

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – September 14, 2015

**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** appeals filed by Rob Tomlinson and Rolland Jackson with respect to Approval No. 00354088-00-00 and Amending Approval No. 00354088-00-01 issued under the *Water Act*, R.S.A. 2000, c. W-3, to the County of St. Paul by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: *Tomlinson and Jackson v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: County of St.*

*Paul* (14 September 2015), Appeal Nos. 14-021-022 and 15-011-012-ID2 (A.E.A.B.).

**BEFORE:**

Mr. Eric McAvity, Q.C., Panel Chair.

**SUBMISSIONS BY:**

**Appellants:**

Mr. Rob Tomlinson and Mr. Rolland Jackson.

**Approval Holder:**

County of St. Paul, represented by Ms. Shauna Finlay, Reynolds Mirth Richards & Farmer LLP.

**Director:**

Mr. Mohammad Habib, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development, represented by Mr. Will Randall, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

On October 27, 2014, Alberta Environment and Sustainable Resource Development issued an Approval under the *Water Act* to the County of St. Paul for the infilling of wetlands to accommodate municipal road improvements. Mr. Rob Tomlinson and Mr. Rolland Jackson appealed the Approval on December 22, 2014, and January 21, 2015, respectively.

The Board received submissions on the following preliminary motions:

1. How are Mr. Tomlinson and Mr. Jackson directly affected by the Approval?
2. Does Mr. Jackson assert claims related to Aboriginal, First Nations or Treaty rights and what impact does that have on Mr. Jackson's appeal before the Board?

Prior to the Board making its decision, AESRD issued an Amending Approval, changing the specified location of the proposed project. As a result, the Board asked the parties to provide submissions on the following questions:

1. Is the Amending Approval appealable? Does the Amending Approval merely correct a clerical error? Does the Amending Approval make substantive changes to the Approval?
2. Given the changes to the land locations to which the Approval applies, should the participants be requested to provide additional submissions to the Board on the directly affected status of the Appellants?

After receiving and reviewing the submissions from the participants, the Board determined Mr. Tomlinson and Mr. Jackson were not directly affected by the proposed project given the impacts would be localized to the site of the project. The concerns raised by Mr. Tomlinson and Mr. Jackson were too remote given the distance between the proposed project and the lands owned, occupied, or regularly used by Mr. Tomlinson and Mr. Jackson.

The Board found the changes to the site description in the Amending Approval did not change the directly affected status of Mr. Tomlinson and Mr. Jackson. The Board determined the changes in the Amending Approval corrected clerical errors in the Approval.

The Board dismissed the appeals of the Approval and Amending Approval filed by Mr. Tomlinson and Mr. Jackson since they were not directly affected by the proposed project.

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## I. INTRODUCTION

[1] This is the Environmental Appeals Board's decision regarding the appeals filed by Mr. Rob Tomlinson and Mr. Rolland Jackson (the "Appellants").

[2] Alberta Environment and Sustainable Resource Development ("AESRD")<sup>1</sup> issued an Approval under the *Water Act*, R.S.A. 2000, c. W-3, to the County of St. Paul (the "Approval Holder") on October 27, 2014, for the infilling of wetlands to accommodate road improvements. On May 11, 2015, AESRD amended the Approval, correcting the specified land location for the project.

[3] The Appellants appealed the Approval and the Amending Approval to the Environmental Appeals Board (the "Board").

[4] The Board received submissions from the Appellants, Approval Holder, and AESRD on the issue of whether the Appellants are directly affected by the Approval or Amending Approval, whether Mr. Jackson has aboriginal, First Nation, or Treaty rights that may be impacted, and whether the Amending Approval is appealable.

[5] The Board found the Appellants are not directly affected by the Approval or the Amending Approval. There was no evidence to indicate Mr. Jackson's aboriginal, First Nation, or Treaty rights would be impacted by the proposed project given the localized impacts and the distance between the site of the proposed work and Mr. Jackson's lands. The affect the Appellants argued would occur were too speculative to find the Appellants directly affected and the amended land location did not significantly change the assessment of the Appellants' directly affected status. The Board found the amendments made to the Approval merely corrected clerical errors, but given the Appellants were found not to be directly affected, the Board did not have to assess if the Amending Approval was appealable.

