

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 25, 2014

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 Joan Corbeil, Tania Demencuik, Terri Savitsky, and Paul Baumberg with respect to *Water Act* Approval No. 00349047-00-00 issued to the Municipal District of Bighorn by the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: Issues Decision: *Corbeil et al. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: Municipal District of Bighorn* (25 November 2014), Appeal Nos. 14-003-006-ID2 (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Panel Chair.

SUBMISSIONS BY:

Appellants: Ms. Joan Corbeil; Ms. Tania Demencuik; Ms. Terri Savitsky; and Mr. Paul Baumberg, represented by Mr. Neil Patterson.

Approval Holder: Municipal District of Bighorn, represented by Mr. Derek King, Brownlee LLP.

Director: Mr. Brock Rush, Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval to the Municipal District of Bighorn under the *Water Act* for channel re-alignment, construction, and excavation of a new creek channel, filling in of the existing channel, creation of a berm, and installation of bank protection in Pigeon Creek.

Ms. Joan Corbeil, Ms. Tania Demencuik, Ms. Terri Savitsky, and Mr. Paul Baumberg appealed the issuance of the Approval and requested a stay. The Board granted a stay of the Approval for the part of the project downstream from Station 1+060. The stay is to remain in place until the appeals are heard and the Minister's decision is made.

The Board requested, received, and reviewed the parties' submissions on any preliminary matters and the issues for the hearing.

Mr. Baumberg raised a preliminary matter, asking the Board to summarily reverse the Approval on the grounds the application for the Approval was incomplete or inaccurate. He also requested the Board summarily dismiss the application that was submitted for the Approval. The Board determined it does not have the jurisdiction to summarily reverse the Approval or dismiss an application. Only the Minister has the authority to reverse the Approval after the Board holds a hearing and provides its recommendations to the Minister. In order to deal with Mr. Baumberg's motion, the Board included it as an issue for the hearing.

To be properly before the Board, an issue must be included in the Notice of Appeal, be relevant to the approval being appealed, and be within the Board's jurisdiction. After reviewing the Notices of Appeal, the submissions, and the Approval, the Board determined the following issues will be heard at the hearing:

1. Did the Director properly exercise his discretion regarding the size and scope of the proposed project when issuing the Approval?
2. Are the design requirements of the proposed project, including size and scope, as specified in the Approval adequate to protect the environment and ensure public safety?
3. If the Director's decision to issue the Approval was based on an invalid document, would the Approval be valid?

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	2
III.	MOTION TO SUMMARILY DISMISS	4
A.	Submissions	4
1.	Appellants	4
2.	Approval Holder	7
3.	Director	8
4.	Rebuttal Submissions.....	10
B.	Analysis	12
IV.	ISSUES FOR HEARING	13
A.	Submissions	13
1.	Appellants	13
2.	Approval Holder	18
3.	Director	18
4.	Rebuttal Submissions.....	20
B.	Analysis	22
V.	DECISION	24

I. INTRODUCTION

[1] This is the Environmental Appeals Board’s decision on the issues to be heard at the hearing of the appeals regarding the issuance of Approval No. 00349047-00-00 (the “Approval”) to the Municipal District of Bighorn (the “Approval Holder” or “M.D. of Bighorn”). Alberta Environment and Sustainable Resource Development (“AESRD”) issued the Approval to the M.D. of Bighorn under the *Water Act*, R.S.A. 2000, c. W-3, for channel re-alignment, construction and excavation of a new creek channel, filling in of the existing channel, creation of a berm, and installation of bank protection. The Approval applies to a site located on Pigeon Creek in the Hamlet of Dead Man’s Flats in the M.D. of Bighorn. The work is in response to damage done during the 2013 floods. Ms. Joan Corbeil, Ms. Tania Demencuik, Ms. Terri Savitsky, and Mr. Paul Baumberg (collectively, the “Appellants”) appealed the decision to issue the Approval and Ms. Savitsky requested a stay.

[2] The Environmental Appeals Board (the “Board”) issued a stay until the Minister issues his decision. The stay applied only to that portion of the project downstream of Station 1+060 and through Dead Man’s Flats (“Phase 2”).¹

[3] The Board received submissions from the Appellants, Approval Holder, and the Director (collectively, the “Parties”) on the issues for the hearing and on Mr. Baumberg’s motion to summarily dismiss the Approval and the application for the Approval. The Board determined it does not have the jurisdiction to summarily reverse an approval or dismiss an application. Only the Minister has the authority to reverse the Approval after the Board holds a hearing and provides its recommendations to the Minister.

¹ Although the Approval does not identify Phase 1 and Phase 2 of the proposed project, the Appellants’ appeals and stay request relate to the lower part of the project downstream of Station 1+060, which they refer to as Phase 2. The Appellants refer to that portion of the project extending from the Thunderstone Quarry Waterfall to Station 1+060 as Phase 1. For clarity, the Board will use the terms “Phase 1” and “Phase 2” as defined by the Appellants.

[4] To be properly before the Board, an issue must be included in the Notice of Appeal, be relevant to the approval being appealed, and be within the Board's jurisdiction. The Board determined the following issues will be heard at the hearing:

1. Did the Director properly exercise his discretion regarding the size and scope of the proposed project when issuing the Approval?
2. Are the design requirements of the proposed project, including size and scope, as specified in the Approval adequate to protect the environment and ensure public safety?
3. If the Director's decision to issue the Approval was based on an invalid document, would the Approval be valid?

