

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Hearing – November 5, 2004
Date of Report and Recommendations – November 17, 2004

IN THE MATTER OF sections 91, 92, 94 and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Robert, William, Donald and James McCracken with respect to *Water Act* Approval No. 00206965-00-00 issued to Keland Holdings Ltd. by the Director, Northern Region, Regional Services, Alberta Environment.

Cite as: *McCracken v. Director, Northern Region, Regional Services, Alberta Environment re: Keland Holdings Ltd.* (17 November 2004), Appeal No. 04-034-R (A.E.A.B.).

HEARING BEFORE:

Dr. Frederick C. Fisher, Q.C., Chair.

APPEARANCES:

Appellants: Messrs. Robert, William, Donald and James McCracken, represented by Mr. Darryl Carter.*

Approval Holder: Keland Holdings Ltd., represented by Mr. Keith Greschner.

Director: Mr. Gary Sasseville, Director, Northern Region, Regional Services, Alberta Environment, represented by Mr. Jeffrey Moore, Alberta Justice.

Board Staff: Ms. Denise Black, Board Secretary; and Ms. Marian Fluker, Senior Research Officer.

WITNESSES:

Appellants: Messrs. Robert and Donald McCracken.

Approval Holder: Mr. Keith Greschner, Keland Holdings Ltd.

Director: Mr. Gary Sasseville, Director, Northern Region, Regional Services, Alberta Environment; and Mr. Terry Sawchuk, Northern Region, Regional Services, Alberta Environment.

* Messrs. William and James McCracken did not attend the Hearing.

EXECUTIVE SUMMARY

Alberta Environment issued *Water Act* Approval No. 00206965-00-00 to Keland Holdings Ltd. authorizing the development of an agricultural enhancement project, near Manning, Alberta.

The Environmental Appeals Board received a Notice of Appeal from Messrs. Robert, William, James and Donald McCracken, appealing the Approval.

A hearing was held in Grande Prairie, Alberta, on November 5, 2004.

After hearing the evidence and arguments of the parties, the Board did not believe the Appellants would suffer any adverse affects from the works allowed under the Approval, and in fact, the works may reduce the incidence and severity of flooding on the Appellants' lands.

The Board determined the Approval was properly issued, and recommended the Minister confirm the Approval as issued.

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I. BACKGROUND

[1] On June 15, 2004, the Director, Northern Region, Regional Services, Alberta Environment (the “Director”), pursuant to the *Water Act*, R.S.A. 2000, c. W-3, issued Approval No. 00206965-00-00 (the “Approval”) to Keland Holdings Ltd. (the “Approval Holder”) authorizing the development of an agricultural enhancement project near Manning, Alberta.

[2] On July 8, 2004, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Messrs. Robert, William, James, and Donald McCracken, (the “Appellants”) appealing the Approval.

[3] On July 12, 2004, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to this appeal, and the Parties provide available dates for a mediation meeting or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] On July 28, 2004, the Board received a copy of the Record from the Director, and on July 30, 2004, copies were forwarded to the Appellants and the Approval Holder.

[6] On August 16, 2004, the Board wrote to the Parties advising that a mediation Meeting would be held in Manning on August 24, 2004.

[7] On August 19, 2004, the Board wrote to the Parties granting a postponement of the mediation meeting. The Appellants objected to the Director having legal counsel present at the mediation meeting, and the Appellants indicated that they had been advised by legal counsel they had consulted not to sign the Participants’ Agreement to Mediate. The Board granted the postponement to allow the Appellants to retain and instruct legal counsel.

[8] On September 14, 2004, the Board notified the Parties that, upon further review of the file, it had decided to proceed directly to a hearing of the appeal. The Hearing was scheduled for November 5, 2004.

[9] On October 8, 2004, the Board received an intervenor request from the Municipal District of Northern Lights No. 22, as it wished to ensure its interests were protected and no future damages become the responsibility of the municipality. The Board requested comments from the Parties regarding the intervention request. The Board received comments from the Approval Holder on October 15, 2004. No comments were received from the Appellants or the Director.

[10] On October 19, 2004, the Board notified the Parties that it was granting intervenor standing to the Municipal District of Northern Lights No. 22 (the "Intervenor").

[11] On October 18, 2004, the Board received the Parties' submissions for the Hearing.

[12] On October 28, 2004, the Intervenor notified the Board that it was withdrawing its earlier request to intervene.

[13] The Hearing was held on November 5, 2004, in Grande Prairie, Alberta.

