

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 29, 2016

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 Cory Wiebe, Nancy Pratch Wiebe, Aline Pratch, Darren Pratch, and Valerie Pratch with respect to *Water Act* Amending Approval No. 00344519-00-03 issued to ATCO Electric Ltd. by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

Cite as: Preliminary Motions: *Wiebe et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: ATCO Electric Ltd.* (29 July 2016), Appeal Nos. 15-033-034, 036-038-D (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Board Chair.

SUBMISSIONS BY:

Appellants: Mr. Cory Wiebe, Ms. Nancy Pratch Wiebe, Ms. Aline Pratch, Mr. Darren Pratch, and Ms. Valerie Pratch.

Approval Holder: ATCO Electric Ltd., represented Mr. Shawn Munro and Mr. Blake Williams, Bennett Jones LLP.

Director: Mr. Mohammad Habib, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball and Mr. Larry Nelson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Amending Approval to ATCO Electric Ltd. (ATCO) under the *Water Act*. The Amending Approval amended the original Approval which authorized ATCO to place, construct, operate, maintain, remove, or disturb works in or on any land, water, or water body for the purpose of altering wetlands for the construction of a power transmission line.

Mr. Cory Wiebe, Ms. Nancy Pratch Wiebe, Ms. Aline Pratch, Mr. Darren Pratch, and Ms. Valerie Pratch (the Appellants) appealed the issuance of the Amending Approval.

The Board received and reviewed submissions on three preliminary matters: (1) whether the Appellants filed valid Statements of Concern; (2) whether all the issues raised in the Notices of Appeal were adequately dealt with at the Alberta Utilities Commission (AUC) hearing; and (3) whether the Appellants were directly affected by the issuance of the Amending Approval.

Based on the submissions, the Director's record, and the AUC decision, the Board found that only Ms. Valerie Pratch filed a valid Statement of Concern. The remaining Appellants did not file their Statements of Concern within the legislated timeframe or did not file a Statement of Concern. In most cases, filing a Statement of Concern is a prerequisite to the right to file a Notice of Appeal.

The Board determined that all the issues identified in Ms. Valerie Pratch's Notice of Appeal were adequately dealt with at the AUC hearing. Therefore, the Board had to dismiss Ms. Pratch's appeal.

Given all of the appeals were dismissed, the issue of whether the Appellants were directly affected matter did not have to be considered.

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's decisions and reasons in response to the preliminary matters raised in respect of Amending Approval No. 00344519-00-03 (the "Amending Approval") issued to ATCO Electric Ltd. (the "Approval Holder" or "ATCO"). Alberta Environment and Parks ("AEP") issued the Amending Approval to ATCO under the *Water Act*, R.S.A. 2000, c. W-3. The Amending Approval applies to a site located in the County of St. Paul. Mr. Cory Wiebe, Ms. Nancy Pratch Wiebe, Mr. Darren Pratch (collectively, the "Applicants"), Ms. Aline Pratch, and Ms. Valerie Pratch¹ (the "Appellant") appealed the issuance of the Amending Approval.

[2] Three preliminary matters were raised: (1) whether the Applicants, Ms. Aline Pratch, and the Appellant filed valid Statements of Concern; (2) whether all the matters raised in the Notices of Appeal were adequately dealt with at the Alberta Utilities Commission ("AUC") hearing; and (3) whether the Applicants, Ms. Aline Pratch, and the Appellant were directly affected by the decision to issue the Amending Approval.

[3] The Environmental Appeals Board (the "Board") received and reviewed the submissions from the Applicants, Ms. Aline Pratch, and the Appellant, ATCO, and AEP (collectively, the "Participants") and final comments from the Applicants, Ms. Aline Pratch, and the Appellant on the three preliminary matters.

[4] Based on the submissions and the information before the Board, the Board determined that only Ms. Valerie Pratch submitted a valid Statement of Concern and only her Notice of Appeal could be accepted as validly before the Board. However, the Board found all the issues raised in Ms. Valerie Pratch's Notice of Appeal were adequately dealt with at the AUC hearing. Therefore the Board must dismiss her appeal pursuant to section 95(5)(b)(i) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA").² As all of the

¹ Ms. Sue Reilly withdrew her appeal on February 2, 2016, and the Board dismissed her appeal. See: Board's letter, dated February 3, 2016.

² Section 95(5)(b)(i) of EPEA provides:

"The Board...

Notices of Appeal were dismissed as not being validly before the Board, the Board did not have to determine the question of whether the Appellant is directly affected.

II. BACKGROUND

[5] On January 5, 2016, the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the “Director”), issued the Amending Approval. The Amending Approval amended the original Approval which authorized the Approval Holder to place, construct, operate, maintain, remove, or disturb works in or on any land, water, or water body for the purpose of altering wetlands for the construction of a power transmission line. The amendment revises clause 3.2 of the original Approval, stating that activities shall be undertaken in accordance with an additional report: Letter Report: Wetland Field Confirmation, St. Paul Transmission Project, dated September 9, 2015, submitted by Tetra Tech for ATCO Electric Ltd. AEP No. 0344519-R002 (“Letter Report”).

