
ALBERTA
ENVIRONMENTAL APPEALS BOARD

DECISION

Date of Decision – November 2, 2021

IN THE MATTER OF sections 91, 92, 93, 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 Bob Fedyna and Desmond McClure with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 5041876 to Shaun Larsen.

Cite as: *Fedyna and McClure v. Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Park*, re: Larsen (2 November 2021), Appeal Nos. 20-006 and 008-ID1 (A.E.A.B.), 2021 ABEAB 28.

BEFORE:

Ms. Meg Barker, Acting Board Chair.

SUBMISSIONS BY:

Appellants:

Mr. Bob Fedyna; and Mr. Desmond McClure.

Approval Holder:

Mr. Shaun Larsen.

Director:

Mr. Muhammad Aziz, Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, represented by Mr. Paul Maas, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an approval under the *Water Act* to Mr. Shaun Larsen (the Approval Holder) allowing the construction of a diversion ditch for the purpose of flood control at SE-23-58-21-W4M, near Redwater, Alberta (the Approval).

Mr. Bob Fedyna and Mr. Desmond McClure (the Appellants) filed appeals of the Approval on June 8, 2020, and June 30, 2020, respectively, with the Environmental Appeals Board (the Board).

As the appeals were filed outside the seven-day time limit provided in the *Water Act*, the Board requested the Appellants provide reasons why the appeals were filed late and why an extension of time to appeal should be granted.

The Board extends the time to file an appeal only in exceptional circumstances. Following a review of the submissions provided by the Appellants, the Approval Holder, and AEP, the Board found the Appellants demonstrated extenuating circumstances existed that prevented them from filing their Notices of Appeal in time.

Notice of the application was not provided due to a clerical error during the application process, and AEP waived the requirement for notice of the application after the Approval was issued. Notice of the decision was posted on the Alberta Environment and Parks Public Notices Viewer after the Approval was issued. Given the potential impacts of the proposed project, waiving notice of the application was not appropriate in the circumstances.

The Board, therefore, accepted the requests to extend the appeal period after the legislated time limit had expired. The Board accepted the Notices of Appeal.

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I. BACKGROUND

[1] On December 5, 2019, the Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (the “Director”) issued Approval No. 5041876 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Mr. Shaun Larsen (the “Approval Holder”). The Approval allowed the Approval Holder to change the location of water for the purposes of drainage, flood control, erosion control, or channel, and to construct a diversion ditch for the purpose of flood control at SE-23-58-21-W4M (“the Activity”), near Redwater, Alberta.

[2] On June 8, 2020, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Bob Fedyna appealing the issuance of the Approval.

[3] On June 10, 2020, the Board wrote to Mr. Fedyna, the Director, and the Approval Holder acknowledging receipt of the Notice of Appeal. The Board noted that, under section 116(1)(a)(ii) of the *Water Act*, a Notice of Appeal of an approval must be submitted to the Board not later than seven days after receipt of notice of the decision being appealed or the last provision of notice of the decision. Under section 116(2) of the *Water Act*, the Board may extend this time period if it is of the opinion there are sufficient grounds to do so. The appeal was filed past the legislated timeframe. The Board asked Mr. Fedyna to provide reasons why the appeal was filed late and why the Board should consider extending the appeal period.

[4] On June 19, 2020, Mr. Fedyna provided additional information to explain why his appeal was filed outside the seven-day time limit.

[5] On June 24, 2020, the Board acknowledged receipt of Mr. Fedyna's reasons for filing the appeal late and set a process for receiving response submissions from the Approval Holder and Director. The Board asked the Director to provide an abbreviated record, including the Statement of Concern (if applicable), the response, the letter to the proponent directing how notice was to be given, and confirmation the Approval Holder undertook those directions (the “Record”).

[6] On June 30, 2020, the Board received a Notice of Appeal from Mr. Desmond McClure. The Board acknowledged receipt of the Notice of Appeal and notified the Approval Holder and Director of the appeal. Mr. McClure was asked to provide the Board with any further information as to why the appeal was filed outside of the seven-day time limit, and indicate any reasons why the Board should grant an extension of time to appeal.

[7] On July 8, 2020, Mr. McClure provided additional information to explain why his appeal was filed outside the seven-day time limit.

[8] On July 10, 2020, the Director provided the Record, and the Board provided copies to Mr. Fedyna, Mr. McClure, the Approval Holder, and the Director (collectively, the "Parties") on July 13, 2020.

[9] On July 16, 2020, the Board received the Director's response submission to the issue on whether the appeals of Mr. Fedyna and Mr. McClure (collectively, the "Appellants") were filed late.