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<sup>1</sup> As of May 24, 2015, the Department is now called Alberta Environment and Parks. However, at the time the Approval was issued, the Department was Alberta Environment and Sustainable Resource Development.

## II. BACKGROUND

[6] On October 27, 2014, the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development (the “Director”), issued Approval No. 00354088-00-00 under the *Water Act* (the “Approval”) to the Approval Holder to allow for the infilling of a wetland at NE 16, NW 15, E½ 21, W½ 22, E½ 27, W½ 33, E½ 34-58-10-W4M located in the County of St. Paul.

[7] On December 22, 2014, the Board received a Notice of Appeal from Mr. Rob Tomlinson appealing the Approval.

[8] On December 23, 2014, the Board acknowledged Mr. Tomlinson’s appeal and notified the Approval Holder and Director of the appeal. In this letter the Board noted the Notice of Appeal appeared to have been filed after the 7-day appeal period for approvals issued under the *Water Act*.<sup>2</sup> The Board asked Mr. Tomlinson to explain why the appeal was filed after the time limit and to provide reasons why an extension should be granted.

[9] Mr. Tomlinson provided his response on January 6, 2015, and responses from the Director and the Approval Holder were received on January 12 and 13, 2015, respectively. Final comments were received from Mr. Tomlinson on January 19, 2015.

[10] On January 21, 2015, the Board received a Notice of Appeal from Mr. Rolland Jackson. On January 26, 2015, the Board acknowledged Mr. Jackson’s appeal and notified the Approval Holder and Director of the appeal. In this letter the Board noted the Notice of Appeal appeared to have been filed after the 7-day appeal period for approvals issued under the *Water*

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<sup>2</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...
  - (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,
- or
- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

*Act.* The Board asked Mr. Jackson to explain why the appeal was filed after the time limit and to provide reasons why an extension should be granted. Mr. Jackson provided his response on January 26, 2015. On February 3, 2015, the Director provided his response, and on February 5, 2015 the Approval Holder provided its response. Mr. Jackson provided final comments on February 10, 2015.

[11] On February 17, 2015, the Board notified the Appellants, Approval Holder, and Director (collectively, the “Participants”) that it was accepting that both appeals were filed in time. The Board requested the Participants file their preliminary motions by February 27, 2015.

[12] On March 2, 2015, the Board asked the Participants to provide submissions on the following preliminary motions raised by the Approval Holder and Director:

1. How is Mr. Tomlinson directly affected by the Approval?
2. How is Mr. Jackson directly affected by the Approval?
3. Does Mr. Jackson assert claims related to Aboriginal, First Nations or Treaty rights and what impact does that have on Mr. Jackson’s appeal before the Board?

[13] On March 6, 2015, the Board provided its decision on the timing of the filing of the appeals to the Participants.<sup>3</sup> The Board decided the appeals were filed in time.

[14] On March 13, 2015, the Board received a copy of the documents upon which the Director’s decision was based (the “Record”). Copies of the Record were provided to the Appellants and Approval Holder on March 16, 2015.

[15] On March 16, 2015, the Board received the Appellants’ written submissions with respect to the preliminary motions.

[16] On April 13, 2015, the Board received submissions on the preliminary motions from the Approval Holder and Director.

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<sup>3</sup> See: *Tomlinson and Jackson v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: County of St. Paul* (05 March 2015), Appeal Nos. 14-021 and 12-022-D (A.E.A.B).

[17] On April 17, 2015, the Appellants requested an extension of time to provide their rebuttal submissions due to work commitments. The Board granted the request. The rebuttal submissions were received on May 20, 2015.

[18] On May 28, 2015, the Board received Notices of Appeal from the Appellants appealing the Director's decision to issue Amending Approval No. 00354088-00-01 to the Approval Holder. The Amending Approval amends the expiry date to May 15, 2016, and the location of the proposed project from NE 16, NW 15, E½ 21, W½ 22, E½ 27, W½ 33, E½ 34-58-10-W4M to E½ 16, W½ 15, E½ 21, W½ 22, W½ 27, E½ 33, and W½ 34-58-10-W4M.

