

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – August 18, 2014

**IN THE MATTER OF** sections 91, 92, 93, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** an appeal filed by Black Diamond Land & Cattle Company Ltd. with respect to Approval No. 00332236-00-00 issued under the *Water Act*, R.S.A. 2000, c. W-3 to Terry and Veena Beglinger by the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

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

**BEFORE:**

Ms. A.J. Fox, Panel Chair.

**SUBMISSIONS BY:**

**Appellant:**

Black Diamond Land & Cattle Company Ltd.,  
represented by Mr. Trevor McDonald, Burnet,  
Duckworth & Palmer LLP.

**Approval Holders:**

Mr. Terry and Ms. Veena Beglinger.

**Director:**

Mr. Brock Rush, Director, Southern Region,  
Operations Division, Alberta Environment and  
Sustainable Resource Development,  
represented by Ms. Jodie Hierlmeier, Alberta  
Justice and Solicitor General.

## EXECUTIVE SUMMARY

In October 2013, Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval under the *Water Act* to Mr. Terry and Ms. Veena Beglinger for the construction of erosion protection works including the installation and repair of culvert crossings and removal of debris at Three Point Creek in the Municipal District of Foothills. Black Diamond Land & Cattle Company Ltd. (Black Diamond) appealed the Approval on April 22, 2014.

The appeal of the Approval was filed past the 7-day deadline stipulated in the *Water Act*. The Environmental Appeals Board (the Board) asked Black Diamond to provide its reasons for filing its appeal past the prescribed time limit and why the Board should extend the deadline. The Board found Black Diamond had provided a *prima facie* case to allow the extension. The Board asked and received responses from AESRD and the Beglingers regarding allowing the time extension to appeal.

AESRD determined no notice of the application was required. However, Black Diamond was aware the application for the project was submitted to AESRD, and it was provided with a copy of the report supporting the application. The report stated that Black Diamond's written consent was required for the project to proceed because the project straddled lands belonging to Black Diamond and the Beglingers. The project was revised so work would only take place on the Beglingers' lands, thereby eliminating the need for written consent from Black Diamond. The Beglingers did preliminary work at the site in October 2013 after the Approval was issued, and work continued again on April 1, 2014.

Black Diamond filed its Notice of Appeal five months after the Approval was issued. Although there might have been some confusion regarding the need for written consent before the project proceeded, Black Diamond was aware of the application and notice of the decision was posted as required under the legislation and the decision letter issued by AESRD.

The Board found there were no exceptional circumstances to warrant an extension of the appeal period. The Board dismissed the appeal.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's decision regarding the appeal filed by Black Diamond Land & Cattle Company Ltd. (the "Appellant").

[2] The Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director") issued an Approval under the *Water Act*, R.S.A. 2000, c. W-3, to Mr. Terry and Ms. Veena Beglinger (the "Approval Holders") on October 24, 2013, for the construction of erosion protection works, installation and repair of culvert crossings, and debris removal.

[3] As the appeal for the approval was filed outside of the 7-day appeal period, the Environmental Appeals Board (the "Board") asked the Appellant to provide reasons why the Board should extend the appeal period. The Director had waived the requirement for notice of the application.

[4] The Appellant argued it was unaware of the application and the granting of the Approval. The Appellant believed it had to provide written consent before the project could proceed. In the original plan, the project straddled the Appellant's and the Approval Holders' lands. However, the plan was revised placing the project entirely on the Approval Holders' property thereby eliminating the need for obtaining consent from the Appellant.

[5] The Board found the Appellant was aware of the application and supporting report and was given the opportunity to provide input into the approval process. Failing to provide input does not mean the Appellant did not receive notice of the application. Notice of the Approval was posted as required in the Director's decision letter and as required under the legislation.

[6] The Board dismissed the appeal of the Approval because the Appellant did not demonstrate exceptional circumstances that warranted extending the appeal period.

## II. BACKGROUND

[7] On October 24, 2013, the Director issued Approval No. 00332236-00-00 under the *Water Act* (the “Approval”) to the Approval Holders for the construction of erosion protection works, installation and repair of culvert crossings, and debris removal in the SW 8-21-2 W5M (the “Site”) in the Municipal District of Foothills, Alberta.

[8] On April 22, 2014, the Board received a Notice of Appeal from the Appellant appealing the Approval.

[9] On April 22, 2014, the Board acknowledged the appeal and notified the Approval Holders and Director of the appeal. In this letter, the Board noted the Notice of Appeal was filed after the 7-day appeal period for approvals issued under the *Water Act*.<sup>1</sup> The Board asked the Appellant to explain why the appeal was filed after the time limit and to provide reasons why an extension should be granted.

[10] The Appellant provided its response on April 24, 2014.