II. BACKGROUND

[5] On May 12, 2014, the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development (the "Director"), issued the Approval to the Approval Holder authorizing the installation of bank protection (rip rap), channel re-alignment, construction or excavation of a new channel, the filling in of an existing channel, and the construction of berms affecting Pigeon Creek in SE 13-024-10-W5M, SW 18-024-09-W5M, and NW 07-024-09-W5M. The proposed project is related to flood recovery activities due to the 2013 floods.

[6] On May 19 and 20, 2014, the Board received Notices of Appeal from the Appellants appealing the Approval. Ms. Savitsky also requested a stay of Phase 2 of the project.

[7] On May 23, 2014, the Board wrote to the Parties acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals and stay request. The Board asked the Director to provide a copy of the documents upon which his decision was based (the "Record"). The Board also requested the Appellants to provide answers to the stay questions.²

² The Appellants were asked to answer the following questions:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board, than the Municipal District of Bighorn No. 8 would suffer from the granting of a stay?

[8] On May 23, 2014, Ms. Savitsky clarified the stay request was for the second part of the project, not the upper quarry portion (between Thunderstone Quarry Waterfall to Station 1 + 060).

[9] Between May 27 and 30, 2014, the Board received the Appellants' responses to the stay questions.

[10] On May 30, 2014, the Board received a copy of the Record. The Board provided a copy of the Record to the Parties on June 4, 2014.

[11] On June 9, 2014, the Board notified the Parties that a temporary stay of the second part of the project was granted pending completion of the submission process and the Board's final decision of the stay. The Board asked the Director and Approval Holder to provide response submissions on the stay questions.

[12] On June 11, 2014, the Board notified the Parties that, based on the available dates provided by the Parties, the mediation meeting was scheduled for July 21, 2014.

[13] The Board received response submissions to the issue of the stay from the Director and Approval Holder on June 19 and 23, 2014, respectively.

[14] Mr. Baumberg, Ms. Savitsky, and Ms. Corbeil provided final responses on June 30, July 2, and July 8, 2014, respectively. Ms. Demencuik did not provide a final response.

[15] On July 10, 2014, the Board notified the Parties that it was putting the stay decision on hold pending the mediation meeting.

[16] The mediation meeting was held on July 21, 2014, in Cochrane. The Appeals were not withdrawn, and the Board proceeded to determine whether the stay should remain in place until the hearing was held and the Minister makes his decision.

[17] On August 12, 2014, the Board requested the Approval Holder advise the Board whether the Approval Holder wanted to proceed with construction under the Approval or agree the temporary stay remain in place.

4. Would the overall public interest warrant a stay?

5. Are the Appellants directly affected by AESRD's decision to issue Approval No. 00349047-

[18] On August 19, 2014, the Approval Holder notified the Board that it would like to proceed with construction of the proposed project.

[19] On August 25, 2014, the Board notified the Parties that the stay was to remain in place. Reasons were provided to the Parties on October 20, 2014.

[20] On August 12, 2014, the Board asked the Parties to provide any preliminary motions they wanted the Board to decide and to specify the issues included in the Appellants' Notices of Appeal that should be heard by the Board.

[21] On August 20, 2014, Mr. Baumberg submitted a motion asking the Board to reverse the Director's decision to issue the Approval because the application for the Approval contained an error that voided the application.

[22] On August 21, 2014, the Board acknowledged Mr. Baumberg's motion and noted that it appeared the application requested a remedy that can only be granted following a full hearing of the appeals. The Board requested the Parties provide comments on Mr. Baumberg's motion. On August 25, 2014, Mr. Baumberg provided an amended motion, and a further amendment was received on September 10, 2014.

[23] Between August 31, 2014, and October 10, 2014, the Board received and reviewed the Parties' comments on the issues for the hearing and Mr. Baumberg's motion.

[24] On October 17, 2014, the Board notified the Parties of the issues for the hearing.

III. MOTION TO SUMMARILY DISMISS

A. Submissions

1. Appellants

[25] Ms. Demencuik did not provide a submission.

[26] Ms. Corbeil commented on the question of the validity of a document indicating consent to the project that was purportedly signed by Mr. Derek Ryder on behalf of the Pigeon Creek Condominium Corporation. She stated Mr. Ryder is not a resident of Pigeon Creek

Condominiums but he owns a unit in the complex. She believed he likely signed off for the reconstruction of Pigeon Creek thinking he was acting in the Appellants' best interests and had little time to get the Appellants involved. Ms. Corbeil said that if Mr. Ryder's sign-off is deemed invalid, it would be fairer to allow all 43 owners to have a say in the process since the creek realignment plan lies, in part, on the condominium's community property and will affect the environment and aesthetics.

[27] Ms. Savitsky stated the representation of the condominium corporation's President does not legally represent all of the owners unless they first hold a vote on the issue, there is a 75 percent vote in favour for the decision, and the President is given the authority to represent the decision on behalf of the other owners. She did not believe the condominium corporation board members would have the authority to make such a decision on behalf of the other owners based on the condominium bylaws and the *Condominium Property Act*, R.S.A. 2000, c. C-22. Ms. Savitsky said the document signed by Mr. Derek Ryder did not appear to reflect ownership of the condominiums as it refers to him as the authorized agent of the legal lessee, but the other owners were not involved or notified of the decision even being made on their behalf. Ms. Savitsky acknowledged the parties involved felt the decision needed to be done in a timely manner, but allowing the correct process to occur may have resulted in different decisions. Ms. Savitsky did not believe the consent letter could be considered a legal document as required by the approval process.