II. SUBMISSIONS

A. Appellants

[14] The Appellants stated the application for water diversion was for a drainage project that began four years ago on the E1/2 29-93-21-W5M and N1/2 28-93-21-W5M and includes sections 19, 30, and W1/2 29-93-21-W5M. They questioned why the Approval was given when the majority of the work was done before 2004.

[15] The Appellants raised concern regarding the mapping and surveying of the project. They suggested an independent third party should perform the survey. The Appellants explained that Mr. Terry Sawchuk of Alberta Environment, had stated the Approval Holder would only be flattening the side slopes and straightening some channels, but the survey work

indicates there will be some deepening of the water channels on the N 28-93-21-W5M. The Appellants stated it was their understanding from Mr. Sawchuk's memorandum, the soil from the flattening of the channels would be used to fill and level the land, but they saw the soil being placed on higher ground.¹

[16] The Appellants asked for clarification of what the numbers mean on the drawings provided in the Approval Holder's written submission.

[17] The Appellants stated the Director, in his letter dated May 19, 2004, explained the survey work was to help show that additional water would not be flowing through the culverts under Secondary Highway 741 onto SW 28-93-1-W5M, but the Appellants argued the survey information provided does not do that. The Appellants also stated the Director had mentioned there would be an investigation of the outlets of the project, but the Appellants argued they had not received any information regarding the results of any such investigation.²

B. Approval Holder

[18] The Approval Holder argued the Appellants do not have the right to appeal the Approval since the watercourses have not changed since the Appellants bought the land, and the watercourse have only been maintained as required. The Approval Holder stated the specific work on the N1/2 28-93-21-W5M does not affect the Appellants' land. The Approval Holder explained the water on his land, the N1/2 28-93-21-W5M flows east and north, and the Appellants' land is the S1/2 28-93-21-W5M.

[19] The Approval Holder argued the map included with the Appellants' Notice of Appeal was incorrect, as the water does not run in the directions indicated.

[20] The Approval Holder submitted the appeal should only concern the land locations listed on the Approval.

¹ Appellants' submission, dated October 13, 2004.

² Appellants' submission, dated October 13, 2004.

C. Director

[21] The Director stated the Appellants had filed a Statement of Concern regarding the application, and as a result, he asked for additional information from the Approval Holder.

[22] The Director explained Mr. Terry Sawchuk of Alberta Environment inspected the location of the proposed project, assessed the field conditions, channels and outlets, and requested detailed survey information, and the Approval Holder provided updated survey and design information to him.

[23] The Director stated he wrote to the Appellants, explaining the project, as designed, would have no negative impact on the Appellants' property, and the proposed channeling should help alleviate their concerns regarding excess flows reaching their property from the west.³

[24] The Director stated the application is for an approval, not a licence, and since "...the project involves enhancement of drainage patterns and not use of the water, there is no need for a licence under the *Water Act*."⁴

[25] The Director argued Secondary Highway 741 is the responsibility of Alberta Transportation, and therefore it is not for the Appellants to raise the issue of ditching, it is Alberta Transportation's, and they have not done so. The Director stated he was unable to identify any basis for an objection by Alberta Transportation.

[26] The Director argued the issue of erosion is not an issue for the Appellants to advance, as the drainage allowed under the Approval is not on the Appellants' lands. He stated that given the modest nature of the proposed enhancements, erosion is not a risk. He explained the proposed project is designed to drain the water more effectively, not increase the amount of water flowing.

[27] The Director stated he was satisfied the project will not increase the amount of water flowing onto the S1/2 28-93-21-W5M, and therefore, there should be no delay in seeding crops.

³ Director's submission, dated October 18, 2004.

[28] The Director argued this is not the forum for allegations about past activity, including arguments with respect to ditching being done prior to any licence or agreement being obtained. The Director submitted the relations between the Appellants and the Approval Holder is poor. The Director explained the "...proposed project is such that the Director would not normally expect an application to be made for an approval. The proposed project is a localized farm improvement plan that follows standard practice. In most instances, the proponent negotiates an agreement with any potentially affected party, such as occurred with the Twin Rivers Hutterite Colony."⁵ The Director stated the Approval Holder was unable to reach an agreement with the Appellants, and as "...a consequence, the Director was obliged to impose a settlement."⁶ The Director stated he assessed the potential impacts and determined there would be no negative impacts on the Appellants' property, and the Approval addressed all of the Appellants' relevant concerns.

[29] The Director submitted that the appeal be dismissed.

III. ANALYSIS

[30] The Approval allows for work to be completed on the E1/2 29-93-21-W5M and the N1/2 28-93-21-W5M. The Board will discuss each of these properties separately and will then discuss additional arguments presented by the Parties.