[10] On July 17, 2020, the Board received the Approval Holder's response submission. In his submission, the Approval Holder raised preliminary motions that: (a) the appeals had no merit; (b) the Appellants were not directly affected by the Approval; and (c) the Appellants had not filed statements of concern. The Board notified the Parties the preliminary motions were being held in abeyance pending the outcome of the Appellants' applications for an extension of the appeal period.

[11] On August 6, 2020, the Board received Mr. Fedyna's rebuttal submission. Mr. McClure provided his rebuttal submission on August 7, 2020.

[12] On August 24, 2020, the Board notified the Parties that, after reviewing the submissions of the Parties, the Board granted the requests to extend the time to appeal and accepted the appeals as filed on time, and reasons would be provided at a later date. These are the Board's reasons.

II. SUBMISSIONS

A. Appellants

1. Mr. Fedyna

[13] Mr. Fedyna stated the Approval Holder started ditching prior to the Approval being issued. Mr. Fedyna said the Approval application was not discussed with downstream landowners and no advertisement was published in the papers advising of the Approval. Mr. Fedyna noted the Approval requires the ditch to match the depth of the existing culvert, but this was not followed since the ditch and culvert are significantly larger than the existing culvert.

[14] Mr. Fedyna noted the Approval was issued December 5, 2019, but he questioned the timeline. Mr. Fedyna said he spoke to Alberta Environment and Parks (“AEP”) regarding the Approval Holder’s ditching and the loss of 35 acres of canola that was ready to swath. Mr. Fedyna argued the Approval was issued after the ditch was completed.

[15] Mr. Fedyna commented the Approval Holder said he was concerned about flooding in his yard, impacting agricultural and residential buildings during the spring melt and heavy summer rain. Mr. Fedyna stated that did not seem possible as the Approval Holder hauled in clay in previous years.

[16] Mr. Fedyna stated his farm was flooded within two hours every time it rained, and he lost approximately 35 acres of crop a year, for the past three years. Mr. Fedyna said the ditch caused significant damage to his property, and this year, 50 acres of seeded crop were flooded out. Mr. Fedyna stated the roads and culverts have been washed out since the new flow pattern was created. He said the ditch was built before the Approval was given and is about 20 feet wide and very deep. Mr. Fedyna further stated he is unable to access part of his farmland as a result of the ditch.

[17] Mr. Fedyna stated the Approval Holder, along with neighbouring landowners, ditched and diverted water flow from secondary Highway 829 from the west toward the properties in the east. Mr. Fedyna stated the Approval Holder dug along his fence line to divert the water flow, and this caused the culverts and road to wash away.

[18] Mr. Fedyna stated that as a result of the Approval Holder draining sloughs, the Approval Holder gained additional acres to farm, while many others are negatively impacted, the environment has been altered, and many landowners have suffered loss of previous high quality land.

[19] Mr. Fedyna stated it would be appropriate to rescind the Approval and restore the water flow path to its original state.

2. Mr. McClure

[20] Mr. McClure stated he did not file an appeal within the seven-day appeal period because he was unaware the Approval had been issued.

[21] Mr. McClure said he had not been consulted, notified, or issued any paperwork. The Appellant stated he did not know about the Approval so there was no way for him to know to file an appeal.

[22] Mr. McClure explained he only learned of the Approval in the spring, once the snow melt ran through the Approval Holder's ditch and settled on Mr. McClure's property.

B. Approval Holder

[23] The Approval Holder stated the Approval was granted in relation to a proposed ditch to divert water flow around the Approval Holder's farm yard, instead of through it.

[24] The Approval Holder stated the preliminary work was completed on the ditch, but it was not finished and not connected to the drainage system on his land.

[25] The Approval Holder stated there was no merit to the appeals contemplated by the Appellants. The appeals claimed the ditch increased the water flow rate to the Appellants' properties, which are downstream from the Approval Holder's land.

[26] The Approval Holder stated the ditch was not functional and remained a trench, unconnected to any dugout, drainage undertaking, or other ditching project. The Approval

Holder stated aerial drone footage¹ showed standing water in the ditch, indicating the ditch had not resulted in a diversion of water around the property. The Approval Holder argued this meant the claims made in the Notices of Appeal that the Appellants' properties being flooded as a result of the ditch, were currently not possible.

[27] The Approval Holder argued the Appellants were not directly affected by the ditch. The scope of the Activity was to divert existing water flow around the yard instead of through it. No contouring or drainage had been conducted to the Approval Holder's land that could increase water flow from the Approval Holder's property to the Appellants' properties.