[6] On January 21, 2016, the Board received Notices of Appeal from the Applicants, Ms. Aline Pratch, and the Appellant appealing the Amending Approval.

[7] On January 23, 2016, the Board wrote to the Participants acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals.

[8] On January 23, 2016, the Board requested the AUC review the Amending Approval and Notices of Appeal and advise the Board whether the matter had been the subject of any hearings or reviews under the AUC’s legislation.

[9] On January 27, 2016, the Board asked the Participants to provide submissions regarding the late-filed Statements of Concern and whether the Applicants, Ms. Aline Pratch, and the Appellant were directly affected by the Director’s decision to issue the Amending Approval.

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- (b) shall dismiss a notice of appeal if in the Board’s opinion
 - (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission at which all of the matters included in the notice of appeal were adequately dealt with....”

[10] On January 27, 2016, the Board received a letter from the AUC regarding a hearing it held with respect to the construction and operation of a proposed transmission line which crossed the lands specified in the Notices of Appeal. The AUC issued Decision 2013-446 with respect to the AUC hearing held on November 5, 6, and 7, 2013 in St. Paul, Alberta.

[11] On February 5, 2016, the Board asked the Participants to provide submissions as to whether the Applicants, Ms. Aline Pratch, and the Appellant received notice of or participated in or had the opportunity to participate in a hearing or review under an Act administered by the AUC at which all the matters included in the Notices of Appeal were adequately dealt with.

[12] On March 9, 2016, the Board received written submissions from the Applicants, Ms. Aline Pratch, and the Appellant on the preliminary matters regarding the filing of the Statements of Concern, directly affected status of the Applicants, Ms. Aline Pratch, and the Appellant, and participation in the AUC hearing.

[13] On March 15 and 16, 2016, the Board received submissions from the Approval Holder and Director, respectively, regarding the preliminary matters.

[14] On March 24, 2016, the Board received the rebuttal submission from the Applicants, Ms. Aline Pratch, and the Appellant.

[15] On April 13, 2016, the Board notified the Participants that the appeals were dismissed. These are the Board's reasons for its decision.

III. STATEMENTS OF CONCERN

A. Submissions

1. Appellants

[16] The Applicants, Ms. Aline Pratch, and the Appellant explained they tried to obtain publically available documents from AEP and the Approval Holder during the seven-day Statement of Concern filing period, including the applications and supporting documents. They said the documents were provided to them on November 18, 2015.

[17] The Applicants and Ms. Aline Pratch stated they submitted their Statements of Concern on time, noting the steps that were undertaken to obtain an extension because Ms. Wendi Dehod, an AEP employee, was on holidays and unable to provide the required information in a timely manner. The Applicants, Ms. Aline Pratch, and the Appellant noted there was a statutory holiday within the seven-day period to file a Statement of Concern, making it hard for potential applicants to acquire file information. The Applicants and Ms. Aline Pratch stated their Statements of Concern were submitted within the same timeframe as the Statement of Concern of the Appellant, which was determined to be submitted on time. The Applicants, Ms. Aline Pratch, and the Appellant argued the Director failed to handle the Statements of Concern consistently and fairly, in light of the efforts made on behalf of the Applicants and Ms. Aline Pratch to meet the deadline under extraordinary conditions, including attempting to get someone in AEP to respond within a reasonable time. The Appellants stated that, after not hearing from anyone regarding the extension, they filed their submissions on November 18, 2015. The Applicants, Ms. Aline Pratch, and the Appellant said the Director and Approval Holder were aware the Applicants and Ms. Aline Pratch intended on filing a submission, and any reasonable person would have accepted all the Statements of Concern.

2. Approval Holder

[18] The Approval Holder submitted that, with the exception of the Appellant, the Applicants' Statements of Concern were not filed within the time required and, therefore, were not properly before the Board. The Approval Holder noted the Director notified the Applicants that, since their submissions were received after the closing date, the submissions would not be considered Statements of Concern regarding the Amending Approval. The Approval Holder requested the Board dismiss the Notices of Appeal of the Applicants on the basis their submissions were not valid Statements of Concern.

[19] The Approval Holder did not take issue with the timing of the filing of the Appellant's Statement of Concern. The Approval Holder noted the Director considered it to be an official Statement of Concern. The Approval Holder submitted that, by acknowledging all

submissions received within the notice period as valid Statements of Concern, the Director acted fairly and consistently.

3. Director

[20] The Director stated the Applicants submitted Statements of Concern on November 18, 2015. This was after the deadline set out in the Notice of Application for the Amending Approval and, therefore, none of these individuals were persons who could submit a Notice of Appeal. The Director noted Ms. