ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 20, 2010

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 Larry Donkersgoed and Donkersgoed Feeders Ltd., Paul Veurink and Farview Poultry Farms Ltd., and Ken Jagersma with respect to *Water Act* Approval No. 00262038-00-00 issued to Douglas J. Bergen & Associates Ltd. by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: *Donkersgoed and all* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *Douglas J. Bergen & Associates Ltd*. (20 December 2010), Appeal Nos. 10-003, 005 & 006-D (A.E.A.B.).

PANEL MEMBERS:	Mr. Eric O. McAvity, Q.C., Panel Chair, Mr. Jim Barlishen, Board Member, and Ms. A.J. Fox, Board Member.
SUBMISSIONS BY:	
Appellants:	Mr. Larry Donkersgoed and Donkersgoed Feeders Ltd., Mr. Paul Veurink and Farview Poultry Farms Ltd., and Mr. Ken Jagersma.
Director:	Mr. Robert Burland, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
Approval Holder:	Douglas J. Bergen & Associates Ltd.

EXECUTIVE SUMMARY

Alberta Environment issued an Approval to Douglas J. Bergen & Associates Ltd. under the *Water Act*, authorizing the construction and operation of works for Phase 1 of the Seasons subdivision located at SE 11-009-20-W4M in Coaldale, Alberta, that will alter the amount and direction of flow of water to an unnamed drainage tributary to the Malloy Drain and Stafford Reservoir.

The Board received Notices of Appeal from Mr. Larry Donkersgoed and Donkersgoed Feeders Ltd., Mr. Paul Veurink and Farview Poultry Farms Ltd., and Mr. Ken Jagersma. The Board received submissions on the following questions:

1. Are the Appellants directly affected by the terms and conditions of the Approval (no release)?
2. How are the Appellants directly affected?
3. Are the land use/storm drainage planning issues properly before the Board?

The Board found that, based on the submissions provided, the Appellants were not directly affected. The Approval mandates a zero release of any stormwater from the Seasons subdivision. The Appellants argued they would be directly affected if the Approval was not complied with; however, the Board could not find the Appellants directly affected based on non-compliance with the zero release provision of the Approval. No evidence was presented by the Appellants to demonstrate that the conditions of the Approval would or could not be complied with.

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I. BACKGROUND

[1] On May 6, 2010, the Director, Southern Region, Environmental Management, Alberta Environment (the "Director"), issued Approval No. 00262038-00-00 (the "Approval") to Douglas J. Bergen & Associates Ltd. (the "Approval Holder") under the *Water Act*, R.S.A. 2000, c. W-3, authorizing the construction and operation of works located at SE 11-009-20-W4M in Coaldale, Alberta for Phase 1 of the Seasons subdivision (the "Seasons") that alters the amount and direction of flow of water to an unnamed drainage tributary to the Malloy Drain and Stafford Reservoir.

[2] On May 17 and 18, 2010, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. Larry Donkersgoed and Donkersgoed Feeders Ltd., Mr. Paul Veurink and Farview Poultry Farms Ltd., and Mr. Ken Jagersma (collectively, the "Appellants") appealing the Approval. The Board notified the Approval Holder and Director of the appeals, and requested the Appellants provide additional information in order to process the appeals. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals, and that the Approval Holder, Appellants, and Director (collectively the "Participants") provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[3] On June 8 and 9, 2010, the Board received more information on the appeals from the Appellants. On June 11, 2010, the Board wrote to the Participants acknowledging receipt of the completed Notices of Appeal.

[4] On June 22, 2010, the Board received a copy of the Record from the Director, and on June 24, 2010, forwarded a copy to the Appellants and the Approval Holder. In his June 22, 2010 letter, the Director raised preliminary motions to dismiss the appeals.

[5] On June 24, 2010, the Board set the dates for submissions on the following questions:

1. Are the Appellants directly affected by the terms and conditions of the Approval (no release)?
2. How are the Appellants directly affected?

3. Are the land use/storm drainage planning issues properly before the Board?

[6] Submissions were received between August 31, 2010 and September 28, 2010.

II. SUBMISSIONS

A. Appellants

[7] The Appellants stated they are not directly affected by the "no release" Approval, but they questioned whether a no release condition is valid.