[28] Ms. Savitsky did not believe the application was filled out correctly for the following reasons:

1. the written consent of the registered landowner for the Pigeon Creek Condominiums was not valid and not signed by a person with the authority to represent the other owners;
2. letters from other landowners were not included, such as Copperstone, Kiska Inn, and the ESSO station, even though they all experienced flood damage;
3. other stakeholders identified in the BGC Engineering Report, such as the Town of Canmore, ATCO gas, Fortis Alberta, Alta Link, BHB Canmore Ltd., Alberta Transportation, and Tourism, Parks and Recreation were not included in the approval process;

4. the description of the amount of debris in the lower reaches of the creek is inconsistent with other reports;
5. no estimate was provided of the volume of material that was filled in;
6. the removal of trees along the creek will impact erosion and bank protection and will not leave the creek natural or result in minimal disturbance as described; and
7. given the amount of vegetation that will be removed, there was no indication of how the disturbed sites will be re-vegetated.

[29] Mr. Baumberg requested the Board dismiss the application for the Approval as he takes the position the application is not properly before the Board since it is not complete and includes an “error in law” which is shown in the Record. Mr. Baumberg stated that, if the Board considers it necessary to have a hearing, his motion to dismiss the application should be heard as a preliminary matter. Mr. Baumberg stated the error in law cannot be changed or removed.

[30] Mr. Baumberg noted that in the application for the Approval, in response to the question of whether the registered landowner where the activity will occur provided written consent to access, the Approval Holder indicated “yes.” He noted that, included in the application, was an agreement signed by a lessee, Mr. Derek Ryder, in which Mr. Ryder certified that he was the legal lessee of property located at Pigeon Creek Condominiums. Mr. Baumberg argued that, in law, a lessee is a tenant not a landowner and, in this situation, has no authority to sign any agreement with the Approval Holder. Mr. Baumberg stated Mr. Ryder was not a tenant or a lessee. Mr. Baumberg argued that, as a lessee, Mr. Ryder would have no authority to sign an agreement with the Approval Holder. Mr. Baumberg argued this is a fatal error in law, as the application affects the land right of Pigeon Creek Condominiums. Mr. Baumberg said the error is a palpable error because it is plainly seen in the Record. Mr. Baumberg noted that, pursuant to section 37(4) of the *Water Act*,³ 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. He submitted the Approval Holder did not meet this consent requirement.

³ 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.”

[31] Mr. Baumberg requested that, pursuant to section 98(2) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”),⁴ the Board reverse the Director’s decision to issue the Approval, because the application for the Approval had an error in law that rendered the application void.

[32] Mr. Baumberg requested the Board require the Director to direct the Approval Holder to provide notice under section 8 of the *Water Act*⁵ in order that all residents of Dead Man’s Flats are given the opportunity to voice their opinions on the application.

2. Approval Holder

[33] The Approval Holder submitted the Board should reject the motion to summarily dismiss the Approval on the following grounds:

1. The motion raises matters that cannot be considered preliminary in nature since the challenges raised and the remedy sought go to the issues of the

⁴ Section 98(2) of EPEA provides:

“In its decision, the Board may

- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
- (b) make any further order the Board considers necessary for the purposes of carrying out the decision.”

⁵ Section 8 of the *Water Act* states:

“(1) In this section, ‘biological diversity’ means the variability among living organisms and the ecological complexes of which they are a part, and includes diversity within and between species and ecosystems.

(2) The Minister must establish a strategy for the protection of the aquatic environment as part of the framework for water management planning for the Province.

(3) The strategy referred to in subsection (2) may include

- (a) identification of criteria to determine the order in which water bodies or classes of water bodies are to be dealt with,
- (b) guidelines for establishing water conservation objectives,
- (c) matters relating to the protection of biological diversity, and
- (d) guidelines and mechanisms for implementing the strategy.

(4) The Minister must, in a form and manner that the Minister considers appropriate, consult with the public during the development of the strategy.”

appeal itself, which are to determine if the Director's decision to issue the Approval was valid and if the Approval should be denied;

2. Mr. Baumberg raised new grounds of appeal in the motion, but the proper procedure would have been to seek the right to amend his grounds of appeal so that the alleged new grounds could be considered and addressed by the Board as part of the substantive hearing; and
3. The sections of EPEA and the *Water Act* referred to in Mr. Baumberg's motion do not support his motion. Section 95(5)(a)(iii) of EPEA⁶ authorizes the Board to dismiss a Notice of Appeal if the Board determines the Notice of Appeal is not properly before it, but it does not authorize the Board to dismiss the Approval or the application that was submitted in support of the Approval. Section 99(1) of EPEA⁷ relates to the Board's report to the Minister. Section 99(1) of the *Water Act* applies to Water Management Orders.

[34] The Approval Holder submitted Mr. Baumberg's motion should be dismissed and not be addressed as a preliminary motion.

3. Director

[35] The Director stated the Board's governing legislation does not allow the Board to reverse the Director's decision to issue the Approval. The Director stated, at this point in the appeal process, the Director's decision could only be reversed by consent of all the Parties, as in a mediation, or following a hearing on the merits, where the Board would prepare a report and recommendations and the Minister would then confirm, reverse, or vary the decision.

[36] The Director argued Mr. Baumberg's motion should be dismissed because the Board does not have the legislative authority to summarily reverse the Approval.

⁶ Section 95(5)(a)(iii) of EPEA provides:

"The Board may dismiss a notice of appeal if...

(iii) for any other reason the Board considers that the notice of appeal is not properly before it...."

⁷ Section 99(1) of EPEA states:

"In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the *Water Act*, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."

[37] The Director stated the Board does not have the authority to dismiss the application. The Director noted section 95(5)(a)(iii) of EPEA allows the Board to summarily dismiss a Notice of Appeal, but it does not authorize the Board to dismiss an application for an approval.

[38] The Director submitted Mr. Baumberg's motion should be dismissed because the Board does not have the legislative authority to dismiss the application or the Approval.

[39] The Director disagreed with Mr. Baumberg's characterization of the "three consent letters" as an error of law on the face of the Record. The Director noted that questions of law are questions about what the correct legal test is, so an error of law is applying the incorrect legal test or applying the legal test incorrectly. The Director stated neither scenario applies in this case.

[40] The Director noted section 37(4) of the *Water Act* gives the Director discretion whether to require the written consent of the owner. The Director explained that owner consent is usually obtained in circumstances of this nature. The Director said the Approval Holder submitted Mr. Ryan's consent on behalf of the condominium corporation along with the application for the Approval because the undertaking crosses portions of the condominium corporation's common property. The Director noted Mr. Ryder represented himself as having the authority to consent on behalf of the condominium corporation, and the Director relied on Mr. Ryder's representation in good faith. The Director stated the issue of Mr. Ryder's consent is a question of fact.

[41] The Director explained he does not independently verify the authority of those who provide consents unless there is an obvious reason to do so. The Director said Mr. Ryder represented himself as having the requisite authority to bind the condominium corporation, and it was reasonable for the Director to rely on this. The Director noted Mr. Baumberg indicated in his Notice of Appeal that Mr. Ryder was the President of the condominium corporation, and given the powers and duties of the condominium corporation are exercised and performed by an elected board of directors of which the President is the chair, it was reasonable for the Director to rely on Mr. Ryder's representation that he had the authority to bind the condominium corporation.

[42] The Director explained that consent of the owner is sought at the time the application is made to ensure the owner whose land may be impacted by the activity authorized by the approval is aware of the application and activity before the activity takes place. The Director stated the Appellants have notice of the hearing and will have the opportunity to speak to the Approval Holder's application before the activity takes place. The Director noted other members of the condominium corporation board may apply to intervene in the hearing if they choose and the Board allows. The Director noted there is a stay in place so no activity under the Approval has occurred.

[43] The Director argued the Appellants have not been prejudiced even if Mr. Ryder's consent was improper because they, and the condominium corporation's board, can have a say at the hearing.

[44] The Director stated that, given a hearing will be held and a stay is in place, the issue of written consent under section 37(4) of the *Water Act* is moot. The Director noted section 37(4) of the *Water Act* only applies at the application stage of the process, and it is now at the hearing stage.

[45] The Director submitted that, given Mr. Baumberg's motion is improper, it should be dismissed.

[46] The Director stated Mr. Baumberg originally asked the Board to require the Director to give notice under Part 8 of the *Water Act*, but that relief is not authorized under the Board's governing legislation.

[47] The Director noted the Board has limited powers to make final decisions or issue orders under section 91(1)(n) or (o) of EPEA or sections 115(j), (l), or (q) of the *Water Act*, but these appeals do not fall within these sections. The Director stated these appeals were filed pursuant to section 115(1)(a)(ii) of the *Water Act*, which requires the Board to make a report and recommendations to the Minister who then makes the final decision.

4. Rebuttal Submissions

[48] Mr. Baumberg stated Mr. Ryder signed the consent as a “lessee” and not as a “landowner.” He argued this is a question of law that is within the Board’s jurisdiction. Mr. Baumberg said a lessee is not a landowner. He agreed with the Director that consent is a question of fact, but the error in this case is not the consent in fact but it is the error in law that the consent was not from a landowner.

[49] Mr. Baumberg did not agree with the Director’s comment that the consent is moot because the Appellants will have a say at the hearing. Mr. Baumberg considered it an unfair comment and not right. He said administrative law proceedings allow affected parties to have a say, which should have been to the Director before the application was approved. Mr. Baumberg said this would mean all members of the condominium association would speak and, if necessary, have a vote of 75 percent of the members to approve the application, but this was not done. He noted only four of the landowners who happened upon the notice of the decision to issue the Approval filed appeals, but they have no expertise to question the engineering experts regarding the application.

[50] Mr. Baumberg argued the consent signed by Mr. Ryder as a lessee and not as a landowner results in the consent being void *ab initio*.⁸ Mr. Baumberg submitted the Approval is invalid because the Director required the Approval Holder obtain consents from the landowners at the Pigeon Creek Condominiums, but this was not done.

[51] Mr. Baumberg stated the first issue the Board must resolve at the hearing is the error in law regarding the consent letter signed by Mr. Ryder.

[52] Mr. Baumberg noted that, even though eight other creeks in the area were damaged in the 2013 floods, only Pigeon Creek is being reviewed by the Director as an emergency under section 108(6) of the *Water Act*. He explained the other creeks are part of the Mountain Creek Mitigation Hazard Update by the Town of Canmore and the M.D. of Bighorn, and they are being reviewed by BGC Engineering, who will file its report before filing applications with the Director sometime in the fall of 2014 or spring of 2015. Mr. Baumberg

⁸ “*Ab initio*” is defined as: “From the beginning; from the first act; from the inception.” See: *Black’s Law Dictionary*, 6th ed., s.v. “ab initio”.

said these reports will contain suggestions of nets and berms in the valley similar to the report filed with the application for this Approval.

[53] The Board did not receive rebuttal submissions from Ms. Corbeil or Ms. Demencuik.

B. Analysis

[54] Under section 95(5) of EPEA, the Board has the authority to dismiss an appeal if it is not properly before the Board. An assessment of whether it is properly before the Board is a preliminary matter that must be determined prior to holding a hearing on the merits.⁹

[55] Under the legislation, an appeal can be dismissed by the Board if the Board finds the appellant is not directly affected, if the appeal is filed past the legislated timeframe, the matter is not within the Board's jurisdiction, the appeal is frivolous or vexatious, or for any other reason the Board considers the appeal is not properly before it. None of these conditions apply in this case.