[28] The Approval Holder argued the ditch could not result in any meaningful increase in water flow to the Appellants' properties now or at any point in the future and, therefore, the Appellants are not directly affected by the Approval.

[29] To the best of the Approval Holder's knowledge, the Appellants did not file a Statement of Concern regarding the Approval.

[30] The Approval Holder stated that, although the Appellants are neighbours, the Appellants had not, prior to the date of the appeals, visited the property to observe the ditch, written, or called about the ditch. If the Appellants had done so, it would have been obvious the intent of the ditch was to reroute existing water. The Approval Holder explained the ditch was not a part of a drainage plan conducted by the Approval Holder in conjunction with others as alleged by the Appellants.

[31] The Approval Holder stated Thorhild County was in a state of agricultural emergency due to extreme flooding in 2020. The Approval Holder, along with the Appellants and their neighbours, lost a significant portion of arable land due to flooding. The Approval Holder noted more than 30 county roads had been closed for portions of the spring and more than 30 culverts had been overloaded.²

[32] The Approval Holder explained the Appellants, along with a neighbour, launched an incident investigation with AEP into unapproved ditching upstream of the Approval Holder's

¹ Aerial Drone Footage, attached as SL-1 to Approval Holder's Response Submissions, July 16, 2020.

² Thorhild County Road Closures Document, June 23, 2020, attached to the Approval Holder's Response

property. The Approval Holder noted the investigation is independent of the Approval and expects the results to prove the Approval is not a contributing factor to the Appellants' downstream water concerns.

[33] The Approval Holder stated the Appellants wanted to extend the appeal period for a project the Appellants were aware of for three years, but they did not approach the Approval Holder to discuss the project. The Approval Holder stated the ditch was not complete, and argued the ditch had not affected the Appellants to date, nor would the ditch affect the Appellants when it is completed and becomes subject to the terms and conditions of the Approval. The Approval Holder objected to any extension of the appeal period.

C. Director

[34] The Director stated that on May 29, 2019, the Approval Holder filed an application under the *Water Act* to alter the direction of the flow of water on the Approval Holder's property by constructing a ditch. According to the application, the spring melt and summer rains caused frequent flooding to agricultural and residential buildings on the property. The purpose of the ditch was to allow water to follow a path around, rather than through, the Approval Holder's yard.

[35] The Director noted the Approval was issued on December 5, 2019, for a 15-year term and, on December 23, 2019, an email was sent to the Approval Holder as the file did not contain proof of public notice. The email indicated proofs of public notice documents were sent to the Approval Holder for posting in July 2019.

[36] The Director stated the Approval Holder replied on January 8, 2020, and requested a copy of the public notice and information about how the public notice documents were sent in July. It was noted the Approval Holder had not received the documents due to a clerical error, and the Director decided to proceed with a Notice of Decision as a result.

[37] The Director explained the Notice of Decision was posted from January 9, 2020, to January 16, 2020 on AEP's Public Notices Viewer.³ The Notice of Decision provided that an appeal must be submitted within seven days. The Director acknowledged the Appellants filed their appeals on June 7, 2020, and June 30, 2020. The Director noted Mr. McClure did not file his Notice of Appeal until June 30, 2020, even though he contacted the Board in early June.

[38] The Director argued public notice of the decision was reasonable and the Appellants still filed their appeals approximately six months after the appeal period ended. In the alternative, the Director argued the Appellants had knowledge of the Approval by April 2020, but did not file appeals for over another month.

[39] The Director argued the Appellants were not prejudiced by there being no notice of the application. The Director noted the Appellants still had an opportunity to appeal the Notice of Decision but filed the appeals past the statutory appeal period, and there were no extenuating circumstances to warrant the extension of the appeal period.

[40] The Director stated the statutory time limit for filing an appeal of an approval under section 116 of the *Water Act* is seven days.⁴ Section 116(1)(a)(ii) provides that a Notice of Appeal must be submitted not later than seven days after receipt of a notice of decision that is appealed from or the last provision of notice of the decision that is appealed from. The Director explained the latter applies when the Director does not know the identity of the directly affected persons and provides or instructs the applicant to provide notice of the decision to the public generally.

[41] The Director stated in this case, the Notice of Decision was posted publicly on the Public Notices Viewer from January 9, 2020, to January 16, 2020. The Director submitted the seven-day appeal period began on January 16, 2020, the final day the Approval was posted.

³ Note: Alberta Environment and Park's Public Notices Viewer is located on the department's website at: <https://avw.alberta.ca/ApprovalViewer.aspx> ("Public Notices Viewer").