[19] On June 5, 2015, the Board wrote to the Participants, noting the Amending Approval changes the land locations to which the Approval applies and, therefore, has the potential to impact the directly affected status of the Appellants. The Board asked the Participants to provide comments on the following matters:

1. Is the Amending Approval appealable? Does the Amending Approval merely correct a clerical error? Does the Amending Approval make substantive changes to the Approval?
2. Given the changes to the land locations to which the Approval applies, should the participants be requested to provide additional submissions to the Board on the directly affected status of the Appellants?

[20] On June 15, 2015, the Approval Holder responded to the Board's June 5, 2015 letter.

[21] On June 16, 2015, the Board received a copy of the Director's Record in relation to the Amending Approval. Copies were provided to the Appellants and Approval Holder on the same date.

[22] On June 22, 2015, the Board received the Appellants' response to the Board's June 5, 2015 letter.

[23] On June 24, 2015, the Board received additional information from the Approval Holder in response to the questions in the Board's June 5, 2015 letter.

[24] On June 26, 2015, the Board received the Director's comments to the Board's June 5, 2015 letter.



### **III. SUBMISSIONS**

#### **A. Appellants**

##### **1. Submissions Regarding Approval**

[25] The Appellants argued that, when considering surface water runoff, distance is not a factor. They stated that what determines who is directly affected is whether the person is within the watershed and within the narrow pathway in which water flows to the North Saskatchewan River. The Appellants stated it is difficult to measure a distance that is impacted by water flow events.

[26] The Appellants stated weather events will cause Collins Lake to flow through a number of wetlands and lakes that flow across the Appellants' properties into Lake Sante. They said the infilling of the wetlands along Range Road 103 will affect landowners in the pathway where the water flows towards the North Saskatchewan River.

[27] The Appellants noted the Government of Alberta has a number of watershed management programs to assist rural municipalities to understand and plan the wise use of their watersheds, and the Approval Holder and Director should be aware of these programs.

[28] The Appellants stated the Approval Holder and Director should be aware of the path the water follows from Collins Lake to the North Saskatchewan River, but the Approval Holder and Director argued the Appellants are not directly affected. The Appellants argued that infilling the wetlands along Range Road 103 that are associated with Collins Lake will impact the water flow and, in turn, will affect their use of their lands. The Appellants stated that infilling the wetlands will:

1. reduce wildlife in the area;
2. reduce recharge capability in the area;
3. introduce non-native and invasive species;
4. cause siltation;
5. introduce foreign deleterious soils; and
6. alter the water balance.

[29] The Appellants explained the project is next to the Blue Quills National Wildlife Area that has been recognized by the International Union for Conservation of Nature, but the Approval Holder and Director failed to recognize the area. They said the Blue Quills National Wildlife Area was acquired in 1968 to protect, manage, and secure a block of habitat that is typical of the region's natural vegetation. The Appellants stated the major threats and challenges to the Blue Quills National Wildlife Area are disturbances that introduce non-native invasive species.

[30] The Appellants questioned why the Director waived the Notice of Application on the basis of low risk of impacts even though the Blue Quills National Wildlife Area was adjacent to the project. The Appellants stated the Approval was issued without public input and consideration of the Blue Quills National Wildlife Area and those responsible for its conservation.

[31] The Appellants stated the project was completed prior to the Approval being issued.

[32] In addition, Mr. Tomlinson stated he lives in the narrow pathway through which water from Range Road 103 flows enroute to the North Saskatchewan River. He explained the water flows from Collins Lake, one of the wetlands along Range Road 103, to Camp Lake, to Pakan Lake, and then onto his property. Mr. Tomlinson said he uses the wetlands for grazing livestock.

[33] In addition, Mr. Jackson explained he lives and farms in the path of the water as it flows from Range Road 103 enroute to the North Saskatchewan River. Mr. Jackson said his family has used the bed, bank, and shore of Pakan Lake since it was allotted to his family. He said the shore of Pakan Lake is fenced, and the lake bed has been used for grazing livestock and harvesting hay.

[34] Mr. Jackson stated he is exercising his rights granted to him as an Aboriginal and Canadian citizen.