[31] The Appellant expressed concerns regarding the potential flooding of their property as a result of the approved project on the Approval Holder's property. The work allowed under the Approval is classified as an agricultural enhancement project. It involves the establishment of drainage ditches on the Approval Holder's property, specifically on the N1/2 28-93-21-W5M and the E1/2 29-93-21-W5M, to assist the draining of water from these lands. This is a common practice in the area as it allows for an increase in the amount of arable land and the ability to access the lands earlier in the season.

⁴ Director's submission, dated October 18, 2004.

⁵ Director's submission, dated October 18, 2004.

⁶ Director's submission, dated October 18, 2004.

[32] The Appellants' property is to the east and to the south of the Approval Holder's properties identified in the Approval. Secondary Highway 741 runs between the E1/2 29-93-21-W5M and the S1/2 28-93-21-W5M; there are two culverts under the roadway between these properties, and there is an additional culvert to the north, between the E1/2 29-93-21-W5M and N1/2 82-93-21-W5M.

A. E 1/2 29-93-21-W5M

[33] The Director was of the belief the work to be done by the Approval Holder will improve, not complicate the situation for the Appellants. Less water will flow towards the Appellants than previously, as water on section 29 will be directed to the north and then east, reducing the amount of water flowing through the culverts by the Appellants' property.

[34] According to the maps included in the Approval Holder's submission and the air photographs presented as Exhibit 6, the water from the east half of section 29 that perhaps pools on the east side of section 29 along Secondary Highway 741, appears to be localized water from within that section. It does not appear water from sections 19 and 30 contributes to the pooled water.

[35] The Approval Holder's evidence was that no new works have been done on the east half of 29. They have only cleaned and maintained the works done by prior owners.

[36] The Parties disagreed on the direction of the water flow on section 29. The Appellants argued the water flowed east towards their property. The Director and Approval Holder argued the water flows north and then east. Based on the information provided, the Board believes the local movement of water from the east half of section 29 appears to be north and east. The Director verified this movement of water in a site visit and through air photographs.

[37] The Approval Holder and the Director both testified the work that is being done is basically maintaining and cleaning existing channels. The only new work that is being completed is along the ditch along the west side of Secondary Highway 741. Work done on the east half of section 29, maintaining and cleaning the pre-existing ditches, is considered by the

Director to be a farm improvement project and the project itself was minor. The maintenance of existing works does not require an approval. Under section 2(d) of Schedule 1 of the *Water Ministerial Regulation*, Alta. Reg. 205/98, landscaping that is not in a watercourse, lake or wetland is exempt from requiring an approval if the landscaping does not result in, "...(i) an adverse effect on the aquatic environment on any parcel of land, or (ii) any change in the flow or volume of water on an adjacent parcel of land." According to the Director, an approval is normally not issued for this type of work, but because of the concerns expressed by the Appellants, and the fact the work was being done along the road right-of-way, an Approval was issued.

[38] The proposed work along Secondary Highway 741, according to the Director and the Approval Holder, will move a portion of the water to the north along the west side of Secondary Highway 741 and move it away from the Appellants' property. The Appellants stated that if the water is moved north, it would have a positive affect on the their property. Therefore, based on the evidence presented, the project, as proposed, would be beneficial to the Appellants.

B. N1/2 28-93-21-W5M

[39] The Appellants argued flooding occurs as a result of the drainage system on the N1/2 of section 28, and increased water flow will cause erosion. The water flow on the north half of section 28 is from the west, at the road allowance, to the east, towards the Peace River. All Parties agreed the outlet from the north half of 28 is in the area of the Peace River.

[40] The Director's witness explained the outlets on the north half of 28 are very good outlets. The outlets are a continuation of the swales on the land and considering they are quite wide and drop approximately four feet from the road allowance to the Peace River area, they can maintain a fairly good flow of water from the west to the east. The water flows into an area of bush where there is an area of good retention, allowing the water to flow slowly to the Peace River, and thereby acting as a buffer against erosion. The Director explained there is a possibility the snow build up in the trees may cause water to back up in the outlet. However, the size and depth of the drainage system allows it to hold a significant amount of water, reducing the potential of flooding on the Approval Holder's and the Appellants' lands.

[41] The drainage ditch between the north and south half of section 28 was surveyed and staked by Alberta Environment a number of years ago to facilitate movement of water between the north and south halves of section 28. The Appellants built a fence in the ditch along their property line, which they are legally allowed to do. However, it creates a problem with maintenance of the ditch, and it appears the Appellants have not maintained the ditch and the ditch can no longer facilitate the flow of water to the Peace River. If the Appellants want this ditch to function properly, they will have to maintain it properly. This does not require the fence to be removed, but vegetation along the fence line and siltation will impede the flow of water through the drainage ditch. The Appellants are responsible for maintaining the ditch on their property, and if flooding occurs as a result of the lack of maintenance, the Appellants cannot hold the Approval Holder responsible.