[8] The Appellants explained they are downstream and experience flooding in major and minor storm events. They questioned how the Director considered trucking the potential flood waters from the site as a viable option. The Appellants asked that the Approval Holder secure a bond to ensure all reasonable measures are taken to protect the Appellants in order to provide them with some financial assistance in case major flooding occurs from stormwater released from the Seasons. The Appellants stated that if the "no release" condition is not complied with, the Approval Holder may be fined, but there are no other repercussions and the landowners affected would have no means of recovering their losses or damages except through the civil courts, which would result in a long process fraught with huge expenses and potentially limited success in their favour.

[9] The Appellants understood the Approval Holder was providing its own stormwater management control, but it is still part of the Town of Coaldale's and Malloy Drain flooding problems that periodically inundate the Appellants' lands and damage their properties. The Appellants explained that, should the Town declare a state of emergency in a major storm event, the Approval Holder would be protected against repercussions should it not comply with the "no release" condition.

[10] The Appellants acknowledged the Approval Holder overbuilt its stormwater storage capacity and the Approval Holder stated the detention pond will never reach capacity. However, the Appellants expressed concerns this may not be true since the Town of Coaldale made similar statements yet, during the last storm which was not a 1-in-100 year storm event, the Town's existing stormwater retention ponds overflowed.

[11] The Appellants explained they do not have objections to new developments but, as landowners, they have dealt with the flooding situation for many years and it is their livelihoods they are trying to protect. They stated they want to ensure that new developments will not add to the existing drainage and flooding problems. They noted the "no release" condition is a solution to added drainage problems, but they wanted assurance the condition will be met.

B. Approval Holder

[12] The Approval Holder noted the Appellants acknowledged they are not directly affected by the Approval. The Approval Holder recognized the Appellants are adversely affected during times of heavy rain, but the Approval Holder has taken measures above provincial standards to ensure the development does not negatively impact the drainage system. The Approval Holder committed to abide by the conditions of its Approval.

[13] The Approval Holder requested the Board dismiss the appeals.

C. Director

[14] The Director explained that in the Approval Holder's original application, the drainage system design included using the Malloy Drain (or South Coaldale Drain) as the outfall for its stormwater. The Director stated he accepted the Appellants' Statements of Concern based on the original design. The Director found the Appellants were directly affected because their lands and farming operations are located in close proximity to the Malloy Drain. The Director stated the Approval Holder amended the original stormwater retention design for the project to a zero release of stormwater from the Seasons Phase 1 site. The Director noted that any stormwater in excess of the detention pond capacity has to be disposed of offsite but not into the Malloy Drain. The Director stated he was advised that, since there would be zero release from the site, the Appellants' concerns were addressed.

[15] The Director explained the Approval:

1. applies only to Phase 1 of the Seasons development;

2. requires a zero release;
3. requires the proposed pond outlet culvert be sealed so that no runoff can be released to the downstream system; and
4. the Malloy Drain system cannot be used to dispose of excess stormwater.

[16] The Director argued the Appellants are not personally directly affected because the Approval does not authorize or have any impacts off the site during standard operation of the works. The Director confirmed the approved activity cannot impact or harm the area where the Appellants live, and the Appellants agreed.

[17] The Director explained the Approval authorizes the removal of stormwater during severe events by trucking, but the water cannot be disposed of in the area where the Appellants reside. The Director submitted the Appellants cannot base standing on the possibility the Approval Holder will not comply with the terms and conditions of the Approval, thereby becoming directly affected because of the non-compliance. The Director argued the Appellants must be directly affected by the project completed in accordance with the terms of the Approval.

[18] The Director acknowledged the Appellants may be impacted by existing flood events in the Malloy Drain, but the Approval does not authorize the release of any stormwater into the Malloy Drain system. Therefore, according to the Director, the Appellants are not directly affected by this Approval.

[19] The Director noted the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") does not affect any civil remedies the Appellants may or may not choose to pursue.

