

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – February 24, 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 Bill Bogdan with respect to *Water Act* Approval No. 00389282-00-00 and *Water Act* Licence No. 00389719-00-00 issued to William and Audrey Trenchuk by the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks.

Cite as: *Bogdan v. Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Trenchuk* (24 February 2022), Appeal Nos. 20-023-024-D (A.E.A.B.), 2022 ABEAB 10.

**BEFORE:**

Ms. Meg Barker, Acting Board Chair.\*

**SUBMISSIONS BY:**

**Appellant:**

Mr. Bill Bogdan.

**Approval/Licence Holders:**

Mr. William and Ms. Audrey Trenchuk,  
represented by Mr. Sean Parker, McLennan  
Ross LLP.

**Director:**

Mr. Muhammad Aziz, Director, Red Deer-  
North Saskatchewan Region, Regulatory  
Assurance Division, Alberta Environment and  
Parks.

\* At the time the decision was made, Ms. Meg Barker  
was Acting Board Chair.

## **EXECUTIVE SUMMARY**

Alberta Environment and Parks (AEP) issued an Approval and a Licence under the *Water Act* to Mr. William and Ms. Audrey Trenchuk (Trenchuks) to construct a dugout and to operate works and divert up to 61,234 cubic metres of water annually for agricultural feedlot stockwatering.

Mr. Bill Bogdan appealed the issuance of the Approval and Licence.

The Trenchuks argued Mr. Bogdan was not directly affected by the issuance of the Approval nor the Licence.

The Trenchuks provided a third-party report that assessed the local drainage patterns in the area of the proposed dugout, which found the drainage pattern changes resulting from the Approval and Licence would not significantly impact water flow to Mr. Bogdan's property. Mr. Bogdan, whose property was more than four kilometres from the proposed dugout, did not provide any evidence to show how the construction of the dugout and diversion of water would impact him and his water needs.

Based on the submissions provided, the Board found Mr. Bogdan was not directly affected and the appeals were dismissed.

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## **I. BACKGROUND**

[1] On August 20, 2020, the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance, Alberta Environment and Parks (the “Director”), issued Approval No. 00389282-00-00 (the “Approval”) and Licence No. 00389719-00-00 (the “Licence”) to Mr. William and Ms. Audrey Trenchuk (the “Approval Holders”). The Approval and Licence were issued under the *Water Act*, R.S.A. 2000, c. W-3. The Approval allows for the construction of a dugout (“Dugout #3”) for the purpose of agricultural feedlot stockwatering. The Licence grants the Approval Holders the right to operate a works and divert up to 61,234 cubic metres of water per year from the source of water for the purpose of agricultural feedlot stockwatering.

[2] On September 10, 2020, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Bill Bogdan (the “Appellant”) appealing the issuance of the Approval and Licence.

[3] On September 16, 2020, the Board acknowledged receipt of the appeals and requested the Director provide all documents and electronic media that were available to him, including policy documents, when making his decision to issue the Approval and Licence (the “Record”). The Board received a copy of the Record on December 8, 2020, and copies were provided to the Appellant and Approval Holders on December 14, 2020.

[4] On May 10, 2021, the Board acknowledged the Approval Holders’ letter in which they questioned whether the Appellant was directly affected by the Approval and Licence. The Board provided the Appellant, Approval Holders, and Director (collectively, the “Participants”) with the schedule to receive written submissions on whether the Appellant was directly affected. In response to the Director’s request to be given the opportunity to respond to the submissions from the Appellant and the Approval Holders, the Board provided a revised schedule on May 20, 2021.

[5] The Participants provided their initial written submissions on June 9 and 10, 2021. On June 11, 2021, the Approval Holders provided a copy of a report prepared for them by Advisian Consultants (the “Advisian Report”) regarding the proposed dugout.

[6] The Participants provided their response submissions between June 29 and July 8, 2021.

## **II. SUBMISSIONS**

### **A. Appellant**

[7] The Appellant stated that, given the topography of the area and being downstream of Dugout #3 along White Earth Creek, his agricultural operation is located within the catchment basin of Dugout #3. The Appellant argued the spring melt flow path would be interrupted by Dugout #3, and without the spring freshet in White Earth Creek, his water requirement, and potentially the health of the creek, would be jeopardized.

[8] The Appellant explained that, according to the information provided in the “Smoky Lake Region, Part of the North Saskatchewan River Basin, Parts of Tp 057 to 064, R 11 to 19, W4M, Regional Groundwater Assessment, revised November 1999, completed for Agriculture and Agri-Food Canada”<sup>1</sup> (“Smoky Lake Region Assessment”), his groundwater well would be negatively impacted by the placement of Dugout #3.