## 2. Submissions Regarding Amending Approval

[35] The Appellants submitted the Director substantially changed the Approval in the following ways:

1. allowing the infilling of a wetland located on the E1/2 of section 16 and the W1/2 of section 15, when there is no wetland at this location and it is actually Collins Lake;
2. relying on an environmental assessment conducted along Range Road 103 that addressed only wetlands and did not include Collins Lake;
3. there are no records from the Department of Fisheries and Oceans granting approval to fill in Collins Lake, so the Director does not have the jurisdiction to give approval to fill in Collins Lake;
4. the Director extended the expiry date even though the Director stated the work was complete on January 12, 2015, so the expiry date of May 15, 2016 is moot;
5. the assessment completed by EnviroMak on behalf of the Approval Holder did not mention Collins Lake or the Blue Quills National Wildlife Area, and the photographs provided have the wrong land location or are from a different area;
6. the field assessment was conducted when the ground was still frozen and before the migratory bird and nesting season;
7. the field assessment failed to characterize Collins Lake and the Blue Quills National Wildlife Area;
8. the Approval, Amending Approval, and environmental assessment specifically refer to infilling of wetlands, so Collins Lake is not part of the Approval or Amending Approval, and the land locations associated with Collins Lake should be removed from the Approval and Amending Approval;
9. the compensation for the wetland does not fairly represent the compensation needed for infilling Collins Lake; and
10. land titles identify Collins Lake as a lake, but the environmental assessment conducted for the Approval Holder refers to the lake as a wetland. A legal survey to identify the lake, bed, and shore should be conducted.

[36] The Appellants stated the environmental assessment had errors and omissions, thereby creating a number of unknowns including:

1. Is the work complete?
2. Is there a lake involved?
3. What compensation for disturbing the lake is required?

4. Was the environmental assessment conducted at the time of year that best identifies the wildlife? and
5. Does the wildlife at the Blue Quills National Wildlife Area support the lake and wetland wildlife and vice versa?

**B. Approval Holder**

1. Submissions Regarding Approval

[37] The Approval Holder submitted that neither of the Appellants have standing under section 115 of the *Water Act*.

[38] The Approval Holder explained an Environmental Assessment Report (the “EA Report”), prepared by EnviroMak Inc., was incorporated into the terms of the Approval. The Approval Holder said the Approval and the EA Report related to construction work consisting of upgrades to an existing road and widening, by 3.0 m, on either side of the existing road along Range Road 103 in sections 15 to 34-58-10-W4M. The Approval Holder stated all construction work would be contained within the existing road right-of-way.

[39] The Approval Holder noted the EA Report concluded that, provided the mitigation measures described in the EA Report were undertaken, environmental impacts resulting from the road widening would be minimal. The Approval Holder stated the Director reached the same conclusion following his evaluation of the application for the Approval.

[40] The Approval Holder noted the map provided by the Appellants in their submissions indicates Mr. Tomlinson’s lands appear to lie directly south of Pakan Lake, and given Pakan Lake is about 9.2 km from the project, Mr. Tomlinson’s land would be even further. The Approval Holder stated Mr. Tomlinson’s lands would lie outside the drainage area of Pakan Lake and are a significant distance from the project area.

[41] The Approval Holder stated the Appellants appear to suggest they are directly affected by any small change in water flow within the watershed because catastrophic floods could result in water flowing from the vicinity of Range Road 103 to their respective lands. The Approval Holder noted there are no technical reports or expert evidence or opinions provided to substantiate the concerns raised by the Appellants.

[42] The Approval Holder explained it instructed its environmental consultant to evaluate the environmental impacts, if any, which would be expected outside the project area in the drainage areas referenced by the Appellants. The Approval Holder noted the conclusion reached by its consultant was that no effects are expected at Pakan Lake and Camp Lake. The Approval Holder noted the consultant's report indicated the environmental effects would be confined to the road widening and the areas immediately adjacent to the road construction. The Approval Holder said the consultant concluded that no harmful environmental effects are expected on water resources and wildlife that are located more than 200 metres on each side of the proposed construction area.

[43] The Approval Holder stated that if the lands owned by Mr. Tomlinson are affected by the road upgrades, then it would not dispute there is a personal interest capable of satisfying one part of the standing test. The Approval Holder noted no title documents or other documents establishing ownership of the lands identified by Mr. Tomlinson were provided.

[44] The Approval Holder stated that, if lands have been allocated to the Jackson family at the locations identified on the map provided by Mr. Jackson in his submission, and if the lands are affected by the road upgrades, the Approval Holder would not dispute that this is a personal interest capable of satisfying one part of the test for standing. The Approval Holder noted Mr. Jackson did not provide any Band correspondence or other documents that establish such allocations have been made, and he did not include any documents to establish his interest in the lands identified.

[45] The Approval Holder noted the Appellants raised concerns regarding the impact of the road upgrades on the Blue Quills National Wildlife Area, but neither Appellant pointed to any particular interest that they have in the wildlife area. The Approval Holder submitted there is no personal interest identified by the Appellants regarding this area. The Approval Holder added that it is not anticipated that the Blue Quills National Wildlife Area will be affected by the road upgrades, because there is no drainage from the area of the upgrades to Range Road 103 that flows to the wildlife area.

[46] The Approval Holder noted the Appellants raised concerns regarding the impact of the project on certain wildlife species, but neither pointed to any particular interest in the

wildlife species identified. The Approval Holder added that any wetland habitat lost would be replaced at a 3:1 ratio, thus ensuring that any effects are mitigated and reduced.

[47] The Approval Holder stated the lands identified by the Appellants are many kilometres away from the site. The Approval Holder said Pakan Lake is over nine kilometres away. The Approval Holder stated Mr. Tomlinson's lands fall outside the drainage basin of Pakan Lake. The Approval Holder noted that neither Appellant provided any evidence of a detrimental impact to their lands, assuming such an interest in these lands can be established.

[48] The Approval Holder stated the Appellants did not provide a basis for concluding that the road upgrades will increase the flooding potential of their properties. The Approval Holder submitted the Appellants' suggestion that the road upgrades will cause an increase in the flooding on the lands identified by the Appellants is speculative and not based on any reliable opinion or evidence.

[49] The Approval Holder said its consultants determined that if major flooding was to occur, the road upgrades would not have an impact. The Approval Holder said the road upgrades are not expected to have any impact on the likelihood of any of the areas within the Pakan Lake drainage basin to flood, particularly when any wetlands removed as part of the project will have to be replaced in the vicinity at a 3:1 ratio.

[50] The Approval Holder submitted no detrimental effects have been established based on the Appellants' submissions.

[51] The Approval Holder stated that no evidence was provided to show there was a potential for the road upgrades to affect the quantity of runoff water that makes its way to the Pakan Lake drainage system and all the way to the Jackson lands. The Approval Holder said there was no evaluation of what kind of event or event frequency would be required to cause flooding on the Jackson lands that would be worsened by the road upgrades. The Approval Holder explained this was not evaluated by its consultants, because it is not an effect that is expected to result from the road upgrades. The Approval Holder stated the expected environmental impacts are local and confined to the immediate vicinity of the road upgrades.

[52] The Approval Holder stated there is no evidence that established the personal interest in lands asserted by the Appellants. The Approval Holder submitted the direct impacts the Appellants suggest will occur on their lands are speculative, and no evidence was provided that establishes there is a reasonable probability of such effects occurring.

[53] The Approval Holder submitted the Appellants did not demonstrate they are directly affected by the road upgrade described in the Approval.

## 2. Submissions Regarding Amending Approval

[54] The Approval Holder submitted the issuance of the Amending Approval is not appealable because it merely corrects a clerical error. The Approval Holder noted section 115(2)(c)(i) of the *Water Act* states that a Notice of Appeal may not be submitted with respect to an amendment due to a clerical error.

[55] The Approval Holder stated the correct legal descriptions were contained in the environmental assessment reports submitted to the Director, including the EA Report that forms part of the Approval. The Approval Holder stated the correct locations of the wetlands were identified to the Director and evaluated prior to the granting of the Approval. The Approval Holder suggested the Amending Approval simply corrected the legal descriptions. The Approval Holder stated the general location of the lands is accurate, and the amendment does not identify different land sections, only different areas of the same sections. The Approval Holder stated the revised land descriptions do not refer to unconsidered or unevaluated wetlands and the location does not substantially change.

