analyzed; and
- climate warming will contribute to more extreme events, especially drought, and future licence holders should include capture and storage of runoff waters exclusively. This was not included in the Licence.

[52] The FCWG stated it conscientiously acted on behalf of water protection and for two of its members and, therefore, standing should be granted. It said the growing pressures from development, logging, and agricultural land use have threatened both quality and quantity of water in Fish Creek. The FCWG argued the precautionary principle in the over-allocated basin supports reducing water withdrawals for non-essential uses.

[53] In response to the Board's questions regarding the *Normtek* decision, the FCWG stated matters related to the watershed, withdrawals, and impacts on water flow and quality do not affect only downstream users. It said the entire ecosystem, including those upstream, are impacted when instream objectives are not met downstream. Therefore, according to the FCWG, the Statement of Concern that was filed by two residents upstream of Priddis, while representing the FCWG, should be considered to be directly affected, especially at times of low flow. The FCWG confirmed it represented all its members, including those downstream who submitted Notices of Appeal.

[54] The FCWG explained the group was founded in June 2018 as a stewardship group concerned with protecting the Fish Creek watershed.

[55] The FCWG said the signatories to the Statement of Concern, filed on behalf of the FCWG, did not know the importance of receiving signatories living downstream of the point diversion, nor did they know the exact location of the point of diversion. The FCWG said it notified members who were downstream of the point of diversion to enable them to participate in the appeal, and 11 residents who were directly affected filed Notices of Appeal.

[56] The FCWG believed it fulfilled the spirit of the legislation by acting, as an organization representing its members, in good faith by filing the Statement of Concern. It said the members had concerns about the impacts further water withdrawals would have on water quality and quantity and the resulting impact on their viability as landowners and farmers. The FCWG argued denying its members standing goes against the spirit of the legislation on a minor technicality.

[57] The FCWG said it was a proxy acting on behalf of its members in relation to monitoring and protecting the Fish and Priddis Creeks. It argued upstream users are affected

given the frequent violations of instream flow objectives. The FCWG said upstream users are impacted when the Director orders reduced water withdrawals due to low flows downstream of Priddis.

[58] The FCWG stated its purpose is to study and rehabilitate reaches where riparian health has been disrupted. The FCWG said it acted responsibly on behalf of its directly affected members, the watershed, and residents downstream.

[59] The FCWG stated the purpose of the appeal legislation is to identify and mitigate risks to the environment, people, and the economy. It argued the lack of awareness of the need for individuals downstream to be identified should not be used as a legitimate reason to deny standing, and it was a technical deficit that should not impede the objections of upstream and downstream landowners.

2. Foothills Land Trust

[60] The Foothills Land Trust was aware of the Licence Holder's plans and when they met in December 2018 to discuss the plans, there was no mention of land being used for agricultural purposes in the discussion or handout and no mention of water in the handout. The Foothills Land Trust said water supply was discussed briefly, but no mention was made of diverting water from Fish Creek and piping it to the residential development. It thought the source would be groundwater.

[61] The Foothills Land Trust stated the Licence Holder was incorrect in believing the Foothills Land Trust knew of the plan to divert water from Fish Creek. It said it first learned of the plan on March 17, 2020, and received details on March 19, 2020. The Foothills Land Trust provided its initial submission within two weeks of learning of the matter, and it did not stay quiet for 15 months before appealing.

[62] The Foothills Land Trust stated it did not file a Statement of Concern, because it was unaware of the plan to divert water. The Foothills Land Trust filed its Notice of Appeal on March 28, 2020, which was within the 30-day time period of learning of the Licence Holder's intent to divert water.

[63] The Foothills Land Trust said it was directly affected because the conservation easement it holds begins about two kilometres downstream from the point of diversion. The Foothills Land Trust stated its concerns included possible damage to water quality, aquatic habitat, wildlife, and riparian vegetation.

[64] The Foothills Land Trust offered an alternative for water sourcing, specifically transferring a licence upstream of the point of diversion rather than downstream as granted in the Licence.

[65] In response to the Board's questions regarding the *Normtek* decision, the Foothills Land Trust said the 2010 hydrology review supports the Foothills Land Trust proposal of moving the point of diversion upstream, as the majority of the existing licences are upstream of Priddis. The FCWG stated transferring the required volume upstream of the point of diversion would not affect the volume in the river until Fish Creek reaches the point of diversion previously allowed under the licence downstream at Shaw-Nee Golf Course.