[11] On April 24, 2014, the Board notified the Appellant, Approval Holders, and Director (collectively, the “Parties”) that the Appellant provided sufficient Information to consider extending the appeal period. The Board asked the Approval Holders and Director to provide comments on whether the Board should allow the appeal period to be extended.

[12] On April 28, 2014, the Board received comments from the Approval Holders.

[13] On April 29, 2014, the Board received comments from the Director. Included in the response from the Director was notification that the Approval had been amended on April 25, 2014, to include the revised plans that showed the berm was to be built entirely on the Approval Holders’ property.

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<sup>1</sup> Section 116(1) of the *Water Act* provides:

“A notice of appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after
  - (i) receipt of a copy of a water management order or enforcement order, or
  - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from....”

[14] On May 1, 2014, the Board received the Appellant's rebuttal submission.

[15] On May 13, 2014, the Board notified the Parties that the appeal was dismissed. These are the Board's reasons.

### **III. SUBMISSIONS**

#### **A. Appellant**

[16] The Appellant stated that, even though the Approval was issued on October 24, 2013, it did not receive notice of the Approval or the application for the Approval, and it was not until April 27, 2014, after construction of the berm was started, that it received a copy of the Approval.

[17] The Appellant noted that, under section 111(2) of the *Water Act*, if notice of the application was waived by the Director, he must ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected persons.<sup>2</sup> The Appellant acknowledged the *Water (Ministerial) Regulation*, Alta. Reg. 205/98 (the "Regulation") provides for various forms of notice, but it did not know whether any of the methods of notice of the application or Approval were followed by the Approval Holders or Director. The Appellant argued that, based on the Record, notice of the Approval may have been posted on the AESRD website on October 24, 2013, but such notice is not effective if the affected party does not know an application has been made. The Appellant argued it is not reasonable or realistic to expect every resident to check the AESRD website on a daily basis to see if an application has been made that could affect their lands. The Appellant stated the Director must take some steps to ensure neighbouring landowners will receive notification of an application and approval, particularly when the water body in question flows through a landowner's property and where the proposed berm will divert flood waters directly onto that landowner's property.

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<sup>2</sup> Section 111(2) of the *Water Act* states:

"If subsection (1) applies, the Director must

[18] The Appellant argued one of the principles of administrative law, the duty of fairness, was not followed because the Appellant was not given any notice and had no opportunity to provide submissions about the impact the construction of the berm would have on its lands.

[19] The Appellant stated the Notice of Appeal was filed five days after the Appellant received notice of the Approval, and had the Appellant received notice of the application or the Approval in October 2013, it would have filed an appeal at that time.

[20] The Appellant said the appeal was filed in time and no extension should be necessary, but if an extension is necessary, it should be granted for the following reasons:

1. The Director had originally required specific notice be provided to the Appellant, but later he did not require specific notice be given. The Director and Approval Holders were aware of a specific person, the Appellant, whose interests would be affected by the decision, so providing actual notice to the Appellant would not have been burdensome and should have been required.
2. The Approval Holders told the Director that the Appellant's engineer had stated the berm would not impact the Appellant's lands, but the Appellant never retained an engineer and it was never given the opportunity to retain an independent expert to assess the impacts of the Approval on the Appellant's lands.
3. The Matrix Report, prepared for the Approval Holders by Matrix Solutions Inc. ("Matrix") and submitted with the application for the Approval, states the Appellant's written consent would be required, and clause 3.1 of the Approval requires the Approval Holders to undertake the work according to the Matrix Report.
4. The Appellant had no notice of the application or the Approval and was given no opportunity to provide submissions, so the Director's decision was made without any consideration of the impact on the Appellant's lands and was not made in a fair or open manner.
5. Public notice buried on a government website cannot be effective or sufficient notice when an affected party has no reason to check the website.

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- (a) if notice of the application or proposed changes was waived by the Director under section 108(6), ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected person...."



6. Three Point Creek is highly susceptible to flooding in the area of the Appellant's and Approval Holders' lands.
7. The construction of the berm is complete, and if it is allowed to stay in place, it will divert all of the flood waters directly onto the Appellant's lands, which will cause erosion, damage, and contamination to the detriment of the Appellant's property, operations, and financial interests.

[21] The Appellant requested the appeal be heard.

## **B. Approval Holders**

[22] The Approval Holders disagreed with the Appellant's statement that it had not received notice of the Approval or the application. The Approval Holders explained they had a telephone conversation with the Appellant in September 2013 about the project and the flooding issues. The Appellant asked for a copy of the Matrix Report, and the Approval Holders stated they provided a copy to the Appellant on September 18, 2013. The Approval Holders said they followed up with the Appellant on September 26, 2013, when they mentioned wildlife and fisheries coming to their property to check if the project would affect fish habitat. The Approval Holders mentioned they were in the "late stages of getting this Approval."<sup>3</sup> According to the Approval Holders, the Appellant responded on September 27, 2013, stating it was willing to help wherever it could. The Approval Holders said they emailed the Appellant and indicated the Approval Holders were in the process of getting the Approval. The Approval Holders also sent the Matrix Report and invited the Appellant to come to the Approval Holders' property to see the affected area.