⁴ Section 116(1)(a)(ii) of the *Water Act* provides:

"116(1) A notice of appeal must be submitted to the Environmental Appeals Board
(a) not later than 7 days after

...

(ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,".

[42] The Director stated the Appellants did not submit their Notices of Appeal until almost six months after the Notice of Decision was posted on the Public Notices Viewer, well past the statutory time limit.

[43] The Director referenced the Board's previous decision, *Terry's Lease Maintenance v. Director*,⁵ and noted the Board recognized the importance of appeal period deadlines. The Director noted the Board acknowledged the need for certainty in the appeal process which adherence to the statutory timelines provides.

[44] The Director argued that, in the alternative, the Appellants had actual knowledge of the Approval by April 2020, and did not submit Notices of Appeal to the Board until June 7, 2020, and June 30, 2020. The Appellants were aware of the decision for over a month before filing the Notices of Appeal.

[45] The Director referenced the Board's previous decision, *Black Diamond Land & Cattle Company Ltd. v. Director*,⁶ and noted the Board had looked to the date the appellant had actually learned of a decision when determining whether an appeal was filed out of time.

[46] The Director acknowledged that due to a clerical error, notice of the application was not provided to the public. An advertisement, which was supposed to be posted in the Redwater Review, the local newspaper, on July 19, 2019, was not posted as intended, and as a result, public notice of the application was not provided.

[47] The Director stated he had the authority to waive the requirement to publicly post a notice of application under section 108(6) of the *Water Act*.⁷ The Director acknowledged this waiver occurred after the Notice of Decision was issued.

⁵ *Terry's Lease Maintenance Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (03 February 2017), Appeal No. 16-007-D (A.E.A.B.), 2017 AEAB 01.

⁶ *Black Diamond Land & Cattle Company Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: Beglinger* (18 August 2014), Appeal No. 14-002-D (A.E.A.B.).

⁷ Section 108(6) of the *Water Act* provides:

“(6) Notwithstanding subsection (1), if the Director has received an application for an approval, a licence or an amendment of an approval, preliminary certificate or licence or the Director proposes to make an amendment on the Director's own initiative, the Director may waive the notice requirement under subsection (1) if the Director is of the opinion that

[48] The Director explained he has discretion on how the notice of application and Notice of Decision are provided. The Director said he chose to post the notice on the Public Notices Viewer, which is standard practice for posting notice of a decision. The Director noted there is no legislative requirement to post notices in newspapers.

[49] The Director argued the Appellants had not been prejudiced by there being no notice of application, since the Appellants had the opportunity to appeal the Notice of Decision but filed their appeals out of time.

[50] The Director argued the Board should only use its authority to extend an appeal period in extenuating circumstances,⁸ and the Appellants had not met the onus of showing there were extenuating circumstances that warranted extending the appeal period.

[51] The Director noted much of Mr. Fedyna's submission addressed the alleged non-compliance issue of the Approval Holder, but did not provide reasons why the appeal period should be extended. The Director said Mr. Fedyna only stated the Approval Holder did not discuss the application with downstream land owners, did not place any ads in local newspapers, nor advise downstream landowners of the decision.

[52] The Director argued the Appellants did not demonstrate extenuating circumstance that warranted extending the appeal period. The Director argued the Appellants could have appealed within the appeal period but did not.

[53] The Director submitted the appeals should be dismissed for being filed out of time.

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- (a) there is an emergency,
 - (b) the activity or diversion of water specified in the application for the approval or licence or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users, or
 - (c) adequate notice of the subject-matter of the application or the proposed amendment has already been provided or given under this Act or the *Water Resources Act*, RSA 1980 cW-5."

⁸ Director's Response Submissions, July 16, 2020, at page 4, citing *Terry's Lease Maintenance Ltd. v. Director*, at para. 20.

D. Appellants' Rebuttal Submissions

1. Mr. Fedyna

[54] Mr. Fedyna noted the Approval Holder neglected to mention the Approval Holder's neighbours had changed the water flow onto the Approval Holder's farm, which led to the Approval Holder's decision to ditch and divert the excess water to Mr. Fedyna's farm.

[55] Mr. Fedyna stated the ditching had occurred over the previous three years, prior to permits being issued, with no notice, discussion, or advertising of the Approval Holder's intent or identifying effects downstream.

[56] Mr. Fedyna stated the ditch negatively impacted him, his farm, and his neighbours. Before the ditch, there was very little flood damage to crops, but Mr. Fedyna said he lost a substantial amount of crop in each of the last three years.