[66] The Foothills Land Trust explained it holds a 317 acre conservation easement on both sides of Fish Creek, approximately 1.5 kilometres downstream of the proposed point of diversion, and should have standing since its interests would be directly affected.

[67] The Foothills Land Trust argued its property rights and interests under the conservation easement, as trustee and custodian, would be adversely affected if the quality and quantity of the stream flow was negatively impacted, which would affect fish habitat and riparian areas.

III. ANALYSIS

A. Statements of Concern

[68] In order for the Board to find the appeals are validly before it, the Board must determine if the prerequisites to filing an appeal have been met by the Appellants. At issue in these appeals is whether the Appellants filed Statements of Concern and whether the Appellants are directly affected by the Director's decision to issue the Licence.

[69] Under section 115(1)(c) of the *Water Act*,⁶ filing a Statement of Concern with the Director in response to notice of the application of a licence, is a prerequisite to filing a valid Notice of Appeal.

[70] Filing a Statement of Concern is an important part of the application process and has been discussed in previous Board decisions.⁷ In *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection, re: Town of Olds*,⁸ the Board stated:

“Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed late. Or perhaps an appeal could be processed even when a statement of concern has not been filed-- due to an extremely unusual case (e.g. a directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case.” (Footnotes omitted.)⁹

[71] Filing a Statement of Concern reserves the filer’s right to appeal, but it also affords the filer the opportunity to provide input into the application process. As discussed by the Board in *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment*:¹⁰

⁶ Section 115(1)(c) of the *Water Act* provides:

“115(1) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

...

(c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted

(i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director’s decision, if notice of the application or proposed changes was previously provided under section 108....”

⁷ Although many of the decisions in which the importance of filing a Statement of Concern related to the issue under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), the statement of concern and notice of appeal processes under EPEA and the *Water Act* are almost identical, and the Board determined the same principles should apply under both Acts. See: *St. Michael Trade and Water Supply Ltd. v. Director, Environmental Service, Parkland Region, Alberta Environment, re: Cam-A-Lot Holdings*, (17 July 2001), Appeal Nos. 01-055-D (A.E.A.B.), at paragraph 14.

⁸ *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection, re: Town of Olds* (March 12, 1999) E.A.B. Appeal No. 98-250-D (“*O'Neill*”).

⁹ *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection, re: Town of Olds* (March 12, 1999) E.A.B. Appeal No. 98-250-D, at paragraph 14.

¹⁰ *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment, re: EcoAg Initiatives Inc.* (06 January 2011), Appeal Nos. 09-006, 016, 017 & 019-ID1 (A.E.A.B.).

“Filing a Statement of Concern reserves the filer’s right to appeal, but it also provides the filer with the opportunity to bring concerns forward early in the application process. The Director takes these valid concerns into consideration and can incorporate terms and conditions in the approval to address the concerns. Statements of Concern also notify the proponent of the project of these concerns, allowing the proponent the opportunity to mitigate the concerns. Filing a Statement of Concern also balances the interests of those involved, because it provides notice to the Director and project proponent of the concerns early in the process, rather than waiting until the approval is issued and bringing the concerns forward for the first time in an appeal.”¹¹

[72] Without filing a Statement of Concern as required under the *Water Act*, the Board cannot consider the appeal as valid, unless extenuating circumstances prevented the Statement of Concern being filed.

1. Fish Creek Watershed Group

[73] The FCWG filed a Statement of Concern, but only two of its members were identified, Dr. Swann and Mr. Osborne. The Director had no way of identifying the other members and no way of determining their location with respect to the proposed project, in particular the point of diversion, to be able to assess whether they would be directly affected by his decision to issue the Licence. Without some indication of who the members were and how they would be directly affected by the Director’s decision, the Director could not determine if the Statement of Concern was valid with respect to the individual members.

[74] A Statement of Concern must provide sufficient information for the Director to understand the concerns being presented and how the Statement of Concern filer would be impacted. The Statement of Concern filed by the FCWG did not provide any details as to who, or how, the individual members would be impacted. No names of members were provided, so the Director would be unable to contact the individuals to seek out additional information if needed. Respectfully, the Statement of Concern filed by the FCWG did not serve the purpose it was intended to serve.

¹¹ *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment, re: EcoAg Initiatives Inc.* (06 January 2011), Appeal Nos. 09-006, 016, 017 & 019-ID1 (A.E.A.B.), at paragraph 20.