[23] The Approval Holders stated a meeting at the site with the Appellant was held on October 3, 2013. The Approval Holders said they showed the Appellant the site and they explained what they wanted to do on their land and the materials they would use for the project. The Approval Holders said the Appellant explained he wanted to ask his engineer if the berm would affect the Appellant, and the Appellant returned that day with a consultant who had done

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<sup>3</sup> Approval Holder's submission, dated April 28, 2014.

similar work for the Appellant in the past. According to the Approval Holders the consultant said the project would not affect the Appellant's land.

[24] The Approval Holders stated they followed up the meeting with telephone calls to the Appellant to see if it would give consent, but they never heard back from the Appellant. The Approval Holders explained the reason why the Director wanted the Appellant's consent was because Matrix had drawn the project on the Appellant's land, even though this was not what the Approval Holders had planned to build. The Approval Holders said the project was redrawn to be entirely on the Approval Holders' land, and after that, the requirement for the Appellant's consent was removed.

[25] The Approval Holders explained the Matrix Report stated that consent would be required because the project straddles the Appellant's and the Approval Holders' lands, but revisions made to the project placed the entire project on the Approval Holders' land.

[26] The Approval Holders explained that, as soon as the Approval was issued on October 24, 2013, they started clearing debris from the area to gain access for the work to be done. The Approval Holders stated they posted the Approval at the office of the Municipal District of Foothills and on the Approval Holders' property at the site. The Approval Holders said they had a dump truck, mini hoe, and skid steer at the site, and the contractor kept his track hoe on the front pasture in front of the project for over four months waiting for breaks in the weather to work.

[27] The Approval Holders explained the Court of Queen's Bench issued a stop order, but the contractor had already completed the bank repair and berm.

[28] The Approval Holders said the Appellant had received a copy of the Approval from the Director prior to April 17, 2014.

[29] The Approval Holders noted the Matrix Report stated that consent was required because the project straddled the Appellant's land and the Approval Holders' land. The Approval Holders explained the Appellant's consent was not required when the project was revised and the entire project was on the Approval Holders' land. The Approval Holders stated the Appellant did not return their phone calls about the project, so the Approval Holders assumed the Appellant

was satisfied with the project. The Approval Holders noted the Appellant never raised any issues with Matrix or the Director.

[30] The Approval Holders explained they informed the Appellant about the Flood Recovery Erosion Control (“FREC”) program and how to apply if it had issues about flooding on its property. The Approval Holders said they had applied for their land to be considered, and the engineers for the Municipal District of Foothills created a project proposal for the Approval Holders and contacted the Appellant about doing a larger project to fix the river in the combined area.

[31] The Approval Holders disagreed with the Appellant’s statement that it had no knowledge of the application or Approval and no opportunity to respond. The Approval Holders stated the Appellant had actual notice through conversation and e-mails, and it had the opportunity to participate in the process. The Approval Holders stated the Appellant had notice from the activity at the site.

[32] The Approval Holders stated the Director looked at whether the berm would direct all of the floodwaters directly onto the Appellant’s land. The Approval Holders noted the Matrix Report stated the berm would not affect the hydraulic behaviour of Three Point Creek. The Approval Holders explained the riverbank and berm are in the same location where the riverbank is and fills in the holes blown out by the floods and, therefore, it does not change how the river water would have flowed if the bank had not blown out. The Approval Holders stated the berm keeps the river flowing the way it flows when the water levels are not high and the way it was prior to the flood in 2005. The Approval Holders explained that, when there is a flood or sudden increase in water, the water carves a hole in the bank and a portion of the river comes through their property, flooding 60 acres of their land, and exiting south onto the Appellant’s property. The Approval Holders thought the Appellant would appreciate the project stopping the flow of water onto the Appellant’s land and prevent further topsoil erosion and flooding of Englishman’s Park (a recreation area on the Appellant’s land).

[33] The Approval Holders stated the river should flow downstream like it has for hundreds of years, and the berm would not be different from the bank. The Approval Holders

stated they have nothing on their lands that could contaminate the Appellant's land, and if the berm holds, then it would only be river water that would be an issue.

[34] The Approval Holders requested the Board not extend the appeal period.

**C. Director**

[35] The Director stated the appeal period should not be extended.