[56] In this case, Mr. Baumberg is asking the Board to summarily dismiss the Approval or the application for the Approval. The Board does have the authority to make a final decision, but only in limited types of appeals.¹⁰ The legislation does not provide authority to the Board to summarily dismiss an approval or the application in support of an approval. In this case, the Board can only make a recommendation to the Minister to confirm, reverse, or vary the Approval and only after hearing the submissions by the Parties. Therefore, the Board cannot summarily dismiss the Approval.

[57] However, the Appellants argued that, if the information in the application supporting the Approval is inaccurate or incomplete, then the Approval itself should not have been issued. In order to determine if there has been an error in the application that would result

⁹ See: *Court v. Alberta (Environmental Appeal Board)* (2004), 4 C.E.L.R. (3d) 185, 10 Admin. L.R. (4th) 219 (Alta. Q.B.).

¹⁰ See: Section 98 of EPEA, which provides:

“In the case of a notice of appeal submitted under section 91(1)(n) or (o) of this Act or a notice of appeal submitted under section 115(1)(j), (l) or (q) of the *Water Act*, the Board shall, within 30 days after the completion of the hearing of the appeal, make a written decision on the matter.”

in the Director's decision being invalid, or if such an error in the application would have resulted in a different decision by the Director, the Board will include the following issue for the hearing:

If the Director's decision to issue the Approval was based on an invalid document, would the Approval be valid?

IV. ISSUES FOR HEARING

A. Submissions

1. Appellants

[58] Ms. Corbeil said it was odd the creek upstream of the Trans-Canada Highway is not as wide as what is planned to be constructed downstream even though there is room to construct a very wide creek bed. She noted the culverts at the Trans-Canada Highway would become a bottleneck again, considering the amount of debris that came down from the quarry and the mountain in general during the 2013 flood. Ms. Corbeil found the proposed size of the project was inconsistent with the requirement of restoring the creeks to as close to original as possible.

[59] Ms. Corbeil explained the water flow in Pigeon Creek past the condominiums is minimal all year except during peak flow in the third week of June. Ms. Corbeil stated she would like the creek restored to its original path and state if possible without the large "S" turn put in by River's Bend. She said that leaving it the way it is now would reduce expenses, minimize the destruction of trees, and would not cause further disturbance to the environment. Ms. Corbeil did not want the creek moved closer to their condominium building. Ms. Corbeil said it would be disastrous to lose so many trees close to their condominiums, and it would impinge on the privacy the condominium owners now have.

[60] Ms. Corbeil questioned if it was possible to prevent so much debris from coming down from above, given that much of the debris that ended up on the condominium owners' property came from the quarry. She believed it would be appropriate to spend some of the money to clean up debris that still lies around the area and to shore up the bottom of the quarry to prevent it from ending up by the condominiums.

[61] Ms. Savitsky believed the creek remediation strategies along where the creek flows are inconsistent. She stated the proposed mitigation strategy on the Hamlet of Dead Man's Flats side seems excessive and will cause adverse impacts to the environment, the wildlife corridor, and residents' and campers' enjoyment of the area.

[62] Ms. Savitsky explained the uppermost part of the watershed is managed by the Town of Canmore, and the uppermost part of the watershed includes Thunderstone Quarry and a condominium complex east and further uphill from the quarry. The creek then passes under the Trans-Canada Highway, which falls under the responsibility of Alberta Transportation. The creek then flows onto the Approval Holder's lands and to some degree on the Pigeon Creek Condominium property, and then it continues to the Three Sisters Campground, which is the responsibility of Alberta Tourism, Parks and Recreation. Ms. Savitsky stated all segments of the creek have the same or similar risk to public safety, but the mitigation strategies for each segment are different. Ms. Savitsky said there are other stakeholders that have not been involved in the approval process and whose infrastructure and services are at risk, including Alberta Transportation, ATCO Gas, Fortis Alberta, and Alta Link.

[63] Ms. Savitsky believed mitigation strategies along the creek should be similar with the same anticipated flow. Ms. Savitsky said reclamation along the Town of Canmore and the Trans-Canada Highway segments intends to restore the creek to the same or similar state as was present before the 2013 flood. She said the slight redirection of the creek at Thunderstone Quarry appears to follow the same flow location that naturally occurred during the 2013 flood.

[64] Ms. Savitsky stated the scale of the proposed mitigation strategy at the Hamlet of Dead Man's Flats and Municipal District segment is massive compared to the other segments. Ms. Savitsky noted there did not appear to be any regulations or criteria set out by the flood mitigation funding application process that says the project must be designed to handle the largest experienced flood, but it appears the mitigation decisions are up to the town or district that receives the monies. Ms. Savitsky argued that, if the level of protection was listed in the application process, then the other segments of the creek would also have to meet the same size of event. Ms. Savitsky believed the upper segments of the creek would have experienced the same or similar water flow and flooding since the majority of the debris came from the upper

parts of the watershed. Ms. Savitsky noted there did not appear to be any mitigation plans for the part of the watershed between the Pigeon Creek Condominiums and the playground and the Three Sisters campground, even though this is where the flow will end up.

[65] Ms. Savitsky stated the proposed mitigation strategies for the uppermost parts of the watershed are not very environmentally disruptive while the lower part is very disruptive. She noted the proposed project results in the natural flow and location of the creek being significantly altered, and she questioned whether it was necessary, given the upstream mitigation strategies. Ms. Savitsky raised the issue of flow rates in the creek given the inconsistencies in mitigation measures and resulting variation in creek width.