[56] The Approval Holder stated the work is still being done at the same location as originally evaluated and submitted to the Director.

[57] The Approval Holder stated its submissions regarding the directly affected status of the Appellants do not change with the amended land location references. The Approval Holder stated the locations are sufficiently similar to the original location and the concerns raised by the Appellants were considered by the Approval Holder's consultant.

[58] The Approval Holder's consultant, EnviroMak Inc., responded to the Appellants' concerns. EnviroMak stated the environmental assessment described the waterbody referred to

as Collins Lake as a wetland and it was addressed in the report. EnviroMak explained the report did not name Collins Lake because, under the wetland classification system used by the Government of Alberta Regulators, some wetlands are actually lakes. EnviroMak stated it did not refer to Collins Lake in its report because it is not an official name used in the Alberta Gazette or on any national topographic maps, and the Fish and Wildlife Management Information System does not identify it as Collins Lake.

[59] EnviroMak explained the environmental assessment was intended to meet regulatory requirements, and wetland classification, compensation quantification, and mitigation were the focus of the field assessment. EnviroMak stated the encroachment onto wetlands was deemed to be local and, therefore, the environmental effects did not extend beyond the local encroached area. EnviroMak said an April assessment was deemed sufficient to quantify the effects and to classify the watercourse given the encroachment was along an existing roadway. EnviroMak stated sufficient environmental protection was implemented since Ducks Unlimited was conducting the compensation ratio of 3:1 in the vicinity of Range Road 103 and mitigation measures were being used.

[60] EnviroMak explained a wetland compensation plan using a 3:1 wetland replacement standard was arranged with Ducks Unlimited and approved by the Director. EnviroMak stated wildlife habitats are to be restored and surface water values and drainage are to be replaced in the area. EnviroMak said that no major changes to the watershed values were expected.

[61] EnviroMak stated a review of existing information indicated no fish were present in any of the wetlands or lakes that were affected by the proposed project. EnviroMak acknowledged no field checks for fish were conducted.

[62] EnviroMak stated the timing of the environmental assessment was somewhat related to the planned road construction schedule.

## **C. Director**

### **1. Submissions Regarding Approval**



[63] The Director submitted the appeals of Mr. Tomlinson and Mr. Jackson should be dismissed because they did not make a *prima facie* case to show they are directly affected by the issuance of the Approval.

[64] The Director stated the Appellants' Notices of Appeal and submissions do not provide evidence on how their interests are directly affected.

[65] The Director stated the information provided by Mr. Tomlinson is too speculative in nature to find a potential or reasonable possibility that the Approval would impact him. The Director noted the County of St. Paul No. 19 2012 Ownership Maps show Mr. Tomlinson's lands are located at least 12 km from the site of the Approval.

[66] The Director explained the water draining from the site flows to the northeast via small watercourses in agricultural lands. The water enters Stony Creek and flows southwest into Saddle Lake and then outflows into the Saddle Lake Creek, which drains into the North Saskatchewan River. The Director said the overall pattern of the area drainage will not be significantly impacted by the removal of small portions of wetlands along Range Road 103, and will not impact Mr. Tomlinson's lands. The Director argued that, given the Approval does not change the overall regional groundwater and surface water systems, the probability of impacting Mr. Tomlinson's property is speculative.

[67] The Director stated Mr. Jackson did not demonstrate there is any actual connection in water flow between the site of the Approval and his home. The Director said it is unclear as to the exact location of Mr. Jackson's home near Pakan Lake, but based on the County of St. Paul No. 19 2012 Ownership Maps, Mr. Jackson's home is at least 10 km from the site of the Approval. The Director submitted the likelihood of the Approval impacting Mr. Jackson's home is nil.

[68] The Director noted the Appellants did not indicate any interest in Collins Lake to support standing before the Board, and a mere environmental concern is insufficient.

[69] The Director submitted the Appellants' information on the 2013 floods is irrelevant because they did not draw a rational connection between the floods and the Approval.

[70] The Director noted the Appellants expressed concern regarding the Blue Quills National Wildlife Area, but their submissions did not indicate how they use the area or if they have property in or near the area. The Director noted a wildlife biologist reviewed the application for the Approval and expressed no concerns.