[36] The Director explained the Approval was amended on April 25, 2014, to correct a clerical error that was discovered when the appeal was filed. The Director noted he is not required to provide public notice to amend a clerical error under section 108(3)(b)(i) of the *Water Act*.<sup>4</sup>

[37] The Director stated the original plans attached to the Matrix Report showed the project would straddle the Appellant's and Approval Holders' properties and, therefore, the Matrix Report indicated a letter of consent would be required from the Appellant. The Director noted the Approval Holders advised the Director on October 4, 2013, that a copy of the Matrix Report was provided to the Appellant.

[38] The Director said that, on October 9, 2013, he received revised plans for the project that indicated the berm would be built entirely on the Approval Holders' property. The revised plans were forwarded to a fisheries biologist and the River Forecast Section of AESRD to review. The Director stated the River Forecast Section reviewed the plan and concluded the berm should not have any impact on adjacent properties.

[39] The Director stated he waived the notice of application requirement pursuant to section 108(6)(b) of the *Water Act*<sup>5</sup> on the basis the application would have minimal or no adverse effects on the aquatic environment or other water users. The Director provided instructions as to how notice of the decision should be provided.

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<sup>4</sup> Section 108(3)(b)(i) of the *Water Act* states:

“Notwithstanding subsection (1), an applicant is not required to provide notice with respect to...an amendment to correct a clerical error.”

<sup>5</sup> Section 108(6)(b) of the *Water Act* provides:

“Notwithstanding subsection (1), the Director may waive the notice requirement under subsection

[40] The Director explained the Matrix Report was incorporated into the Approval issued on October 24, 2013, but it did not incorporate the revised plans provided to the Director on October 9, 2013.

[41] The Director stated the notice of the decision was posted on the AESRD website on October 24, 2013. The Director said he received photographs from the Approval Holders showing notices of the decision posted at the project site from November 9 to 19, 2013, and on the Municipal District of Foothills' bulletin board from October 31 to November 7, 2013.

[42] The Director explained that, when the Record was compiled, he noticed the revised plan was not incorporated into the Approval. The Approval Holders were contacted and they requested the Approval be amended to include the revised plan and show the berm was to be built on the Approval Holders' property. The amendment, issued on April 25, 2014, incorporated the revised plan.

[43] The Director explained the application was for a proposed project to replace a berm that existed on the Approval Holders' property since 2005 to protect it from flooding. The berm was destroyed in the June 2013 floods.

[44] The Director stated notice of the application was waived, like many applications relating to the June 2013 floods, based on AESRD's River Forecast Section's conclusion that the berm should not impact adjacent properties. The Director noted the Matrix Report concluded that, if the works were constructed and monitored as recommended in the Matrix Report, the works would not affect the hydraulic behaviour of Three Point Creek.

[45] The Director said it appeared the Approval Holders requested Matrix revise the plans to ensure the berm was entirely on the Approval Holders' property after the Appellant did not provide its consent.

[46] The Director submitted the Appellant had actual notice of the application, and the Appellant's assertion it had no notice of the application and no opportunity to respond to the application were unreasonable.

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(1) if ... the Director proposes to make an amendment on the Director's own initiative."

[47] The Director noted the Appellant filed its Notice of Appeal almost five months after the appeal period ended.

[48] The Director submitted the Board must distinguish between the date notice was provided by the Director or applicant in accordance with the Regulation and the date the Appellant became aware of the decision.

[49] The Director submitted that allowing an appeal based on the date the Appellant became aware of the decision would impose an unreasonable burden on AESRD and the applicants. The Director noted the *Water Act* does not require the Director to provide direct notice to all potentially directly affected parties when notice of the application has been waived for legitimate reasons. The Director explained that, when notice of an application is waived, section 111(2)(a) of the *Water Act* requires the Director ensure notice of the decision to issue the approval is provided to any directly affected person in accordance with the Regulation.<sup>6</sup> The Director noted section 13 of the Regulation sets out options for providing notice, including through an electronic medium or in any form the Director considers appropriate.<sup>7</sup>

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<sup>6</sup> Section 111(2)(a) of the *Water Act* states:

“If subsection (1) applies, the Director must if notice of the application or proposed changes was waived by the Director under section 108(6), ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected person....”

<sup>7</sup> Section 13 of the Regulation provides:

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

- (a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (b) provide notice of the application, decision or order through a registry established by the Government for that purpose;
- (c) provide notice of the application, decision or order through a telecommunication system or electronic medium;
- (d) publish notice of the application, decision or order in *The Alberta Gazette*;
- (e) make available a copy of the application, decision or order in one or more branch offices of the Department in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;

[50] The Director explained that, when notice is waived, he instructs the applicant to provide broad notice of the decision in order to inform the public generally and to alert directly affected persons. The Director stated notice was provided three different ways, including posting notice at the project site at the time construction was due to start.