[42] It appears from the evidence that it is unlikely the flow of water through the Approval Holder's lands will have an affect on the Appellants' lands, specifically the south half of section 28. The water flows east on the north1/2 of section 28-93-21-W5M, not south. Therefore, the water will flow towards the Peace River and not towards the Appellants' land.

C. Other Matters

[43] The Appellants submitted the application for the Approval was incomplete, and the Director continued to ask for further information. The Appellants argued the Approval was not the same as what was applied and notice was provided for, and they were not given any notice regarding the changes.

[44] In the original letter from the Approval Holder to the Director, the Approval Holder stated he intended to do further works, but in discussions between the Approval Holder and the Director, it was determined specific parts of the works, such as the V-ditching, did not have to be done and therefore, were left out of the final project approved.

[45] The Director explained it is normal practice to have continuing dialogue between himself and an applicant. From the Board's perspective, these discussions will result in better conditions being included in the approval and better compliance from the applicant. If there are

areas the Director or the approval holder disagree on, or do not understand the other's objectives, it is reasonable to have the issues sorted out prior to the issuance of the approval, or in some circumstances, before the application is rejected. The Board encourages the Director to continue discussions with applicants and third parties with valid concerns.

[46] In this case, the Director requested the Approval Holder submit additional information, often in response to concerns raised by the Appellants. The ongoing discussions were an attempt to alleviate all of the Appellants' concerns prior to the Approval being issued.

[47] The Director explained the Approval Holder does not have to apply for all works at the same time, and they have the option to apply in two or three steps if they so desired. The Director stated the Approval was issued for what was applied for. It does not cover works that did not have to be done or determined as not requiring an approval.

[48] The Appellants argued the Director did not consider the previous works in detail and did not consider the cumulative impacts of the pre-existing drainage ditches. The Director did not look at the previous works as many were sanctioned by Alberta Environment in the past, and the work being done by the Approval Holder was considered as minimal maintenance of existing ditches. It is common practice in Alberta for farmers to prepare ditches on their lands to facilitate the drainage of spring runoff, and the Director has not required approvals for much of this type of work. The previous work was old work and some has been in place for over 30 years. The Approval Holder stated they were maintaining and cleaning the existing works, and no evidence was provided to dispute this evidence. The only new work is along Secondary Highway 741, for which the Approval Holder submitted an application and for which is allowed under the Approval.

[49] One of the issues raised by the Appellants was the drainage in sections 19 and 30-93-21-W5M. These sections were not included in the Approval. However, since the Appellants argued water from these sections flood their property, the Approval Holder and Director provided evidence on the water flow throughout the area.

[50] The issue that precipitated the Appellants' concerns was the flooding of their property. The Director did look at their concerns and required the Approval Holder to submit

further information and a plan that would help alleviate the Appellants' concerns. It was irrelevant whether the flooding was due to water flowing from section 19, 30, and 29, or whether it was just from 29, which the evidence appears to indicate.

[51] There are exiting drainage systems throughout sections 19 and 30 that direct the water to the north towards Notikewin River and the muskeg area. Any water directed to the east goes directly from the section 30 to the N1/2 of section 28-93-21-W5M. It does not flow towards the Appellants' property to the east.

[52] The Appellants argued the diagrams demonstrating the depth of the drainage ditch was not considered by the Director. These diagrams were included as part of the Approval. They were dated June 1, 2004, and the Approval was not issued until June 15, 2004. The Director did have the opportunity to review the diagrams before issuing the Approval, and the information provided in the diagrams had to be provided before the Approval was issued. The Director and the Approval Holder explained the application process undertaken and how the Director asked for additional information, often in response to the Appellants' concerns, and the Approval Holder was required to provide the information before the application process could proceed.

[53] There was some confusion regarding the maps provided by the Appellants and the Approval Holder. The Appellants explained the arrows on the map they provided with their Notice of Appeal did not indicate the flow of water, but merely marked the areas the Approval Holder had completed work or intended to complete work. The arrows on the map provided by the Approval Holder in their written submission, did indicate the flow of water on his property. The Director agreed the arrows on the Approval Holder's map accurately represented the direction of water flow in the area.