[9] The Appellant expressed concern regarding his ability to continue to use the water in the area to fulfill his domestic and agricultural needs. The Appellant questioned whether the Approval Holders had conducted sufficient analysis on the cumulative effects of removing the licenced amount of water from the local watershed while ensuring water was available for him today and the future.

[10] The Appellant explained he does not want the feedlot too close due to water concerns, but he wanted to ensure there was enough water for everybody.

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<sup>1</sup> See: Hydrogeological Consultants Ltd., 1998, Smoky Lake Region Part of the North Saskatchewan River Basin. Parts of Tp 057 to 064, R11 to 19 W4M. Regional Groundwater Assessment. [www.hcl.ca/public/download/documents/11752](http://www.hcl.ca/public/download/documents/11752).

**B. Approval Holders**

[11] The Approval Holders stated the Appellant did not provide any evidence to show he was directly affected by Dugout #3.

[12] The Approval Holders noted the Advisian Report, dated January 17, 2017, clearly demonstrated there was enough water for what they requested, because the water that would be used was snow melt that flows in early spring when the ground is frozen and was not recharge ground water. The Approval Holders explained the amount of water they requested amounted to between 0.0025% and 0.0050% of the annual White Earth Creek flow, a minimal amount that would be undetectable to downstream users.

[13] The Approval Holders said they located Dugout #3 further from the Appellant's property, even though it would now be farther from the feedlot, resulting in more work and increased costs for them.

**C. Director's Initial Submission**

[14] The Director noted the applications for the Approval and Licence were submitted on January 27, 2017. After notice of the applications were published, the Appellant filed Statements of Concern regarding the Approval and Licence. The Director stated a clarification letter was sent asking the Appellant to explain how the proposed project would directly impact him given his residence is approximately 4 kilometres from Dugout #3. The Appellant provided a response to the Director's request.

[15] The Director explained the Appellant's concerns outlined in his Statements of Concern and in the clarification letter were considered when assessing the Approval Holders' applications. The Director determined the Appellant was directly affected since there was a reasonable probability of effects to groundwater and surface water, and the Appellant lived in the geographic vicinity.

[16] The Director noted the Approval Holders requested a reconsideration of his decision on the Statements of Concern. The Director explained he could not reconsider his decision. The Director said that, given the Approval Holders and Appellant could not mitigate

the concerns on their own accord, the Director included conditions in the Approval and Licence to mitigate the relevant concerns expressed by the Appellant.

[17] The Director noted Alberta Environment and Parks' ("AEP") subject matter experts determined the quantity of water requested for Dugout #3 would amount to between 0.0025% and 0.0050% of the annual flow of White Earth Creek, which would have a minimal effect on the creek and would be undetectable to downstream users. The Director said the water used to fill the dugout would come from snowmelt in the spring when the ground is still frozen, and would not be water that results in groundwater recharge. The Director stated the subject matter experts determined that, even though there may be shallow groundwater in the area, significant impacts would not be expected given the proximity of wells and the anticipated evapotranspiration of Dugout #3. The subject matter experts advised installing a monitoring well between Dugout #3 and the nearest groundwater well which, the Director noted, belongs to the Approval Holders.

[18] The Director explained a review of the Statements of Concern resulted in conditions included in the Approval and Licence to address the Appellant's concerns. Specifically, the recommendations included conditions in the Approval that would not allow the construction of Dugout #3 below the water table of the surficial aquifer, thereby mitigating any potential groundwater impacts (conditions 3.4, 3.5, and 3.6 of the Approval). The Licence also included conditions requiring monitoring and reporting of water usage and acknowledgement of complaints (conditions 4 and 5 of the Licence). The Director noted the Appellant was not in the catchment area of Dugout #3, and he was not immediately downstream of the ephemeral creek.

[19] The Director stated there would be minimal impact to the Appellant's water supply source, and the additional condition of not allowing construction below the surficial aquifer water table would eliminate any potential impacts.

#### **D. Appellant's Response Submission**

[20] The Appellant stated the Licence would have an accumulative effect on the aquatic ecosystem and downstream water users in the White Earth Creek system. The Appellant said he is a downstream user of the same water the Approval Holders intend to capture for their

feedlot operations. The Appellant expressed concern regarding the White Earth Creek ecosystem if too many water licences were granted in the same drainage system.

[21] The Appellant stated the water source for Dugout #3 is in the same drainage system from which he draws water, and he is located downstream from Dugout #3. The Appellant expressed concern on how his water supply would be impacted in years with low snowfall. The Appellant said the impact of low runoff was not addressed in the Advisian Report. The Appellant questioned how he would be compensated for the lack of water when he needs it in the future.