[51] The Director stated he is not obligated to seek out all the neighbours and provide them with direct notice of the decision. He has the discretion to decide what type of notice is appropriate in the circumstances.

[52] The Director explained the only time another landowner's consent is required is when the activity authorized under the approval takes place on the land that is not owned by the applicant. The Director noted the amendment indicated the berm would be constructed entirely on the Approval Holders' property.

[53] The Director submitted that certainty in the regulatory process is important particularly when the project is for flood mitigation efforts and erosion control. The Director argued that, if the time limits on the appeal period are substantially relaxed or extended, an approval holder will never know when they may proceed with the project.

[54] The Director stated the appeal was filed considerably past the appeal period stipulated in the *Water Act*. The Director submitted the Appellant had actual notice of the application and it was provided the opportunity to provide input into the Approval Holders' plans before the Approval was granted. The Director stated the Appellant failed to provide evidence of extenuating circumstances to extend the appeal period, particularly so long after the appeal period. The Director said certainty is required to respond to the 2013 floods in a timely manner, and allowing an appeal so late in the process would prevent the Approval Holders from protecting their property from future flooding.

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- (f) provide notice of the application, decision or order, in the form and manner and within the time period specified by the Director, to
  - (i) any persons determined by the Director, and
  - (ii) the local authority of the municipality in which the land on which the activity, diversion of water or operation of a works is located;
  - (g) provide notice in any other form and manner considered appropriate by the Director.”

[55] The Director submitted the appeal period should not be extended.

**D. Appellant's Rebuttal**

[56] The Appellant explained the previous berm was a non-engineered berm made of tree branches and debris that was built by the Approval Holders in 2009. It stated the Approval Holder later added concrete blocks to the berm. The Appellant argued the application was not to replace a 10-year old berm but to build something new. The Appellant believed the 2009 berm caused increased harm to its property including the loss of use and enjoyment of a roadway on the lands and flooding of Englishman's Park.

[57] The Appellant noted the Director initially thought it was important to consider the interest of neighbouring landowners, specifically the Appellant. The Appellant stated the Director acknowledged the Approval Holders' common law right to protect their home and property from damage if it does not affect others.

[58] The Appellant noted the Matrix Report stated that a letter of consent would be required from the Appellant before the application could proceed. The Appellant stated the Matrix Report did not address erosion concerns for upstream or downstream landowners. The Appellant surmised the need for consent was in lieu of taking into account the impact on its lands.

[59] The Appellant acknowledged the Approval Holders e-mailed it a copy of the Matrix Report on September 13, 2013, and they e-mailed again on September 26, 2013, stating they were in the late stages of the approval process and they wanted the Appellant's consent. The Appellant stated the diagram showed the berm being built on the Appellant's property, and the Matrix Report stated the Appellant's consent would be required. The Appellant said it responded on September 27, 2013, and on October 1, 2013, the Appellant asked the Approval Holders if it could meet at the site on October 3, 2013.

[60] The Appellant stated it met with the Approval Holders on the site, but no engineers or consultants were present. The Appellant denied the heavy equipment operator at the

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site made any comments to the effect that the project would not impact the Appellant's land, and there was no one at the meeting who was qualified to make that determination. The Appellant said no consent was given to proceed with the work. The Appellant stated the Approval Holders did not follow-up further, and the project was not discussed again.

[61] The Appellant noted the Director notified the Approval Holders on October 9, 2013, that consent would be required because work relating to the project was to take place on the Appellant's land. The Approval Holders responded, stating they intended to build on their own land. The Appellant noted the revised drawing, showing a shift in the location of the berm, was provided to the Director on October 9, 2013. The Appellant stated there was no indication that any engineering work was done to confirm Matrix's conclusions were still valid or if there would be any impacts on the water flow by moving the berm. The Appellant noted the Matrix Report still stated that written consent from the Appellant was required.

[62] The Appellant noted the requirement of obtaining neighbouring landowners' consent is consistent with section 37(4) of the *Water Act*.<sup>8</sup> The Appellant stated the works that were submitted for approval were appurtenant to its lands in the original and revised drawing. The Appellant argued the appurtenance did not change with the movement of the berm given there was no evidence a formal survey of the property line was conducted.

[63] The Appellant stated the Director knew the Appellant had not consented to the work proposed, but he issued the Approval anyway. The Appellant said the Director allowed the revised drawing to be added to the Matrix Report without requiring the whole report be re-issued.

[64] The Appellant stated the Director accepted the e-mail from the River Forecast Section as evidence the Approval considered the Appellant's interests. The Appellant said there was no indication the River Forecast Section consulted any source, analyzed any data, or ran any models to reach that conclusion.