[57] Mr. Fedyna said he has been a lifelong resident on the family farm and had never seen the extreme amount of water now present on the Approval Holder's property before the Approval Holder's neighbour began his ditching project. Mr. Fedyna stated it was this water that caused the Approval Holder to ditch towards Mr. Fedyna's property.

[58] Mr. Fedyna stated there is an ongoing investigation by AEP into the ditching by the Approval Holder's neighbour. Mr. Fedyna suggested the neighbour's ditching may be the root of the Approval Holder's problem, which in turn is causing Mr. Fedyna's flooding.

[59] Mr. Fedyna stated he was looking for answers to the following questions:

- (a) why did the Approval Holder not advertise in the local papers of his intent to build the ditch prior to obtaining the Approval?
- (b) where is the erosion plan?
- (c) how did he get an Approval to complete this ditching in December 2019, when a formal complaint was registered in September 2019?
- (d) why was the ditch built well before the Approval was issued in December 2019?
- (e) what is the flow rate for the ditch? and

- (f) what action should be taken to solve the erosion and flooding issues on Mr. Fedyna's property as a result of the ditching?⁹

2. Mr. McClure

[60] Mr. McClure argued that, while the ditch may not be functional for the reason the Approval Holder claims it is required, it is functional for catching water diverted onto his land by his neighbour.

[61] Mr. McClure stated that when he spoke to the Approval Holder about the flooding on his land in mid-April, the Approval Holder advised the Appellant the ditch was to prevent his grain yard from flooding due to the ditching directed towards the Approval Holder's property from the Approval Holder's neighbour's property. Mr. McClure stated this reason was not given in the application, where the reasoning states "spring melting and heavy summer rains."¹⁰

[62] Mr. McClure stated that when he opened a file with AEP to investigate the ditching by the Approval Holder's neighbour, the Approval Holder read the information over and provided corrections to the information. Mr. McClure understood the Approval Holder's neighbour had ditched 400 acres of land into the quarter section adjacent to the Approval Holder, and Mr. McClure was told this was done without approval from AEP. Mr. McClure stated the Approval Holder ditched, with approval, just behind the Approval Holder's grain bins to prevent his grain yard and home site from flooding. Mr. McClure stated the Approval Holder did not correct him. The Approval Holder provided maps to Mr. McClure showing the ditching in the neighbour's yard and the subsequent flow of water through the Approval Holder's yard.

[63] Mr. McClure stated, but for the Approval Holder's ditch, the Approval Holder's yard would be flooded with water from the neighbour, as had been the case in the previous two years.

[64] Mr. McClure said the Approval Holder passed the flooding problem from the Approval Holder's neighbour upstream onto Mr. McClure's land. Mr. McClure noted the Approval Holder provided all of the information regarding the neighbour's ditching.

⁹ Mr. Fedyna's Rebuttal Submission, August 6, 2020, at page 2.

¹⁰ Mr. McClure's Rebuttal Submissions, August 7, 2020, at page 1.

[65] Mr. McClure stated the Approval Holder acknowledged witnessing the neighbour ditching and the Approval Holder intended to dam off the water entry points. Mr. McClure stated that when asked why this had not been the first course of action, the Approval Holder responded he did not want to alienate his neighbour, and the ditch diverted the water away from his property.

[66] Mr. McClure noted the Approval Holder did not correct the Appellant's belief that the Approval Holder's attempt to save the Approval Holder's own property directly affects Mr. McClure's property, and were it not for the ditching from the Approval Holder's neighbour, both the Approval Holder and Mr. McClure would have a dry yard.

[67] Mr. McClure said the Approval Holder had previously advised him the neighbour's ditching was the reason for the Approval, yet this was not the reason stated in application for the Approval.

[68] Mr. McClure noted the Approval Holder's SL-1 photograph showed the water erosion path running directly towards the ditch. Mr. McClure stated the same photograph showed the level of erosion cut into the opposite side of the culvert running towards his property and the water coming from the Approval Holder's ditch.¹¹

[69] Mr. McClure said the Approval Holder's ditch was in place in 2018, as shown by a Google Earth image dated August 19, 2018.¹² Mr. McClure noted the application was submitted on May 29, 2019, and the Approval was issued in January 2020. Mr. McClure stated his land began to flood in 2018, and became worse with each successive year.

[70] Mr. McClure noted rain levels for the past eight years had been consistent, with the exception of 2020 and the low levels in 2014 and 2015, and in earlier years, rainfall levels were higher with no flooding. Mr. McClure stated the snow pack had been higher in previous years, yet flooding had not reached the levels it did in 2018, 2019, and 2020.