[66] Ms. Savitsky stated the watershed is a “classified” creek, which makes it important for sustaining fish in the watershed. She said as a tributary to the Bow River, Pigeon Creek contributes to the sustainability of at-risk fish species that inhabit the Bow River.

[67] Ms. Savitsky stated the vegetation and wildlife will be affected due to the magnitude of the proposed 30 metre creek width with the associated berms, spanning an area of 52 to 60 metres of clear-cut.

[68] Ms. Savitsky noted Alberta Transportation replaced its culvert with the same size culvert as was in place before the 2013 flood since its analysis indicated it was the appropriate size. Ms. Savitsky questioned whether the current modified embankment would not adequately protect their condominium complex.

[69] Ms. Savitsky explained the natural flow of the creek during floods is to the east where the River’s Bend development is located. She said the development criteria require an internal berm be constructed to protect the development in case of a potential flood. Ms. Savitsky questioned whether this overflow berm along with the berm that currently surrounds the creek would not be adequate to protect the development from flood damage and alleviate the need to redirect the creek and clear-cut the area around the creek.

[70] Ms. Savitsky noted the Approval Holder was aware on March 10, 2014, that funding for the creek mitigation project had been approved and that an engineering report had been completed for the watershed, but it was not until April 3, 2014, that the Approval Holder

requested the Director waive the Notice of Application. She questioned whether during this time there was not adequate time to conduct public hearings and other means of public notification and receive public feedback.

[71] Ms. Savitsky stated that most of the residents of Dead Man's Flats are not aware of any remediation or the relocation of the creek because no one saw any public notice or had been told about the proposed changes even though the project will affect their enjoyment of the creek, vegetation, wildlife, and the environment. Ms. Savitsky said the only notice provided was the notice to appeal the Approval that was posted at the local mail kiosk. She noted the proposed time to start construction as indicated on the application form was May 1, 2014, with a completion date of May 22, 2014, two days after the appeal deadline. Ms. Savitsky said the timing to beat the 2014 spring flood was already behind schedule at the time the Notice of Approval was posted. Ms. Savitsky believed the outcomes would have been different if the normal procedures for notification and voting under the condominium corporation rules for the impacted parties would have been allowed. She said allowing for public input would have been appreciated by the residents of Dead Man's Flats. Ms. Savitsky thought landowners who experienced flood damage should have been involved in the approval process.

[72] Ms. Savitsky stated that, since Pigeon Creek is a classified creek, there could be an impact on the Bow River and the endangered fish species due to changes in flow rates and channel capacity.

[73] Ms. Savitsky noted the bush along their condominiums is full of debris and silt, which is killing the remaining vegetation. She said there has been no clean up in the Dead Man's Flat and no monies from the Disaster Recovery Fund Program have been delegated to assist with some of the clean-up.

[74] Mr. Baumberg expressed concern regarding the size and scope of the proposed project and the impact it will have on him and the community. Mr. Baumberg listed the following as issues for the hearing:

1. residents of Dead Man's Flats were not invited to or included in any information session to discuss the plans for the proposed project, which he considered unfair under the rules of natural justice;

2. the proposed project changes the design footprint of the Pigeon Creek Condominium communal property, which required a special resolution with 75 percent approval;
3. changing the natural flow of Pigeon Creek is contrary to the goals of AESRD, and AESRD stated publicly it intended, to the best of its ability, to return all creeks and streams to their natural state as much as possible; most creeks and streams in Kananaskis and the Bow Valley have been returned to their natural state with no plans to change this approach, pending long term mitigation studies;
4. the inclusion of an upstream debris net would reduce potential threats of a debris flow downstream and would allow the size and scope of the project to be reduced;
5. berms along the creek during the 2013 flood were about one metre high and the creek was about 15 feet wide, but the condominiums sustained only minor damage, relative to the size of the event;
6. Thunderstone Quarry will not give up any of its property for a sediment pond, which would reduce potential downstream threats, so the Appellants are asked to give up something so Thunderstone Quarry does not have to;
7. Alberta Transportation stated it will not be doing remediation work until long-term mitigation studies are complete. Alberta Transportation replaced culverts with ones of the same size as those that were in place before the flood, even though the culverts are not sized for a 1 in 1000 year flood event, which is what the Approval Holder is basing its calculations on for the proposed project. In 2013, the condominiums had a natural flood plain to protect them, but now the Approval Holder wants to protect the natural flood plain from flooding because of a proposed development on that land. Remediation projects in other communities are not being built to a 1 in 1000 year flood threat. The creek side condominiums are losing sight and sound of the creek, and for him, the sight and sounds were the major reason why he purchased the condominium. There will also be clear cutting of all the trees to protect the structural integrity of the project.
8. the project will result in a 53 metre wide concourse of rock and interlocking block, and a creek depth of about 3 metres, for a creek that traditionally has about 15 cm of water in it and is about 2 metres wide. The Approval Holder is driving the creek remediation project and is the driving force behind the proposed development.
9. whether a remediation project of this size and scope would require an environmental impact assessment given the project will affect everything around it environmentally and aesthetically.

2. Approval Holder

[75] The Approval Holder agreed with the Director's submission on the issues for the hearing.

3. Director

[76] The Director stated the issue for the hearing should be:

“Are the design requirements in the Approval adequate to ensure protection of the aquatic environment and public safety?”