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<sup>8</sup> Section 37(4) of the *Water Act* provides:

"If an applicant for an approval does not own the land in fee simple or the undertaking to which the approval is to be appurtenant, if required by the Director, the applicant must submit the written consent of the owner of the land or of the undertaking as part of the application for the approval."

[65] The Appellant stated that, during the application process, the considerations the Director based his decision on changed from whether the works would have any impact on the neighbouring landowners to whether the works would be situated directly on the Appellant's land. The Appellant argued:

“There is no logical or justifiable reason for this shift in policy, other than that AESRD decided to favour the interests of one landowner over another, succumbed to pressure by Mrs. Beglinger, and modified its criteria accordingly. This is contrary to both the guiding principles of the *Water Act*, and the rules of natural justice and procedural fairness in administrative decision-making.”<sup>9</sup>

[66] The Appellant stated the Approval Holders contacted the Appellant after the revised drawing was provided to the Director, but the Approval Holders did not mention the plans were revised and they had requested the requirement of the Appellant's consent be waived. The Appellant argued this was done deliberately because the Approval Holders did not want the Appellant holding up the application by having input into the decision.

[67] The Appellant believed the Approval Holders and the Appellant would be working together on a collaborative effort to have a grant approved from the Municipal District of Foothills under the FREC program. The Appellant stated it e-mailed the engineer involved with the FREC program on December 16, 2013, and explained that, since the Approval Holders installed the berm made of concrete blocks, the river had increasingly encroached onto Englishman's Park. The Appellant was concerned the berm on the Approval Holders' property would change the flow of the river and direct it through Englishman's Park. The Appellant noted the engineer for the FREC program had advised that if work was done at the Site, then work would also be required on the Appellant's land to ensure there were no adverse impacts resulting from work done under the FREC program. According to the Appellant, the engineer for the FREC program indicated that protecting the Approval Holders' site would result in impacts to the Appellant's Englishman's Park located downstream of the Approval Holders. The Appellant stated it was notified on March 24, 2014, that the FREC program project may not be funded.

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<sup>9</sup> Appellant's submission, dated May 1, 2014, at page 4.

[68] The Appellant said it contacted the Municipal District of Foothills on April 14, 2014, because there was work going on at the Approval Holders' property in Three Point Creek, and it was concerned there would be a negative impact on its property. The Municipal District of Foothills confirmed the FREC program project was refused due to costs. The Appellant stated it notified the Municipal District of Foothills and the Approval Holders that it understood that a collaborative approach was being followed, but when the Appellant received no satisfactory response, it filed a Court application seeking a "stop work" injunction.

[69] The Appellant argued the amendment to the Approval to include the revised drawing was a substantial change to the work initially approved. The Appellant stated that notice of an application to amend an approval must be provided in accordance with the legislation, or if notice is waived, notice of the decision to grant the amendment must be provided to any directly affected person.<sup>10</sup> The Appellant said no notice of the application to amend the Approval or the decision to amend the Approval was provided to it.

[70] The Appellant noted the Letter of Approval indicated that notice of the decision must be posted for seven days at the project site at a place accessible by the public. The Appellant stated the notice was attached to a post facing the river bank, so this could not be

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<sup>10</sup> Section 42(3) of the *Water Act* provides:

"Notice of an application to amend an approval must be provided in accordance with Part 8."

Section 11 of the *Water Act* provides:

"(1) If the Director

- (a) issues an approval,
- (b) issues a preliminary certificate,
- (c) issues a licence when a preliminary certificate has not been issued with respect to that licence, except for a licence issued to the Government under section 51(2) that relates to the implementation of a water conservation objective, or
- (d) amends an approval, preliminary certificate or licence,

the Director must comply with the notice requirements referred to in subsection (2).

(2) If subsection (1) applies, the Director must

- (a) if notice of the application or proposed changes was waived by the Director under section 108(6), ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected person...."

considered adequate public notice because there were no public roadways or other public access to the notice.

[71] The Appellant stated it had no actual notice of the application or Approval. The Appellant stated that even though it was provided a copy of the Matrix Report before the revised drawing was submitted, the Matrix Report showed the berm in a different location than what was actually built and stated the Appellant's written consent would be required. The Appellant said the Matrix Report did not contain a statement that a person who is directly affected may submit a Statement of Concern, as required under Section 13(2)(d) of the Regulation.<sup>11</sup> The Appellant argued it did not receive actual or effective notice of the application, the amendment application, or the Approval.

[72] The Appellant stated it would have been easy for the Director to provide notice to the Appellant or require the Approval Holders to notify the Appellant. The Appellant said the Director could have retained the requirement of obtaining the Appellant's written consent after the revised drawing was received or at least required the Approval Holders to notify the Appellant. The Appellant stated that requirement would have resulted in a fairer and more transparent process. The Appellant stated the Approval was issued in October 24, 2013, but work was not permitted to begin in the creek until April 16, 2014.