¹¹ Mr. McClure's Rebuttal Submissions, August 7, 2020, at page 2.

¹² Google Earth Image, dated August 19, 2018, attached to the Appellant's Rebuttal Submissions, August 7, 2020, at page 10.

[71] Mr. McClure stated the Approval Holder acknowledged there was no water flow on his property prior to the Approval Holder's neighbour ditching his property.¹³ The Approval Holder advised Mr. McClure the ditch was to prevent the Approval Holder's grain yard from flooding and allowed Mr. McClure to include this reason in an email sent to the AEP investigator.

[72] Mr. McClure provided a photograph of the ditch full of water and explained it showed the water had spread to the road's ditch, through the culvert, and across the ditch in the field on the east side of Range Road 211, which Mr. McClure described as creating "... a near river" to his home.¹⁴ Mr. McClure described the erosion as substantial and unlike typical runoff.

[73] Mr. McClure stated he was unaware that filing a Statement of Concern was a requirement and neither AEP nor the County, who Mr. McClure had been dealing with regarding this matter, advised filing a Statement of Concern was a requirement. Mr. McClure stated if filing a Statement of Concern was a requirement, he would file one.

[74] Mr. McClure said he spoke to the Approval Holder several times about the ditch prior to filing the appeal, and he had been in contact with the Approval Holder since April 20, 2020, including meeting with the Approval Holder on July 14, 2020, at the Approval Holder's yard to tour the ditch.

[75] Mr. McClure stated he did not travel past the Approval Holder's property, so he had no way of knowing the project was happening, and the Approval Holder did not advise him that he knowingly planned to divert water towards Mr. McClure's home. The Approval Holder did not provide public notice of the proposed ditch, and the Approval Holder explained that, by the time the ditch was approved, it had been worked on for two years.¹⁵

[76] Mr. McClure stated he had been working at home since March 2020 due to the Covid-19 pandemic. He said it was during this time he noticed the water level on his property did not match the water level in years prior to 2018.

¹³ Email from the Approval Holder to Mr. McClure, April 23, 2020, attached to the Appellant's Rebuttal Submissions, August 7, 2020, at page 7.

¹⁴ Mr. McClure's Submissions, August 26, 2020, at page 3.

¹⁵ Mr. McClure's Submissions, August 26, 2020, at page 3.

[77] Mr. McClure stated his complete file was sent to the AEP investigator on April 24, 2020. Mr. McClure said this was a month and a half before Thorhild County received immense rainfall which began on May 28, 2020. Mr. McClure noted the state of local emergency was not declared until June 8, 2020. Mr. McClure explained the flooding on his property predated the rain.

[78] Mr. McClure stated that, while his basement flooding coincided with the heavy rainfall received, a heightened water table from redirected runoff, accelerated flow towards the his property, elevated volume of water flow, and the subsequent increased time water sits on his property before his culverts can drain the additional volume, must be taken into consideration. Every time his property floods and cannot drain the redirected water, it seeps into the ground and raises the water table around his house.

[79] Mr. McClure admitted he learned of the Approval in April when the extent of the flooding became known to him. Mr. McClure stated that, at that time, he was told by a representative of the Board the appeal period for an approval was seven days, which had “long gone.”¹⁶

[80] Mr. McClure stated when he contacted the Board again in June, when his home was flooding, nothing was mentioned of the need to file the appeal in seven days. Mr. McClure said there was no reason to believe time was of the essence in filing an appeal since the seven day appeal period had expired in December 2019. Mr. McClure stated he was sent the appeal form in June 2020.

[81] Mr. McClure stated it took him time to learn all of the information he needed to file the appeal and to gain a complete understanding of the scope of events. Mr. McClure said he filed the appeal as soon as he was able to do so, after mitigating the damage to his home and possessions, and believed it would make no difference as the deadline had already passed.

[82] Regarding extenuating circumstances, Mr. McClure explained he found working from home during the early days of Covid-19 stressful, and during the first two weeks of the

¹⁶ Mr. McClure’s submissions, August 26, 2020, at page 4.

flooding, he had to dedicate time to prevent further damage to his property as his insurance provider did not cover water table related claims.

[83] Mr. McClure stated water started entering the basement of his home on June 6, 2020, and stopped seeping on July 28, 2020. He stated the appeal was not filed on June 8, 2020, because he was overwhelmed with water flowing into his home. Mr. McClure said since the appeal was already late, the priority was to protect his home and property.