[71] The Director noted the Appellants' request for the Board to declare the Approval Holder was in contravention of section 60 of the *Water Act* or to recommend penalties under section 228 of the *Water Act*. The Director stated neither of these sections are applicable to the decision of the Board and are inapplicable to the Notices of Appeal.

## 2. Submissions Regarding Amending Approval

[72] The Director argued the Amending Approval is not appealable because it corrects a clerical error and makes no substantive changes to the Approval. The Director stated the amendment corrected an error related to the legal land description, which falls within the definition of a clerical error. The Director noted that, under section 115(2)(c)(i) of the *Water Act*, an amendment of an approval to correct a clerical error is not appealable and, therefore, the appeals of the Amending Approval should be dismissed.

[73] The Director stated the revised land descriptions do not indicate a substantial change in location and only identify one different subdivision within the same sections. The Director stated it is only a minor change, and the Appellants remain unaffected by the Amending Approval.

## IV. ANALYSIS

[74] At issue before the Board is whether the Appellants are directly affected by the proposed project.

[75] The Board has discussed the issue of "directly affected" in numerous decisions. The Board received guidance on this issue from the Court of Queen's Bench in *Court*.<sup>4</sup>

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<sup>4</sup> See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.) ("*Court*").

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

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

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

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

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

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

[T]he ‘preponderance of evidence’ standard applies to the appellant’s burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm. The Board believes that the Department’s submission to the [A]EUB, together with Mr. Bildson’s own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the

area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

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

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”<sup>5</sup>

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted...”<sup>6</sup>

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

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<sup>5</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“*Bildson*”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“*Mizera*”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.) (“*Vetsch*”). (Note: The Alberta Energy Utilities Board (AEUB) is the predecessor to the Energy Resources Conservation Board.)

<sup>6</sup> *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

directly affected. The onus is on the appellant to present a *prima facie* case to demonstrate to the Board that there is a reasonable probability they will be directly affected by the decision of the Director. The effect must be plausible and relevant to the Board's jurisdiction in order for the Board to consider it sufficient to grant standing.

[78] At this point in the appeal process, the Board does not have all of the evidence and arguments before it. The determination of directly affected is a preliminary matter. As a result, the test for standing cannot be based on whether there is certainty the appellant is directly affected. Without all of the evidence, that cannot be conclusively determined. An appeal before the Board is a quasi-judicial process. The appeals process must adhere to the principles of natural justice and must be fair to all of the participants. The Board considers it appropriate that, in assessing preliminary matters, the standard should be less onerous than those found in a court.

[79] As stated, the effect must be reasonable and plausible. It is not sufficient for an appellant to show it is possibly affected, it must also show the probable affect is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find an appellant directly affected. Both the reasonableness and the probability of the effect must be shown.

[80] The effect on the appellant does not have to be unique in kind or magnitude.<sup>7</sup> However, the effect the Board is looking for needs to be more than an effect on the public at large (it must be personal and individual in nature), and the interest which the appellant is asserting as being affected must be something more than the generalized interest that all Albertans have in protecting the environment.<sup>8</sup> Under EPEA, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. It did not; it chose to restrict the right of

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<sup>7</sup> See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

<sup>8</sup> See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

appeal to a more limited class. The Legislature, in using the more restrictive language, also did not intend for the Board to provide a general right of review for the Director's decision; it intended it be something narrower.

[81] The Board recognizes the confusion that resulted from the inaccurate land descriptions included in the Approval. In reviewing the Record, it is evident EnviroMak assessed the correct area where the project will be taking place.

[82] The Appellants own or use property approximately 10 to 12 kilometres from the site of the proposed project. The Appellants argued the distance from the site should not be the prime deciding factor when assessing an appellant's directly affected status given the impacts can result in a change in water flow that can be seen many kilometres away from the site of the project. The Appellants noted, as an example, the impacts of the 2013 floods in southern Alberta.