[20] The Director stated the Notices of Appeal raise land use planning and storm drainage planning by various municipal and private irrigation entities. The Director argued these issues are not properly before the Board, because the Board can only hear appeals of certain decisions made by the Director under EPEA or the *Water Act*. The Director noted the Board has found in previous decisions that matters of municipal land use planning are not within its jurisdiction. The Director submitted the pre-existing drainage issues around and in Coaldale involve multi-municipal land use and private irrigation district issues and, therefore, are clearly issues not properly before the Board.

[21] The Director submitted the appeals should be dismissed.

D. Rebuttal Submissions

[22] The Appellants acknowledged they cannot base their standing on the possibility the Approval Holder may not comply with conditions of the Approval. The Appellants questioned the validity of trucking excess water from the site if a major storm event occurred. They questioned whether it would be possible to truck that amount of water and questioned why the Director accepted it as a solution.

[23] The Appellants asked that trucking not be considered as a solution. The Appellants argued that, when this option was eliminated, the potential for excess runoff draining into the Malloy Drain increases, resulting in a reasonable probability that they will experience greater damage and loss. The Appellants suggested the Approval Holder provide a cash bond to be held against the "no release" condition set out in the Approval.

[24] The Appellants acknowledged the issues regarding the storm drainage problems experienced by the Town of Coaldale, County of Lethbridge, and the irrigation district cannot be dealt with by the Board, but the existing conditions need to be considered when addressing the potential increase of stormwater runoff.

[25] The Appellants stated they filed the appeals to protect them and their livelihoods because they did not feel certain Approval conditions were attainable.

III. ANALYSIS

[26] The Board has discussed the issue of "directly affected" in numerous prior decisions. The Board received guidance on this issue from the Court of Queen's Bench in *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*").

[27] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

"First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. …

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. …

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

> What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

> [T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

> While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated."[1]

Justice McIntyre concluded by stating:

> "To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted…."[2]

[28] When the Board assesses the directly affected status of an appellant, the Board looks at how the person uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the person's use of the area. The closer these elements are connected (their proximity), the more likely the person is

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[1] *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). 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.) ("*Bildson*"); *Mizera et al.* v. *Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) ("*Mizera*"); and *Vetsch* v. *Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al.* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

[2] *Court* v. *Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.[3]

[29] The Court of Queen's Bench in *Court*[4] stated an appellant only needs to show there is a potential for an effect on that person's interests. This potential effect must still be within reason, plausible, and relevant to the Board's jurisdiction in order for the Board to consider it sufficient to grant standing.

[30] In this case, the Appellants acknowledged they are not directly affected by the Approval unless there is a contravention of its terms and conditions. As the Board has stated in previous decisions, the determination of standing cannot be based on speculation. In this case, the Appellants are not only speculating, but they are basing their directly affected status on the possibility the Approval Holder will contravene its Approval.

[31] The Approval requires the Approval Holder to either store or remove stormwater from the site, and the Appellants acknowledged by trucking excess water offsite, stormwater will not enter the Malloy Drain. If excess stormwater is not added to the Malloy Drain, the Appellants will not be affected by the development allowed under the Approval. It is only if the Approval is contravened that there may be an issue of potential increased flooding.

[32] Although the Courts have stated that an appellant need only show the potential of harm to be found directly affected, in this situation that potential can only occur if there is a contravention of the terms and conditions of the Approval. It is presumed the Approval Holder will comply with all of the terms and conditions in the Approval. The Approval Holder filed an application, but the Director required alterations be made to ensure zero release of stormwater. As a result, the Approval Holder expanded the stormwater pond to a size that will accommodate all three phases of the development. The Approval is for Phase I of the development only, and if the Approval Holder decides to continue with Phases II and III, the Approval Holder will be required to secure an amendment to the Approval. Since the stormwater pond has been enlarged to accommodate all three phases of the Seasons development, it is reasonable to conclude that

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[3] See: *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

the detention pond as built should be large enough to contain all water runoff from Phase I. The Approval Holder also stated it would remove excess water from the stormwater detention pond during exceptional rainfall events by trucking excess water from the site. There was no appeal filed by the Approval Holder regarding the conditions in the Approval. It can be assumed by this that the Approval Holder will be able to comply with the trucking requirements of the Approval. If there were conditions the Approval Holder could not comply with, then it could have filed an appeal. Since the Approval Holder intends to develop two additional phases, it will have to apply for an amendment to the Approval to undertake the additional phases. As a result, the Approval Holder does have a vested interest to comply with the Approval and to demonstrate its mitigation proposal can be achieved.