[22] The Appellant was concerned with the proximity of Dugout #3 to the existing drainage system. The Appellant believed, in all likelihood, Dugout #3 was interconnected to underground sand and gravel lenses, resulting in Dugout #3 reversing the water from the drainage system into the dugout, keeping water levels high in Dugout #3. The Appellant said the Approval Holders need to prevent reverse drainage into Dugout #3. The Appellant recommended test holes be drilled, and if porous sand lenses are encountered in the floor or walls of Dugout #3, then the dugout should be lined with a plastic liner and capped with clay.

[23] The Appellant stated he does not have an issue with the Licence being granted if there is a justifiable need and it does not affect the environment or others with existing water licences. The Appellant said the Approval Holders have not shown there is a need for the Licence since the licences the Approval Holders currently hold have met their needs.

[24] The Appellant said there has been little information acquired on the site.

#### **E. Approval Holders' Response Submission**

[25] The Approval Holders argued the Appellant did not meet his onus to show he was directly affected by Dugout #3. The Approval Holders explained previously constructed dugouts, which were authorized after a full hearing,<sup>2</sup> were significantly closer to the Appellant's property than Dugout #3.

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<sup>2</sup> See: *Morgan et al. v. Director, Lower Athabasca Region, Alberta Environment and Parks, re: Trenchuk* (14 July 2017), Appeal Nos. 16-010-023-R (A.E.A.B.), 2007 ABEAB 10.

[26] The Approval Holders stated the technical evidence shows the Appellant's water availability and use would not be negatively impacted by Dugout #3, and the conditions in the Approval and Licence further mitigate any potential impacts. The Approval Holders said the Appellant did not provide any information to contradict the Approval Holders' technical evidence nor the Director's subject matter experts. The Approval Holders stated the Appellant offered unsupported, speculative allegations.

[27] In response to the Director's decision to accept the Appellant's Statements of Concern, the Approval Holders noted the Alberta Court of Queen's Bench determined the:

"...the [Statement of Concern] process is non-adversarial information gathering exercise to assist the Director in making a decision that considers the views and concerns of a broad range of parties. In contrast, the Board's process is more adversarial and is more strictly focused on the burden of proof."<sup>3</sup>

[28] The Approval Holders noted the Court of Appeal in the *Normtek*<sup>4</sup> decision found

"... 'directly affected' standing before the Board applies to a limited class of persons where their health, safety or property may be impaired following an immediate and uninterrupted chain of causes and effect. Moreover, the Board has broad discretion to decide who is directly affected by a Director's decision."<sup>5</sup>

[29] The Approval Holders argued the threshold for the "directly affected" test before the Board is higher than what was required before the Director in the Statement of Concern process. The Approval Holders stated the Director accepted the Appellant's Statements of Concern and considered his concerns when issuing the Approval and Licence. The Approval Holders noted the conditions in the Approval limiting the size of Dugout #3 and prohibiting entering the water table, and conditions in the Licence require monitoring and reporting of water usage, indicated the Appellant's concerns were taken into consideration by the Director. The Approval Holders stated the Director found any potential impacts would be minimal and would be eliminated by the Approval conditions.

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<sup>3</sup> Approval Holders' Submission, dated July 8, 2021, at page 3, quoting *Pembina Institute v. Alberta (Environment and Sustainable Resources Development)* 2013 ABQB 567, citing *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment*, re: *Ouellette Packers (2000) Ltd.* (28 January 2002) Appeal No. 01-076-D (A.E.A.B.) at paragraphs 24 and 25.

<sup>4</sup> *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 ("Normtek").

<sup>5</sup> Approval Holders' Submission, dated July 8, 2021, at page 3.

[30] The Approval Holders submitted the Appellant did not meet the onus of displacing the Director's decision to issue the Approval and Licence, and the Appellant did not satisfy the test for standing.

[31] The Approval Holders said the Advisian Report shows the Appellant's property is not in the catchment area of Dugout #3, and the Appellant did not provide any technical information to support his assertion that his property is within the catchment basin of Dugout #3.

[32] In response to the Appellant's claims that Dugout #3 will intercept spring melt flow and negatively impact him and the health of White Earth Creek, the Approval Holders noted the Appellant did not provide any technical information to support the claim, and the Appellant's claims were contrary to the Director's technical experts.

[33] The Approval Holders noted the Appellant did not provide a copy of the Smoky Lake Region Assessment, but after reviewing it online, the Approval Holders found nothing in the assessment that supported the Appellant's statement. The Approval Holders said the assessment is general in nature and was to be only used as a guide.

[34] The Approval Holders explained they hired Advisian to complete a detailed local study to assess the specific dugout at the specific site in order to provide the appropriate expert information to the Director for his review when deciding to issue the Approval and Licence.