[77] The Director stated the issues raised in the Notices of Appeal that are within the Board's jurisdiction are:

1. the size and scope of the project, especially the movement of the creek channel;
2. reductions in wildlife movement; and
3. height of the creek banks and public safety.

[78] The Director stated the Appellants' concerns regarding wildlife movement and public safety appear to relate to the current state of Pigeon Creek rather than the proposed channel realignment. The Director noted concerns related to wildlife and public safety must relate to the terms and conditions of the Approval to be valid issues at the hearing.

[79] The Director submitted the basis of the Appellants' issues is the design of the channel re-alignment, including size, location, and scope and, therefore, this should be the issue for the hearing.

[80] The Director said the issue as stated falls within the legislative authority of section 38 of the *Water Act*, includes factors considered by the Director in making his decision, reflects the Appellants' concerns, and is within the Board's jurisdiction.

[81] The Director noted that reductions in property values are outside the Board's jurisdiction and should not be considered at the hearing.

[82] The Director stated that impacts on the Appellants' quality of life, specifically their view of the creek, is not an environmental issue, is outside the Board's jurisdiction, and

therefore, should not be considered at the hearing. The Director said the same applies to aesthetic concerns.

[83] The Director stated the issues related to notice of the application or lack of input at the application stage are moot as the Appellants' have notice of the hearing and will have the opportunity to provide input at the hearing. Therefore, the procedural issues related to the application stage should not be considered at the hearing.

[84] The Director noted Mr. Baumberg's request for an environmental impact assessment was not raised in his Notice of Appeal. The Director stated the activity authorized by the Approval is not on the mandatory list under the *Environmental Assessment (Mandatory and Exempted Activities Regulation*, Alta. Reg. 111/1993. The Director noted his decision whether to refer a matter for an EIA is not appealable to the Board and, therefore, this issue cannot be heard at the hearing.

[85] The Director stated Ms. Savitsky added new issues that were not contained in her Notice of Appeal, including concerns related to fish, fish passage, species at risk, and impacts on vegetation. The Director requested these issues be disregarded.

[86] The Director submitted Mr. Baumberg's motion asking the Board to order the Director to give notice under Part 8 of the *Water Act* should be dismissed because the Board does not have the legislative authority to do so.

[87] The Director explained he has the authority to waive notice of the application,¹¹ and he made the decision based on the information in the Approval Holder's application.

¹¹ See: Section 108(6) of the *Water Act*:

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

- (a) there is an emergency,
- (b) the activity or diversion of water specified in the application for the approval or licence or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users, or

[88] The Director noted his decision to waive notice of the application is not appealable, and therefore his decision regarding notice of the application cannot be considered at the hearing.

[89] The Director stated there is no need to order the Director to provide notice of the application to the residents of Dead Man's Flats because the same result will be achieved when the Board provides notice of the hearing to the public. The Director noted the Appellants will have the opportunity to participate in the hearing and have their concerns heard, and other residents from Dead Man's Flats may intervene in the hearing if they choose and the Board allows.

4. Rebuttal Submissions

[90] Ms. Savitsky noted the following as potential issues for the hearing:

1. the size and scope of the proposed project, the rationale for selecting this option, and how well this option will work with other parts of the watershed and the mitigation strategies for those areas;
2. adverse effect on the land and water, including trees and wildlife;
3. the application for the Approval included a letter signed by the past president of the Pigeon Creek Condominium Association and whether the document is legal;
4. the lack of public involvement and information in the community throughout the process;
5. Pigeon Creek should be given the same consideration as to the long term risk assessments and mitigation strategies as other creeks in the area are receiving; and
6. consideration of some of the options for mitigation mentioned in the BCG Reports so that less environmental impact will occur along the watershed.

[91] Mr. Baumberg stated there was no formal vote by the condominium board members on any proposal submitted by the Approval Holder. He noted the document signed by the former condominium association President, Mr. Ryder, was signed on April 1, 2014 at a

(c) adequate notice of the subject-matter of the application or the proposed amendment has already been provided or given under this Act or the *Water Resources Act*, RSA 1980 cW-5."

stakeholders meeting, but the board members did not receive the documents describing the proposed project until April 8, 2014. Mr. Baumberg reiterated that any change to the footprint of communal condominium property requires a special resolution with a 75 percent approval by all condominium owners. Mr. Baumberg said the Approval Holder was aware of this requirement.

[92] Mr. Baumberg stated that not all residents and business owners affected by the 2013 flooding in Dead Man's Flats have been made aware of the proposed mitigation process or changes being proposed to Pigeon Creek.

[93] Mr. Baumberg objected to the size and scope of the proposed project. He stated the condominium owners' "safety net," the Pigeon Creek floodplain, is being taken away to protect vacant property. Mr. Baumberg said the only protection the Appellants need is to have a functioning floodplain for Pigeon Creek.

[94] Mr. Baumberg said the proposed project will negatively affect the value of his condominium, for which he paid a premium due to its proximity to the creek. He stated the proposed project will affect the area aesthetics, ambience of the area, enjoyment by visitors and residents, and wildlife movement. Mr. Baumberg argued that if the proposed project proceeds, the luxury of living near running water will be forcibly taken away from him.

[95] Mr. Baumberg explained the Appellants' condominiums had little damage during the 2013 floods because of the natural floodplain. He believed the damage they did incur was the result of changes made to the creek bank during the flood event, and that creek banks where Pigeon Creek would normally have flowed onto the floodplain were reinforced, sending the water flow back towards the Appellants' condominiums.

[96] Mr. Baumberg stated the proposed project removes what they currently have and replaces it with a "canyon" to protect private vacant property.