[84] Mr. McClure argued the approval process was flawed. Mr. McClure submitted redirection of water should not be allowed without explicit approval from all of the affected landowners downstream, including homeowners that live in the affected area.

[85] Mr. McClure noted it was acknowledged in the documents provided that the ditch was approved without public knowledge and without any notice being placed in the newspaper giving notice. Mr. McClure noted this was apparently a requirement, which was not done, and yet the Approval was granted.

[86] Mr. McClure argued a notice posted on a website that a regular layperson would never have reason to regularly visit should not constitute public knowledge. Mr. McClure stated he has been unable to locate the Approval on the Public Notices Viewer, even though he has searched for it.

[87] Mr. McClure said there were numerous suggestions made during the application process that were not considered, and he argued an environmental engineer must, at minimum, give approval for the ditch.

[88] Mr. McClure noted an AEP staff member cited a concern about the length of the Approval being more than 15 years. Mr. McClure argued that, by default, the term of the Approval should be shorter. Mr. McClure argued that, given the rapid changes in climate and landscape and the nature of the project, the Approval should be for a much shorter term, one year, with further approvals if a project of this nature was to remain.

[89] Mr. McClure stated the reasons the Approval Holder used to obtain the Approval were not the same reasons the Approval Holder provided to Mr. McClure. Mr. McClure said the Approval Holder had already completed the ditch to its current state prior to applying for the

Approval. Mr. McClure stated that, given the Approval Holder was able to acquire the Approval despite there being inconsistencies, suggested a lack of due diligence by the Director.

[90] Mr. McClure asked why the ditch was incomplete and non-functional for three years given the Approval Holder applied for the Approval to reroute water that was purportedly running through and flooding the Approval Holder's yard. Mr. McClure believed if that was the case, it would be a priority to the Approval Holder to complete the ditch. Mr. McClure stated the ditch was, in fact, functional and protecting the Approval Holder's yard from the neighbour's diverted runoff, as the Approval Holder had previously advised Mr. McClure.

[91] In Mr. McClure's opinion, the Approval Holder stating that his water flow was not altered or enhanced does not make it so.

[92] Mr. McClure requested a decision not be made on the appeal until the report by the AEP investigator was supplied and taken into consideration.

[93] Mr. McClure stated the ditch was in place prior to the application for the Approval and the subsequent issuance of the Approval. Mr. McClure stated that if he had known of the application, he would have taken issue with the application. The Appellant requested due diligence be given to the matter.

III. ANALYSIS

[94] In considering the Appellants' requests for a time extension to file their Notices of Appeal, the Board refers to sections 116(1)(a)(ii) and 116(2) of the *Water Act*. These sections provide that:

- “(1) A notice of appeal must be submitted to the Environmental Appeals Board
 - (a) not later than 7 days after
 - ...
 - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,
- (2) The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1) extend that

period, if the Board is of the opinion that there are sufficient grounds to do so.”

[95] The legislation provides the Board with the ability to extend the appeal period. If a reasonable request providing suitable grounds is submitted to the Board, and providing it does not negatively impact the other parties or the environment, the Board has the authority under the legislation to extend the appeal period to file a Notice of Appeal.

[96] The Board is generally reluctant to allow extensions to file a Notice of Appeal except under special or exceptional circumstances, which the person requesting the extension must demonstrate.¹⁷ The Board commonly dismisses appeals that have been filed late where the person requesting the extension cannot provide sufficient reasons to justify allowing an extension of the appeal period.¹⁸

[97] The *Water Act* requires a Notice of Appeal with respect to an approval to be filed no later than seven days after receipt of notice of the decision being appealed or the last provision of notice of the decision.

[98] The issue before the Board is whether there are sufficient grounds to cause it to exercise its discretion under section 116(2) to extend the seven-day period for the Notices of Appeal filed with respect to the Approval.

[99] Based on the evidence, the Director posted notice of the decision between January 9 and January 16, 2020, on AEP's Public Notices Viewer, which complies with the notice provisions in the regulations.¹⁹ The appeal period for the Approval expired on January 24, 2020.

¹⁷ See: *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection re: Town of Olds* (12 March 1999), Appeal No. 98-250-D (A.E.A.B.).

¹⁸ See: *Terry's Lease Maintenance Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, (03 February 2017), Appeal No. 16-007-D (A.E.A.B.); *Valleau v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Town of Wainwright* (19 September 2016), Appeal No. 16-009-ID1 (A.E.A.B.); *Biggart v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.); *Smulski v. Director, Northern Region, Regional Services, Alberta Environment re: Agrium Products Inc.* (18 March 2005), Appeal No. 04-073-D (A.E.A.B.).