[75] Filing a Statement of Concern is an important part of the application process. It provides the Director additional information regarding any potential concerns before issuing a licence. It also provides those who have a concern to bring them forward early in the application process in order for those concerns to be addressed by the applicant prior to the licence being issued, or to have them addressed in the terms and conditions in the licence. It would be unfair to decide not to submit a Statement of Concern and then chose to appeal to the Board after the Director issues the decision.

[76] The FCWG members did not demonstrate there were any extenuating circumstances that prevented them from filing a Statement of Concern. Not being able to contact the individual members does not meet the extenuating circumstances suggested in *O'Neill* that would warrant the Board accepting the Notices of Appeal without the prerequisite Statements of Concern.

[77] The Board finds none of the FCWG members who filed Notices of Appeal filed a valid Statement of Concern with the Director as part of the application process. The FCWG members who filed Notices of Appeal did not meet the threshold set in *O'Neill* for the Board to accept the appeals without valid Statements of Concern.

[78] Therefore, the Board dismisses the appeals filed by the members of the Fish Creek Watershed Group.

2. Foothills Land Trust

[79] The Foothills Land Trust acknowledged it did not file a Statement of Concern. The Foothills Land Trust did not provide any exceptional circumstances that prevented it from filing a Statement of Concern. It was aware of the proposed project and had met with the Licence Holder but did not ask for further details regarding water sources. The Foothills Land Trust said it was unaware the Licence Holder intended to divert water from Fish Creek and anticipated groundwater would be used for the project.

[80] Failure to understand the project does not demonstrate extenuating or exceptional circumstances which would fall into those contemplated by *O'Neill*.

[81] The Foothills Land Trust did not file a Statement of Concern, which is a prerequisite to filing a valid Notice of Appeal. Therefore, the Board dismisses the appeal of the Foothills Land Trust.

[82] As the appeal is not validly before the Board, the matter of when the Notice of Appeal was filed is moot.

B. Directly Affected

[83] It is important to note the signatories to the Statement of Concern, Dr. Swann and Mr. Osborne, did not file Notices of Appeal on their own behalf, and they did not file a Notice of Appeal on behalf of the Fish Creek Watershed Group.

[84] The Director did not accept Dr. Swann as being directly affected, but this did not prevent Dr. Swann from submitting a Notice of Appeal. Although Mr. Osborne also signed the Statement of Concern, the Director did not appear to have made a determination regarding Mr. Osborne's directly affected status. Mr. Osborne could also have filed a Notice of Appeal on his own behalf. The Board could then have determined if either Dr. Swann or Mr. Osborne was directly affected. The Director's decision of who is directly affected is not binding on the Board's determination of who is directly affected since the Board receives additional information through a submission process before making a determination of whether an appellant is directly affected.

[85] The Licence Holder argued the FCWG could not appeal because it was not a registered entity. An organization can represent an appellant in an appeal, but the individual members must be able to show how they are personally directly affected. An organization, even an unregistered organization, can also be found directly affected if it can demonstrate it has a tangible interest that can be directly affected, such as ownership of land or legal use of lands.

[86] The FCWG did not file a Notice of Appeal even though the Statement of Concern was filed on behalf of the FCWG. If it had filed a Notice of Appeal, the Board would have reviewed submissions from the Participants to determine if the FCWG was directly affected.

[87] As Dr. Swann, Mr. Osborne, and the FCWG did not file Notices of Appeal, the Board cannot assess their directly affected status. In addition, the Appellants who filed Notices

of Appeal did not file Statements of Concern, and the appeals were dismissed. Therefore, the Board will not determine the directly affected status of the Appellants.

IV. DECISION

[88] The Board dismisses Appeal Nos. 19-112 to 19-122 and 20-001, filed by Ms. Mary Jane Corrigan and Mr. Tristen Reiss, Mr. Wayne and Ms. Carmen Heinen, Ms. Lisa Huhn, Mr. Glen and Ms. Cindy Kerunsky, Mr. Jamie and Ms. Lindsey Kindrat, Mr. Jope and Ms. Karen Langejans, Ms. Judy Sproule, Mr. Jeff Williamson, Ms. Barb Wright, AgriTeam Canada Consulting Ltd., Teen Challenge Canada Inc., and Foothills Land Trust as no Statements of Concern were filed with the Director. No extenuating circumstances were provided to warrant the Board accepting the appeals without the prerequisite filing of a Statement of Concern.

[89] As none of the Appellants filed valid Notices of Appeal, the Board did not assess whether any of the Appellants were directly affected.

Dated on February 25, 2022, at Edmonton, Alberta.

“original signed by”
Meg Barker
Acting Board Chair