[33] In reading the Appellants' submission, it is clear they do not consider trucking the water from the site as a viable mitigation option, and they do not believe the Approval Holder will be able to achieve the zero release condition. The Board acknowledges there are some questions as to how the Approval Holder intends to truck water from the site since no explanation was given as to how or where the trucks will come from, the time it will take to procure the trucks, and the basic logistics of trucking the water from the site. However, the Appellants did not provide any evidence to indicate that trucking will not work other than speculation. The onus is on the Appellants to demonstrate they are directly affected by the Approval. There needs to be more evidence to support the claim and not speculation. The Board cannot find an appellant directly affected on the basis the appellant does not believe the approval holder will comply with the approval. The appellant needs to show there is some basis to support its claim. An appellant needs to be directly affected by the project as approved. In other words, if the terms and conditions are met, the appellant needs to show there will be an impact on the environment it uses.

[34] It is clear from all of the Participants' submissions that there are flooding issues along the Malloy Drain. The flooding problems already exist and as development in the Coaldale area continues, there will be additional concerns that will have to be addressed. If the

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[4] *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

Town of Coaldale, the County of Lethbridge, and developers want development to continue in the area, they need to work together with the irrigation district and Alberta Environment to resolve the issues of the Appellants and others in the area through the implementation of a flood management plan.

[35] Based on the submissions presented, it appears the proposed development would have no measurable impact on the Appellants during a major rainfall event. The Appellants have flooding issues now without consideration of further development in the area.

[36] An approval allows the approval holder to understand what is expected of it in order to complete the proposed project in a manner that will minimize or eliminate the impacts on the environment. An approval also allows others to understand what the approval holder must do and what actions or non-actions will result in a contravention of the approval and which can be reported to Alberta Environment. Under the *Water Act*, if there is a contravention of an approval or license, the Director can issue an enforcement order, administrative penalty, revoke the Approval, or take enforcement actions. There are steps in place to deal with non-compliance in the Approval. One of the conditions of the Approval requires the Approval Holder to report any contravention to Alberta Environment. If the Appellants see the Approval Holder is not complying with the Approval, they can contact Alberta Environment to report the non-compliance. If the Approval Holder contravenes the Approval and the Appellants are affected, they can also take civil action against the Approval Holder if it can be shown here is harm to them caused by the Approval Holder. Although this may place some of the obligations on the public to report non-compliance, it is one way the purposes of the *Water Act*, specifically section 2(d), can be accomplished.[5]

[37] In assessing directly affected, the Board is required to consider the approval or licence as issued and the terms and conditions included that are intended in that approval or licence to protect the environment and the public. It is presumed the approval holder will

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[5] Section 2(d) of the *Water Act* states:

> "The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making…."

comply with all of the conditions in the approval or licence. If the Board assumed the approval holder had no intention of complying with the approval, then it would mean the approval holder misled the Director in the application process and was not truthful about its intentions. The Board has no basis to conclude such a situation exists in this case.

[38] To assume the Approval Holder will not or cannot comply with the conditions in the Approval is speculative. The Approval Holder may have trucking arrangements on standby if required. Although more detail in the application and responses to the Director's and Appellants' concerns would have been helpful, the Appellants did not meet the necessary onus of demonstrating a probable likelihood the Approval Holder will not comply with the terms and conditions in the Approval.

[39] In conclusion, and in response to the preliminary issues posed in paragraph 5 above, the Board finds that (1) the Appellants are not directly affected; and (2) land use and storm drainage planning issues in the Coaldale region are not issues properly before the Board.

IV. DECISION

[40] The Board finds the Appellants are not directly affected by the Approval as issued. The Appellants did not provide any evidence to show the Approval Holder will not be able to comply with the conditions in the Approval, including the zero release requirement. Therefore, the appeals are dismissed.

Dated on December 20, 2010, at Edmonton, Alberta.

"*original signed by*"

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Eric O. McAvity, Q.C.
Panel Chair and Board Member

"*original signed by*"

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Jim Barlishen
Board Member

"*original signed by*"

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A.J. Fox
Board Member