[35] The Approval Holders explained that conditions in the Approval were added to address groundwater concerns. Specifically, the Approval Holders noted Dugout #3 will only intercept melt runoff during specified times. The Approval Holders stated Dugout #3 will not have any appreciable effect on groundwater recharge, quantity, or quality. The Approval Holders said the Appellant did not provide any technical information to question the findings in the Advisian Report or the findings of the Director's technical advisors.

[36] The Approval Holders argued technical information shows the Appellant will not be directly affected by the Approval and Licence, and any potential impacts were mitigated by the conditions in the Approval and Licence.

## **F. Director's Response Submission**

[37] The Director provided no further comments in response to the Appellant's and Approval Holders' submissions.

## **III. DIRECTLY AFFECTED**

[38] In order to have a valid appeal before the Board under section 115(1)(i) of the *Water Act*,<sup>6</sup> an appellant must be able to demonstrate they are directly affected by the Director's decision being appealed. The Board has previously considered the term "directly affected" in numerous decisions, providing a framework to determine if an appellant should be given standing before the Board. Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and the decision whether an appellant is directly affected will be governed by the particular circumstances of each case.<sup>7</sup>

[39] The Board has addressed the matter of directly affected in previous decisions based on the directly affected test articulated by the Court of Queen's Bench in *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456 ("Court").<sup>8</sup> However, in *Normtek*, the Court of Appeal considered the meaning and application of the phrase "directly affected" in section 91(1)(a)(i) of EPEA<sup>9</sup> and modified the test. The directly affected test was assessed by the Court

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<sup>6</sup> Section 115(1)(a)(i) of the *Water Act* provides:

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

- (a) if the Director issues or amends an approval, a notice of appeal may be submitted
  - (i) by the approval holder 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,...."

<sup>7</sup> See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

<sup>8</sup> See: *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456 ("Court").

<sup>9</sup> Section 91(1)(a)(i) of EPEA states:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

of Appeal as it applies under EPEA, but section 115(1)(a)(i) of the *Water Act* also requires the appellant to be “directly affected,” and the general principles would apply whether the appeal is made under the *Water Act* or EPEA.

[40] The Court of Appeal modified the Board’s “directly affected” test to require the Board to consider effects beyond an appellant’s use of a “natural resource” by taking into account the effects of the Director’s decision on safety, human-health, or property rights, or any environmental, social, economic, or cultural impacts of the activity if those impacts directly affect the appellant.

[41] The Court of Appeal assessed the meaning of “directly affected” based on the ordinary sense of the words that support the purpose and intent of the legislation.

[42] The Court of Appeal in *Normtek* stated the following on the meaning of “directly:”

“The adverb, ‘directly’ also restricts or limits the effects which can give rise to standing. The *Concise Oxford Dictionary* defines ‘directly’ as meaning ‘in a direct manner’. It defines ‘direct’ as ‘straight, not crooked or roundabout, following an uninterrupted chain of causes and effect’. There also appears to be a temporal aspect to ‘direct’ and ‘directly’. ‘Direct’ is defined as ‘immediate’. And ‘directly’ is defined as ‘at once, without delay.’ It is acknowledged that some types of prospective harm may be too remote or too speculative, but not all will be.”<sup>10</sup>

[43] In *Normtek*, the Court of Appeal approved, at paragraph 79, the Board’s interpretation of “affected” in the Board’s decision in *Bildson v. Alberta (Acting Director, North Eastern Slopes Region)*, (19 October 1998) Appeal No. 98-230-D (A.B.E.A.B.), 1998 ABEAB 42:

“The dictionary employed by the [Board] yielded ‘harmed or impaired’ as one meaning for ‘affected.’ On that basis, the [Board] concluded that an appellant must be harmed or impaired by the activity authorized by the approval being appealed. In other words, the [Board] interpreted ‘affected’ to mean adversely affected. The

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- (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director’s decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)....”

<sup>10</sup> *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 at paragraph 81.

distinction between directly affected and adversely affected arises when others who are directly benefitted by the approval seek standing to support the Director's decision, which is being appealed by a party who is directly and adversely affected. The *Concise Oxford Dictionary* which we consulted similarly defines the adjective 'affected' as 'attacked (as by a disease)' or 'acted upon physically'. It defines the verb 'affect' as 'attack (as disease)' and as 'producing a material effect on'. These meanings are not unlike those found by the [Board] over 20 years ago. And so, we too conclude that, without more, 'directly affected' connotes directly affected in an adverse fashion."