[54] The Director attempted, during cross-examination of the Appellants at the Hearing, to argue the Notice of Appeal was not filed within the appropriate time period. The Board considered this was inappropriate and would not entertain it. The Board will not allow the appeal to be dismissed on this basis at this point in the proceedings. Looking at the documents and taking into consideration the relevant time periods, although close, the Board believes the Appellants were still within the appropriate time period. If in fact he was not, it was still

inappropriate for the Director to bring the matter forward on the day of the Hearing. If he was going to challenge the Appellants on that basis, he should have submitted his concerns well before the date of the Hearing. This would have afforded the Appellants the opportunity to prepare a response. In addition, the validity of an appeal, such as whether it was filed properly, is a preliminary matter that should not have been raised at a hearing on the merits of the appeal and in particular, in cross-examination of a witness.⁷

[55] In his testimony, the Director stated there were other options provided by the Approval Holder, but the one chosen appeared to be reasonable and will, in all likelihood, work at moving the water towards the Peace River without causing flooding on the Appellants' lands. He further stated that if it does not work, he will re-assess the options and require the Approval Holder to obtain an amending approval, if necessary.

[56] In the meantime, what the Director may consider doing is to consult with Alberta Transportation to determine the feasibility of constricting the two culverts closest to the access to the Appellants' residence, and constructing additional culverts of appropriate size further north, between the north and south halves of section 28.

D. Conclusion

[57] The photographs provided by the Appellants in their written submission were taken over a four-year period. One photograph (# 40) illustrated flooding on the Approval Holder's property, just across from the Appellants' access to their property. There was no date included on the photograph, but it is evident the flooding occurred prior to the works being completed under the Approval. It is an existing problem. The Appellants cannot argue the works allowed for under the Approval caused the flooding conditions. In reviewing the works described, it appears the project will benefit the Appellants at the Approval Holder's expense.

[58] Based on the evidence and arguments presented by the Parties, the work allowed under the Approval will not have a detrimental affect on the Appellants' land. The water will be

⁷ See: *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*"), at paragraph 67 where Mr. Justice McIntyre held that "...the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re Bildson*, [1998] A.E.A.B.D. No.

directed away from the Appellant's land, reducing the potential for flooding. Therefore, the Board will recommend the Approval be confirmed.

IV. RECOMMENDATIONS

[59] The Board recommends the Approval be confirmed as issued.

[60] Attached for the Minister's consideration is a draft Ministerial Order implementing the recommendation.

[61] Finally, with respect to sections 100(2) and 103 of EPEA, the Board recommends that copies of this Report and Recommendations and any decision by the Minister be sent to the following parties:

1. Mr. Darryl Carter, on behalf of Messrs. Robert, William, Donald and James McCracken;
2. Mr. Keith Greschner, on behalf of Keland Holdings Ltd.;
3. Ms. Sheila McNaughton, Q.C., Reynolds, Mirth, Richards & Farmer, LLP, on behalf of the Municipal District of Northern Lights No. 22; and
4. Mr. Jeffrey Moore, Alberta Justice, on behalf of Mr. Gary Sasseville, Director, Northern Region, Regional Services, Alberta Environment.

V. COSTS

[62] The Board did not receive any request for costs from the Parties. Therefore costs need not be addressed.

Dated on November 17, 2004, at Edmonton, Alberta.

“original signed by”

Dr. Frederick C. Fisher, Q.C.
Chair

VI. DRAFT MINISTERIAL ORDER

Ministerial Order

/2004

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12.

Water Act
R.S.A. 2000, c. W-3.

Order Respecting Environmental Appeals Board Appeal No. 04-034

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 04-034.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2004.

Honourable Dr. Lorne Taylor
Minister of Environment

Draft Appendix

With respect to the decision of Mr. Gary Sasseville, Director, Northern Region, Regional Services, Alberta Environment (the “Director”), to issue Approval No. 00206965-00-00 (the “Approval”) dated June 15, 2004, under the *Water Act*, R.S.A. 2000, c. W-3, to Keland Holdings Ltd., I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director to issue the Approval is confirmed as issued.



ALBERTA ENVIRONMENT

Office of the Minister

Ministerial Order

27/2004


Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12.

Water Act
R.S.A. 2000, c. W-3.

**Order Respecting Environmental Appeals Board
Appeal No. 04-034**

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 04-034.

Dated at the City of Edmonton, in the Province of Alberta this 19 day of Nov., 2004.


Honourable Dr. Lorne Taylor
Minister of Environment

Appendix

With respect to the decision of Mr. Gary Sasseville, Director, Northern Region, Regional Services, Alberta Environment (the "Director"), to issue Approval No. 00206965-00-00 (the "Approval") dated June 15, 2004, under the *Water Act*, R.S.A. 2000, c. W-3, to Keland Holdings Ltd., I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director to issue the Approval is confirmed as issued.