[83] The Board appreciates the Appellants' reasoning that impacts to water courses can extend distances, as noted by the Appellants in the 2013 floods in southern Alberta. However, the expected impacts from the proposed project do not compare in magnitude to the 2013 floods. It is difficult to see, based on the information before the Board, how the proposed project will have any measurable impact on the water flow to the Appellants' properties. There is no indication how the infilling of the wetlands will result in a change in the water flow patterns at a distance of over 10 kilometres from the project site.

[84] In order to be found directly affected, an appellant must be able to demonstrate there is a reasonable probability that it will be harmed by the project. An appellant must do more than speculate about possible impacts that might occur. An appellant needs to demonstrate how the environmental impacts of the project will affect its personal interest.

[85] The concerns raised by the Appellants were: (1) impacts to wildlife; (2) reduced recharge capability; (3) introduction of non-native species; (4) siltation; (5) foreign deleterious soil; and (6) alteration of the water balance equilibrium.

[86] The terms and conditions of the Approval require the Approval Holder to minimize siltation and erosion at the surrounding water bodies, and the Approval Holder cannot

use any material that may cause an adverse effect on the aquatic environment, human health, or public safety. The Approval Holder is required to comply with all of the conditions in the Approval. If the conditions are not followed, AESRD may take enforcement action to ensure compliance. Therefore, the Appellants' concerns regarding the introduction of non-native species, siltation, and foreign deleterious soil should not occur as there is no indication the Approval Holder will not comply with the Approval. The Board also notes the project is to improve an existing roadway, and the existing road itself may already be a source for introducing non-native species. Therefore, the Board does not consider these concerns as a basis to find the Appellants directly affected.

[87] The proposed project is in an already disturbed area. The Appellants did not demonstrate how the project would negatively impact wildlife any more than what is currently occurring.

[88] The remaining two concerns raised by the Appellants were reducing the recharge capability in the area and altering the water balance. The Appellants argued that infilling the wetland will alter the flow of water to their property. Based on the information currently before the Board, these concerns appear to be speculative. There is no indication the water balance will be altered or that recharge capabilities will be changed or will be changed to such an extent as to impact the flow of water to the Appellants' properties.

[89] The Appellants raised concerns regarding potential impacts to the Blue Quills National Wildlife Area. However, the Appellants did not provide an explanation as to how the area will be affected, how they use the area, and how that use would be affected by the proposed project.

[90] As Mr. Jackson stated he was exercising his rights granted to him as an Aboriginal and Canadian citizen and did not appear to assert claims related to Aboriginal, First Nations, or Treaty rights, the Board will not consider the second issue.

[91] Therefore, the Board finds the Appellants are not directly affected by the decision of the Director to issue the Approval and Amending Approval and the appeals are dismissed.

[92] With respect to the issue of whether the amendments made to the Approval were merely clerical corrections or substantive changes, the Board is of the view the amendments were clerical changes. They merely corrected the legal description of the lands in the project area that were fully identified in the environmental assessment report prepared by EnviroMak. No change in the actual originally identified and studied lands location occurred.

[93] Although the appeals are dismissed, the Board is concerned with the manner in which the application was handled by the Director. The Director did not handle this matter in accordance with best practices. The Director did not question the seasonal timing of the assessment work completed by EnviroMak, even though EnviroMak acknowledged the Approval Holder's construction framework affected the timing of its field study work. The Board questions the integrity of such assessment work when seasonal studies of wildlife habitat and use and water course integrity are potentially compromised by undertaking such studies at a time of year when an environmental consultant might be challenged to deliver a more informative and beneficial assessment.

[94] The Board also has concerns of whether the work was completed, or at least started, before the Approval was issued. If this was the case, AESRD may consider investigating as to whether enforcement action should be taken. The Board considers conducting an activity without the required approval to be a significant variation from the regulatory scheme, as the requirement to obtain an approval before work is done is one of the cornerstones of the *Water Act*.

[95] Even though the Appellants were found not to be directly affected, they raised valid concerns, including concerns with AESRD's process in handling the application.

## **V. DECISION**

[96] The Board finds the Appellants are not directly affected by the issuance of the Approval and Amending Approval. The appeals of the Approval and Amending Approval filed by Mr. Tomlinson and Mr. Jackson are dismissed.

Dated on September 14, 2015, at Edmonton, Alberta



"original signed by"  
Eric McAvity, Q.C.  
Panel Chair