[44] Based on these definitions, the Court of Appeal then looked at how "directly affected" should be applied when determining an appellant's standing before the Board:

"[83] ...What is defined and employed is the term 'adverse effect'. It is defined in s. 1(b) of [EPEA] as the impairment of or damage to the environment, human health, safety, or property. In other words, if one's health, safety or property is potentially impaired by the decision of the Director's approving an activity, that person may be directly affected and therefore have standing to appeal the Director's decision, regardless of whether that person's use or enjoyment of the environment or a natural resource is likely to be impacted....

[85] Section 40 of EPEA also provides some indication of what effects might have been contemplated as causing a person to be directly affected. Section 40 states that the purpose of environmental assessment, among other things, is to predict the environmental, social, economic, and even cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the activity. While the proposed activity in this case was not deemed to have warranted consideration under the formal environmental impact assessment process established under Division 1 of [EPEA] (ss. 40-59), the Director is nevertheless obliged by [EPEA] to consider the environmental, social, economic and cultural consequences, if any, resulting from the proposed activity, as well as issues related to human health. Considerations relevant to the granting of an approval for a designated activity are not confined to impacts on natural resources. Nor are they even confined to impacts on the environment. And so the phrase 'directly affected' could not be limited to impacts on one's use of natural resources. Social, economic, cultural, safety, human health effects, if established, could also ground standing, as could adverse effects on property rights. They are all specifically mentioned in [EPEA]. If the direct effect on the person seeking to appeal a Director's decision is economic, cultural, safety or health-related or is on a property right, then standing to appeal 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 as suggested by the Board and the reviewing court...."<sup>11</sup>

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<sup>11</sup> *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 at paragraphs 83 and 85.

[45] The *Water Act* and EPEA both require an appellant to be “directly affected,” which the Court of Appeal in *Normtek* found implies adversely affected.

[46] Based on the interpretation of “directly affected” and “adverse effect,” the Court of Appeal determined the appellant does not have to show the Director's decision causes harm to a natural resource the appellant uses, but evidence of harm to a natural resource the appellant uses may be good evidence an appellant is directly affected. It is not a necessary prerequisite to establish standing before the Board. If the direct effect on the person seeking to appeal is environmental, social, economic, cultural, safety, or health-related or is on a property right, then standing to appeal may be available whether or not there is any connection to an environmental impact to a natural resource used by the appellant proximate to the site of the approval.

[47] The use of the phrase “directly affected” limits “the class of persons” who can appeal the Director’s decision, but it also provides the Board broad discretion to determine who is directly affected.

[48] On reviewing the directly affected test as articulated by the Court of Appeal in *Normtek*, *Kostuch*,<sup>12</sup> and *Leduc No. 25 v. Local Authorities Board*,<sup>13</sup> the Board finds the “directly affected” test provided in section 115(1)(a)(i) of the *Water Act* and section 91()(a)(i) of EPEA has three basic parts:

- a. whether there is an interest being asserted by the person;
- b. whether there is an adverse impact to the identified interest; and
- c. whether the adverse impact to the interest is direct.

[49] The legal test requires the appellant to demonstrate adverse effects of the Director’s decision on safety, human-health, or property rights, or any environmental, social, economic, or cultural impacts of the activity if those impacts directly affect the appellant. This is not an exhaustive list of rights or interests that could afford an appellant the right to appeal if they can show that right or interest will be affected by the Director’s decision. As stated in

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<sup>12</sup> *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.), 1995 ABEAB 16) (“*Kostuch*”).

<sup>13</sup> See: *Leduc (County No. 25) v. Alberta (Local Authorities Board)* (1987), 84 A.R. 361 (Alta. C.A.).

*Normtek*, the appellant's use of a natural resource, or the right to use the resource, could also be the basis for finding an appellant directly affected.

[50] The second and third parts of the test require the appellant to provide information to show how the appellant's rights or interests will be affected by the Director's decision. Each consideration of directly affected status will be determined on a case-by-case basis, taking into account the varying circumstances and facts of the appeal. The Board cannot determine in advance or limit the circumstances in which an appellant may be found directly affected.

[51] The determination of directly affected status is a preliminary matter that is to be determined prior to a hearing on the merits, if one is held. Under EPEA, the Board's enabling legislation, the Board has no authority to grant "provisional standing" to an appellant. The case law is clear the issue of standing has to be decided first, before the merits can be decided.

[52] Rule 29 of the Board's Rules of Practice explains the onus is on the appellant to prove they are directly affected. Rule 29 states:

"In cases which the Board accepts evidence, any Party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence."

[53] In *Normtek*, the Court of Appeal noted the appellant has the onus to establish they will be directly affected by the Director's decision. When an appellant's standing is challenged, their onus is not to prove conclusively they are directly affected, but to establish a reasonable possibility they will be directly affected by the Director's decision. The effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find a person directly affected.