[73] The Appellant listed factors which it considered made the circumstances unique:

1. the Director and Approval Holders knew the Appellant had not provided consent to the original location of the berm, suggesting there was a dispute;
2. the Appellant's lands surround the Approval Holders' lands to the west, east, and south;
3. Three Point Creek runs directly through the Appellant's property;

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<sup>11</sup> Section 13(2)(d) of the Regulation states:

“A notice with respect to an application under subsection (1) must contain the following:...

- (d) a statement that a person who is directly affected by the application may submit a statement of concern to the Director within the time period as provided for by section 109(2) of the Act and set out in the notice....”

4. the Director instructed Matrix to consider the impact of the proposed works on neighbouring landowners, but Matrix did not follow the instructions;
5. the Matrix Report included the requirement of the Appellant's consent in lieu of considering the impacts on the Appellant's lands;
6. the consent requirement was never removed from the Matrix Report, even after the revised drawing was submitted and the amended Approval was issued;
7. there was confusion over which application was proceeding given the FREC Program application, and the Approval Holders deliberately withheld information from the Appellant;
8. the location of the project was changed without providing any notice to the Appellant;
9. the proposed works were to be constructed along or at the property line without a survey being conducted or required;
10. the new berm was a substantial change to and extension of what was applied for and implemented in 2009.

[74] The Appellant submitted these were extraordinary and exceptional circumstances that required the Director to ensure the Appellant had an opportunity to participate in the process and to require the Appellant be specifically notified of the application and Approval. The Appellant stated this would be consistent with the purpose of the *Water Act*.

[75] The Appellant stated its intention to be involved in the process of determining the proper erosion control measures is evident from its participation in the FREC program and its expression of concern to the FREC program engineer and others about the potential impact of erosion that had resulted from the construction of the berm. The Appellant stated that, had it been aware of the Approval Holders' application, it would have become involved in the process and submitted a Statement of Concern.

[76] The Appellant submitted that, while the principle of certainty is important, it should not trump the basic rules of procedural fairness and natural justice. The Appellant stated that, although an applicant should be able to assume that an approval will not be reopened after the appeal period is over, this should not apply when an applicant deliberately withholds information from a neighbour they are purportedly working with collaboratively to reach a joint

solution to protect their mutual interests. The Appellant submitted the facts of this case warrant extending the appeal period.

[77] The Appellant stated Matrix did not consider the impacts of the berm on the Appellant's property. The Appellant said the engineering company retained through the FREC Program concluded a berm would negatively impact the Appellant's lands.

[78] The Appellant explained it retained its own expert, who advised the Appellant that the Approval Holders built a chute spillway, not a berm, and "...it is preventing the dynamic processes of the creek from switching alignments in a wider meander belt."<sup>12</sup> The Appellant's expert concluded the location of the spillway would result in increased erosion on the Appellant's lands. The Appellant noted its expert advised that an in-depth river engineering study be conducted to evaluate the protection of both properties.

[79] The Appellant requested an extension be granted, and the appeal be heard quickly so that mitigation and remediation measures could be implemented before the flooding season.

#### **IV. ANALYSIS**

[80] Section 116 of the *Water Act* sets the time lines for filing a Notice of Appeal.<sup>13</sup> The appeal period for an approval issued under the *Water Act* is seven days. The appeal period starts upon receipt of notice of the decision or the last provision of notice of the decision being appealed.

[81] Section 116(2) of the *Water Act* allows the Board to extend the appeal period if there are sufficient grounds to do so.<sup>14</sup>

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<sup>12</sup> Appellant's submission, dated May 1, 2014, at page 8.

<sup>13</sup> Section 116(1) of the *Water Act* states:

"A notice of appeal must be submitted to the Environmental Appeals Board

(a) not later than 7 days after

(i) receipt of a copy of a water management order or enforcement order, or

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

<sup>14</sup> Section 116(2) of the *Water Act* states:

[82] The Director in this case determined that notice of the application was not required:

“Given the minor scope of the proposed project, the project location and the planned mitigations, the activity will have minimal or no adverse effects on the aquatic environment, household users, licensees or traditional agricultural users.”<sup>15</sup>

[83] Since no official notice of the application was required, there was no notice seeking Statements of Concern from directly affected persons. The appeal period started after the last providing of notice, which in this case was seven days after the posting of the notice at the project site. The Approval Holders stated the notice was up until November 19, 2013. Based on this, the appeal period ended on November 26, 2013.

[84] The Board appreciates the Appellant might have believed that work could not start on the project until it gave its consent. The original drawings had the berm straddling the Appellant’s lands as well as the Approval Holders’ land. Under section 37(4) of the *Water Act*, if the proposed project is not on the applicant’s own property, then consent from the other landowner is required before an approval is issued.<sup>16</sup> When the revised drawings moved the project so it was only on the Approval Holders’ property, consent from the Appellant was no longer required for the Director to issue the Approval.