[97] Mr. Baumberg listed the following as issues that should be heard at the hearing:

1. a decision on whether the consent letter signed by Mr. Ryder is an error in law since he signed it as a lessee and not as a landowner. The Board should send the decision to the Minister indicating the Record has an error in law and the Director must redo the application process;

2. include the Mountain Creek Hazard Mitigation Update from Canmore, because it discusses phases of mitigation and includes information from key stakeholders, including the Province of Alberta, CP Rail, and the M.D. of Bighorn. It discusses all creeks in the Bow River valley and includes long-term risk assessments. It will include new information regarding options for mitigation.
3. why Pigeon Creek was assessed under section 108(6) of the *Water Act* when Exshaw Creek and Jura Creek were not. The BCG Engineering report suggested using upstream berms and nets to retain debris rather than using a less costly “shotgun approach” just because funding was available;
4. the need for a proper risk and long-term mitigation assessment;
5. the changes in the landscape;
6. the need to apply a section 108(6) emergency no longer exists so the timeline does not have to be applied;
7. the Director may cancel the Approval as there is new information and there is no longer an emergency. The Approval Holder did not consider Pigeon Creek an emergency at the time any more than other creeks in the area, but it believed the application could pass without the appropriate risk assessment and mitigation as was done in other creeks. The application was done without all of the information and, therefore, was issued in error.

B. Analysis

[98] In order for a matter to be properly before the Board and be set as an issue for the hearing, the matter must be included in the Notice of Appeal, relate to the approval being appealed, and be within the Board’s jurisdiction.

[99] The issue of loss of property value is a concern to the Appellants. However, it is not an environmental issue and is not within the Board’s jurisdiction. Therefore, it cannot be considered an issue for the hearing.

[100] The Appellants raised concern regarding the loss of the sight and sounds of the creek and the change in the aesthetics of the area. These matters provide a basis for the Appellants’ concern with the proposed project. The Board considers these concerns as part of the Appellants’ larger issue regarding the size and scope of the proposed project and, therefore, will not be considered as separate issues to the appeal.

[101] The Appellants compared work allowed under the Approval to other projects that have been completed in creeks in the area or are planned for the area. The approvals that have issued to allow for the construction of these projects are not part of these appeals.

[102] The Appellants suggested that an environmental impact assessment should be completed prior to the proposed project proceeding. The proposed project is not listed as a project that requires an EIA be completed. Although the Director has some discretion as to whether a project should be referred for an EIA, the Director's decision to not require an EIA is not an appealable decision under EPEA or the *Water Act*.

[103] The Appellants raised concerns with the manner in which notice of the proposed project was provided and with the level of public involvement in the process. Under section 108(6) of the *Water Act*, the Director may waive notice of an application. From the Record it appears that, based on the desire to complete the work prior to another flood event, the Director decided that public notice of the application was not required and that only notice of the decision would be provided. The Director's decision to only require notice of the decision is not an appealable decision and cannot be considered at the hearing.

[104] The Appellants expressed concern regarding the level of participation in the process provided to those impacted by the 2013 flood prior to the Approval being issued. Although it may have been preferable to allow more public input into the decision making process, in this case the Director determined that an expedited process was necessary in order to assess the application and make a decision prior to the next flood season. Although the decision to use this process resulted in limited public input during the application stage, the decision is not appealable.

[105] In her submissions, Ms. Savitsky raised the issue of the effects of the Approval on fish and species at risk. These concerns were not raised in her Notice of Appeal or in any of the Appellants' Notices of Appeal and, therefore, they are not valid issues for the hearing. The Board only considers those issues raised in the Notice of Appeal to prevent appellants from continually raising new issues throughout the process and to provide some degree of clarity for the other parties to the appeal.

[106] The Director argued the Appellants' concerns regarding the impacts to wildlife and public safety relate to the existing berm and not to the proposed project. The Board takes a different view and regards the Appellants' concerns as relating not only to the existing berm, but also to the changes that will be made if the proposed project is built as approved. The potential impacts to wildlife and public safety are within the Board's jurisdiction as these issues relate to the conditions in the Approval and are based on environmental impacts.

[107] The Appellants' primary concerns appear to be the size and scope of the proposed project. They noted the discrepancies in the size of the project within the watershed from Thunderstone Quarry to the Three Sisters campground. The Appellants raised questions as to why the remediation plans for the part of Pigeon Creek that flows past their condominiums is designed to withstand a higher flood event than other creeks in the area that also suffered damage during the 2013 flood event. They also questioned whether a project this size is actually required throughout the Hamlet of Dead Man's Flats. These environmental concerns relate directly to the proposed project as allowed for under the Approval. Therefore, these concerns are within the Board's jurisdiction and will be heard at the hearing.

[108] The Appellants raised the possibility of other options to the proposed project, such as upstream debris nets or leaving the natural route of the creek, that might result in the same level of protection in future flood events. These options can be brought forward at the hearing, if the Appellants chose to, to demonstrate to the Board that conditions in the Approval may not adequately protect the environment and public safety.

V. DECISION

[109] The issues for the hearing will be:

1. Did the Director properly exercise his discretion regarding the size and scope of the proposed project when issuing the Approval?
2. Are the design requirements of the proposed project, including size and scope, as specified in the Approval adequate to protect the environment and ensure public safety?
3. If the Director's decision to issue the Approval was based on an invalid document, would the Approval be valid?

[110] The Parties are reminded that, pursuant to section 95(5) of EPEA, the Board will not hear arguments on any other issues at the hearing.¹²

Dated on November 25, 2014, at Edmonton, Alberta.

“original signed by”

Alex MacWilliam

Panel Chair

¹² Section 95(5) of EPEA provides:

“Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”