[54] The Court of Appeal noted the appellant needs to show a "reasonable possibility" they will be directly affected, and each participant to an appeal is required to submit evidence to support their position.

[55] The potential effect on the appellant's interest must be within reason and plausible for the Board to consider it sufficient to grant standing. The effect does not have to be unique in

kind or magnitude.<sup>14</sup> However, the effect the Board is looking for needs to be more than an effect on the public at large. It must be personal and individual in nature and must be more than the generalized interest that all Albertans have in protecting the environment.<sup>15</sup>

[56] When assessing the directly affected status of an appellant, the Board determines how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the possibility of finding the person directly affected.

[57] The Board may dismiss an appeal if the Board is of the view the appellant is not directly affected, but such dismissal can only be made after the Board has considered the submissions from all the participants regarding the appellant's request for standing. The Board will make its determination as to whether an appellant is directly affected after the Board has allowed the appellant, approval or licence holder, and Director to provide submissions. The process will allow appellants to provide evidence on how they will be directly affected by the Director's decision. The approval or licence holder and Director will then be given the opportunity to respond and, as the onus is on appellants to demonstrate they are directly affected, they are given the opportunity to provide a rebuttal submission. The Board will base its decision on whether an appellant is directly affected on the submissions provided by the participants.

[58] The Board must consider the nature and merits of the appellants' appeals as it applies to the specific circumstances.

#### **IV. DISCUSSION**

[59] The Appellant expressed concerns regarding the potential impacts Dugout #3 would have on his use of water on his property and the impacts on White Earth Creek, which runs adjacent to his property. The Appellant's use of a natural resource that could be adversely

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<sup>14</sup> See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

<sup>15</sup> See: *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.)). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

affected by the issuance of the Approval and Licence is sufficient to meet the first part of the directly affected test.

[60] To meet the second step in the directly affected test, the Appellant needs to demonstrate there is a reasonable possibility an interest, in this case his access to water, will be affected. The third part of the test requires the Appellant demonstrate there will be a direct impact on his interest. In this appeal, these two parts are interconnected.

[61] The Board notes that, in this appeal, the Director determined the Appellant to be directly affected when he filed his Statement of Concern.

[62] Under section under section 115(1)(a)(i) of the *Water Act*, two requirements must be met in order to file a valid Notice of Appeal in response to the Director's decision to issue an approval or licence:

1. the person filing the Notice of Appeal must have filed a Statement of Concern; and
2. the person filing the Notice of Appeal must be directly affected.

[63] Under section 109(1)(a) of the *Water Act*, the Director needs to consider if the person filing the Statement of Concern is directly affected. Section 109(1)(a) of the *Water Act* provides:

“If notice is provided (a) under section 108(1), any person who is directly affected by the application or proposed amendment ... may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.”

[64] The Board has noted in previous decisions:

“...the decision-making function of the Director and the appellate function of the Board are different and that in keeping with this, it is appropriate for the Director to apply a more inclusive test with respect to directly affected than is applied by the Board. The purpose of the directly affected test with respect to the Statement of Concern process, and the Director's decision, is to promote good decision-making taking into account a broad range of interests. The process that the Director is engaged in is non-adversarial information collection – he is collecting information

regarding the views and concerns of a broad range of parties to assist him in making a decision....”<sup>16</sup>

[65] The Board considers the Director’s more inclusive approach to directly affected, for the purposes of his decisions, is entirely appropriate. It is to be encouraged and is in keeping with section 2 of the *Water Act*.

[66] The purpose of Statements of Concern and the Director’s decision-making process are reflected in the “Administrative Policy: Statements of Concern (2014).” This policy, established by Alberta Environment and Sustainable Resource Development (now Alberta Environment and Parks (AEP)), states:

“... The purpose of an [Statement of Concern] is to notify the Director and the project proponent of the person’s concerns and to preserve the person’s right to file an appeal following the Director’s decision on the application or proposed amendment....

To be considered an [Statement of Concern], the submission must relate to the application or proposed amendment and must identify specific concerns with the application or proposed amendment.

#### Specific Considerations

Below is a listing of criteria to determine if an [Statement of Concern] should be considered valid.

Directly Affected      The person must demonstrate:

1. The application or proposed amendment will affect the person;
2. The effect will be to the person;
3. The effect will be direct; and
4. There is a reasonable probability of the effect occurring.

...

Considerable judgement needs to be exercised in determining what constitutes a valid [Statement of Concern] and where there is any doubt the submission should be considered an [Statement of Concern]....”