¹⁹ *Water (Ministerial) Regulation*, Alta. Reg. 205/1998 at Section 13(1) provides:

“13(1) For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:

(a) notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the

The Appellants' Notices of Appeal were not filed until June 8 and June 30, 2020, almost six months after the appeal period ended.

[100] Review of the information in the Parties' submissions indicates the Appellants were aware of the Approval Holder's ditching activity as early as September 2019, having made a complaint to AEP. However, none of the Parties suggested the Appellants were aware of the Approval Holder's application for an Approval, and neither the Approval Holder nor the Director notified the Appellants of the application for the ditch.

[101] Not having received notice of the application for the Approval and unaware of the posting of the Notice of Decision, the Appellants were similarly unaware of the Approval having been issued. As the Appellants did not know the Approval was issued, they did not know of the time limit to file an appeal with the Board.

[102] Mr. McClure stated he became aware of the Approval in April, but as he was preoccupied with protecting his home and property from flooding, he did not see the urgency in filing an appeal that was already late. It is important to note that, even if the appeal was filed late, if the appellant can show extenuating circumstances, the Board can extend the appeal period, within reason.

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- activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (b) provide notice of the application, decision or order through a registry established by the Government for that purpose;
 - (c) provide notice of the application, decision or order through a telecommunication system or electronic medium;
 - (d) publish notice of the application, decision or order in The Alberta Gazette;
 - (e) make available a copy of the application, decision or order in one or more branch offices of the Department in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
 - (f) provide notice of the application, decision or order, in the form and manner and within the time period specified by the Director, to
 - (i) any persons determined by the Director, and
 - (ii) the local authority of the municipality in which the land on which the activity, diversion of water or operation of a works is located;
 - (g) provide notice in any other form and manner considered appropriate by the Director."

[103] The Board acknowledges the appeal process is intended to balance the rights of those obtaining approvals under the *Water Act* with those challenging a decision to grant an approval. Statutory time limits are an integral part of this balance, and the Board will only extend a time limit if it is satisfied there is a good reason or special circumstances for such an extension.

[104] The Board notes the Director initially required the Approval Holder to provide notice of the application. Due to a clerical error, the advertisement, which was supposed to be posted in the Redwater Review, the local newspaper, on July 19, 2019, was not posted as intended and, as a result, public notice of the application was not provided.

[105] The Board further notes the Director acknowledged he changed his mind and decided, after the Notice of Decision was posted on the Public Notices Viewer, to waive the requirement for public notice of the application. It is clear the Director was attempting to correct an administrative flaw in the application process, unfortunately to the detriment of the Appellants and others in the vicinity of the Activity.

[106] The Director referenced *Black Diamond Land & Cattle Company Ltd. v. Director*²⁰ in arguing the Board had previously looked to the date the appellant had actually learned of a decision when determining whether an appeal was filed out of time. The Board notes, in that appeal, there was no public notice of the application posted, but the notice of decision was posted via three different means: on AEP's website, on the Municipal District's bulletin board, and posted on the project site. In contrast, in this case, there was no public notice of the application posted, and the Notice of Decision was only posted on AEP's Public Notices Viewer. There was no evidence of posting the Notice of Decision on the project site, in the local newspaper or other publicly accessible medium, or in the county office.

[107] The effect of not having published notice of the application was to deprive the Appellants the opportunity to obtain more information about the proposed Activity and to raise their concerns regarding the proposed Activity during the application process. Additionally,

²⁰ *Black Diamond Land & Cattle Company Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: Beglinger* (18 August 2014), Appeal No. 14-002-D (A.E.A.B.).

without notice of a pending application, the Appellants would not have known to watch for a Notice of Decision on the Public Notices Viewer or how to appeal the decision to issue the Approval.

[108] Given the potential impacts of the proposed Activity, the decision to proceed by way of Notice of Decision was not appropriate in the circumstances.

[109] Based on the information before the Board, there are extenuating circumstances to provide sufficient grounds for the Board to extend the period for filing the Notices of Appeal.

IV. DECISION

[110] Upon review of the legislation and the written submissions from the Parties, the Board finds there are sufficient grounds to warrant an extension of the statutory appeal period. Therefore, the Appellants' request to grant an extension to the legislated time limit to file an appeal of the Approval is granted.

[111] The Appellants' appeals are accepted as being filed on time.

Dated on November 2, 2021, at Edmonton, Alberta.

"original signed by"

Meg Barker
Acting Board Chair