[85] A lack of communication between the Approval Holders and Appellant resulted in the changes to the proposed project not being conveyed to the Appellant. Notice of the change in the placement of the berm would have alerted the Appellant that the project could proceed even though it did not provide consent.

[86] However, this does not change the fact the Appellant was well aware the Approval Holders had submitted an application to the Director for an approval for the flood control project.

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“The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

<sup>15</sup> Director Decision, Director’s Record at Tab 35.

<sup>16</sup> Section 37(4) of the *Water Act* states:

“If an applicant for an approval does not own the land in fee simple or the undertaking to which the approval is to be appurtenant, if required by the Director, the applicant must submit the written consent of the owner of the land or of the undertaking as part of the application for the approval.”

The Approval Holders and Appellant provided copies of email exchanges between the two parties. The Approval Holders acknowledged it received a copy of the Matrix Report and was provided an opportunity to go to the site of the proposed construction and hear the intended plans for the site before the Approval was issued.

[87] The Approval Holders explained work started on the site after the Approval was granted in October 2013. The site was prepared for construction by removing debris. Large equipment moved onto the site, and the Approval Holders stated the backhoe remained on the site for four months in case it was able to continue construction of the berm. At the end of March, snow was cleared off the site, and work started in earnest on April 1, 2014.

[88] The Appellant was aware of the Approval Holders' intent to construct the berm and the Appellant was also aware that an application had been filed with Director. Given that the Appellant's property is adjacent to the Approval Holders' property, the Board would anticipate the Approval Holders would have seen some of the activity at the site where the Approval Holders indicated the berm would be built. If the Appellant had not provided consent and the Appellant still believed its consent was required, the Board questions why the Appellant did not make an effort to contact the Approval Holders or the Director to determine how the work can be started without the Appellant's consent.

[89] Even if the Board accepted that the Appellant did not become aware of the construction of the project until the berm was being built on April 1, 2014, the appeal period would have ended on April 8, 2014. If the Board allowed an additional seven days for posting the notice as required under the Director's decision, the appeal period would have ended on April 15, 2014. The Notice of Appeal was not filed until April 22, 2014, still past the appeal period.

[90] The Board has stated in previous decisions that direct notice is not practicable in most cases. The Board recognizes that in this case there was primarily one person to notify. Although actual notice was not provided to the Appellant, notice was provided in three ways: (1) posted on the AESRD website; (2) posted in the Municipal District of Foothills, bulletin board for eight days; and (3) posted at the construction site for 11 days. All of these are accepted methods of providing notice as listed in the Regulation.



[91] The Approval Holders notified the Appellant of the application for the Approval, but did not notify the Appellant of the change in the location of the project. However, the Appellant was aware of the Approval Holder's intent to apply for the Approval to build the berm. Even though the Appellant was not notified of the change in the location of the proposed project, this does not provide the extenuating circumstances the Board needs to accept a Notice of Appeal filed five months after the appeal period ended.

[92] The Appellant argued the requirement of its written consent was never removed from the Matrix Report, which was included by reference into the Approval. However, the wording of the Matrix Report states: "As the works straddle the Black Diamond Land & Cattle property, a letter of consent will be required from them."<sup>17</sup>

[93] With the revised drawing, the berm no longer straddled the Appellant's property. Therefore, this sentence no longer applied. This statement complied with the requirements of the legislation. However, as the condition necessary for written consent to be required was removed by the revised drawing, so did the requirement to have consent from the Appellant.

[94] The Appellant filed its Notice of Appeal five months after the appeal period ended. Although the Board may have considered extending the appeal because of the potential confusion on whether consent was required before work could start, the Board believes the Appellant also had a responsibility to follow through and take some initiative to determine the status of the application. The Appellant could have contacted the Director to find out if an Approval was issued. If the Appellant had concerns with the proposed project, it should have contacted the Director to voice the concerns. The Appellant cannot expect to do nothing and then try to file an appeal five months later.

[95] The Appellant has failed to demonstrate that extenuating circumstances prevented it from filing its Notice of Appeal in time. The appeal was not filed within the legislated time frame and, therefore, the appeal is dismissed.

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<sup>17</sup> Matrix Solution Report, dated September 12, 2013, at page 4.

**V. DECISION**

[96] The Board dismisses the appeal because the Notice of Appeal was filed five months after the appeal period ended. Therefore, the Board cannot accept the Notice of Appeal as being validly before the Board.

[97] The Board dismisses the appeal.

Dated on August 18, 2014, at Edmonton, Alberta

"original signed by"

A.J. Fox  
Panel Chair