[67] The purpose of the directly affected test before the Board is somewhat different. The Board’s decision respecting directly affected determines whether a person has a right to appeal. As a quasi-judicial body, the Board must follow the Court of Appeal’s decision in

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<sup>16</sup> *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment*, re: *Ouellette Packers (2000) Ltd.* (28 January 2002) Appeal No. 01-076-D (A.E.A.B.) at paragraph 24.

*Normtek* and other court decisions regarding standing. The Board must consider the onus or burden of proof in making its “directly affected” decisions. Also, the Board’s appeal proceedings are more adversarial. Although the Director will usually provide reasons why they accepted a Statement of Concern filer as directly affected, the Board’s determination of directly affected is based on additional information provided by the participants through the submission process as well as taking into consideration the burden of proof in the adversarial role.

[68] The Approval and Licence were issued to allow for the construction of Dugout #3. The Approval Holders retained third party consultants, Advisian, to prepare a technical report on the suitability of the specific site for the proposed dugout. In the Advisian Report, the drainage basin for Dugout #3 was found to be 5.23 km<sup>2</sup>. Dugout #3 is located approximately four kilometres from the Appellant’s property, putting the Appellant’s property outside the catchment area. The Advisian Report indicated the catchment basin for Dugout #3 is different from the catchment basin for the dugouts previously constructed by the Approval Holders and that of the Appellant’s property. (See: Tab A: Drainage Basin for Tentative Dugout #3 from Advisian Report; and Tab B: Annotated Google Maps).

[69] The Appellant referred to the Smoky Lake Region Assessment to support his position, but this assessment was a generalized overview of the area and did not provide detailed information on specific catchment areas.

[70] The Appellant did not provide any evidence to show the conclusions in the Advisian Report may be incorrect. Since it appears the catchment basins for Dugout #3 and the Appellant’s property are different, the construction of Dugout #3 will not likely impact the overland flow to the Appellant’s property.

[71] The Appellant raised concerns regarding the potential impacts Dugout #3 would have on the groundwater. The Board notes the Director included conditions 3.4, 3.5, and 3.6 in the Approval,<sup>17</sup> requiring Dugout #3 be built as to not interfere with groundwater flow. It cannot

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<sup>17</sup> The Approval includes the following conditions:  
“3.4 The Approval Holder shall ensure the size of the dugout will not exceed a capacity of 55,820 cubic meters.  
3.5 The Approval Holder shall not construct the dugout deeper than 5.4 meters below ground surface.

be constructed below the water table of the surficial aquifer. In addition, there was no evidence provided by the Appellant to show how the construction of Dugout #3, as required in the Approval, would directly affect him.

[72] The Appellant also believed the proposed dugout would divert water from groundwater sources, thereby impacting groundwater flows to his property. Given the distance between Dugout #3 and the Appellant's property, any impact on the Appellant is speculative. The Appellant did not provide any information as to actual groundwater flow patterns between Dugout #3 and his property that would support his concerns regarding potential impacts to groundwater flows.

[73] The Appellant expressed concern about potential impacts the diversion of water into Dugout #3 would have on White Earth Creek, which runs through the Approval Holders' lands and past the Appellant's property. The Approval Holders estimated the amount of water diverted to Dugout #3 would amount to between 0.0025% and 0.0050% of White Earth Creek's annual flow and would have a minimal effect on downstream users. The Appellant did not demonstrate how this amount of intercepted water would have any impact on the water flows in White Earth Creek or water flows onto his property.

[74] The Board appreciates the knowledge and concern the Appellant has about water sources in the area, and his efforts to protect the local environment and water resources. However, he has not met the onus of demonstrating he is directly affected by the Director's decision to issue the Approval and Licence, nor how the Approval and Licence would impact the Appellant's access to water.

[75] The Appellant argued that, because he had standing in the appeals of the previous dugouts built by the Approval Holders, he should have standing in this case. One significant difference between the previous appeals and those currently before the Board is the proximity of the previous dugouts to the Appellant's property compared to Dugout #3. The previous dugouts were within the same drainage basin as the Appellant and closer to the Appellant's property than Dugout #3.

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3.6 The Approval Holder shall not construct the dugout below water table of surficial aquifer."

[76] As stated, the test for directly affected requires the Appellant to provide some evidence the effect will be reasonably possible. It cannot be speculative. The Appellant, even though raising issues he considered were relevant, did not provide the information necessary to demonstrate his concerns were more than speculative.

[77] Therefore, the Board dismisses the appeals.

[78] In his Notice of Appeal, the Appellant raised concerns regarding the Approval Holders not complying with the Ministerial Order issued for two previous dugouts constructed nearer the Appellants' property. Any concerns with the previous dugouts do not have any bearing on the Approval and Licence at issue in the current appeals. If there are concerns with non-compliance with the Ministerial Order, a formal complaint can be registered with AEP.

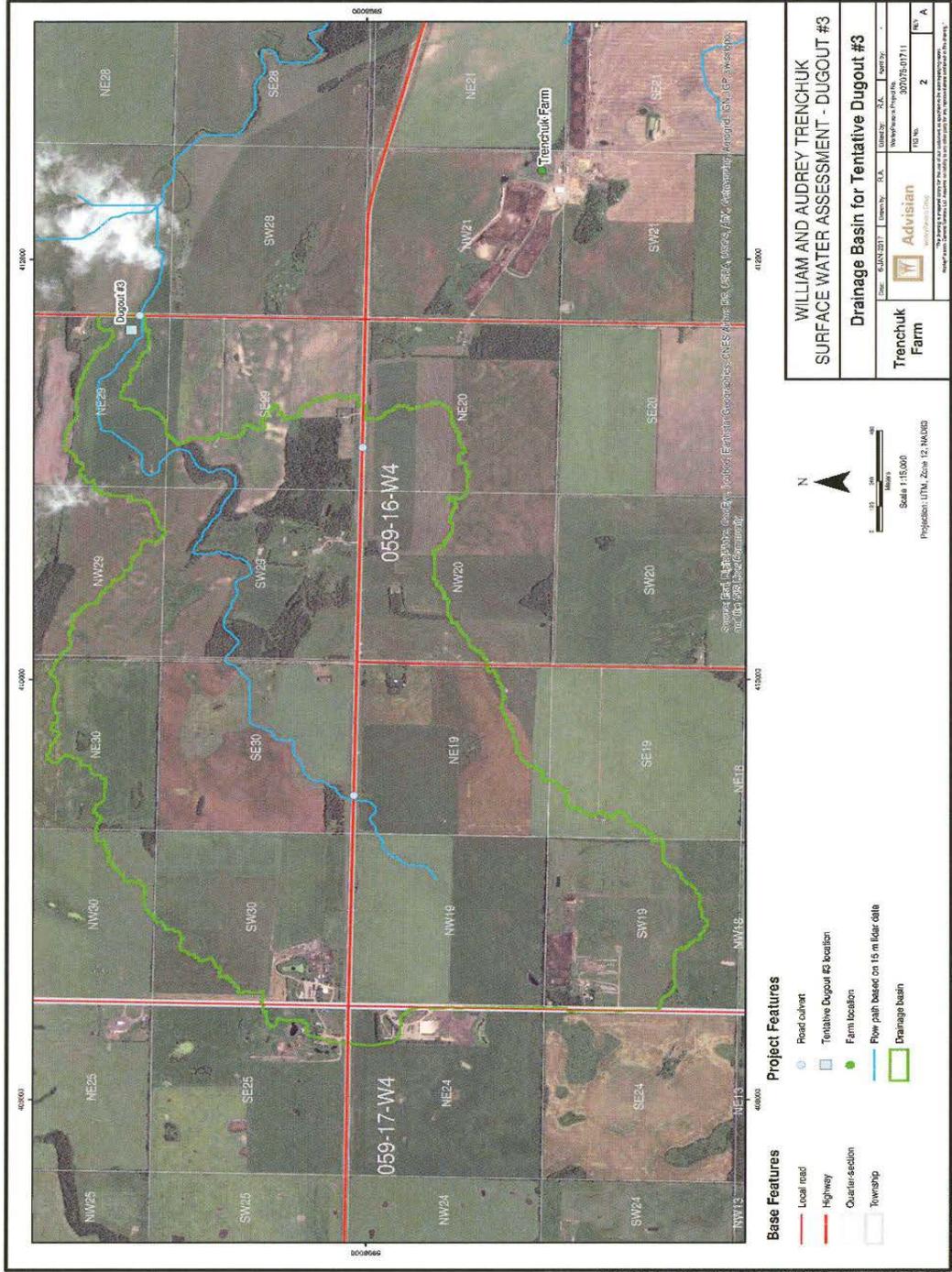
## **V. DECISION**

[79] Based on the submissions and documents provided, the Board dismisses the appeals on the basis the Appellant, Mr. Bill Bogdan, is not directly affected by the Director's decision to issue *Water Act* Approval No. 00389282-00-00 and *Water Act* Licence No. 00389719-00-00.

Dated on February 24, 2022, at Edmonton, Alberta.

"original signed by"  
Meg Barker  
Acting Board Chair

## TAB A: Drainage Basin for Tentative Dugout #3 Advisian Report



**TAB B: Annotated Google Maps**

-06-10, 2:13 PM

Google Maps



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<https://www.google.com/maps/@54.1222916,-112.3343669,52.47m/data=!3m1!1e3>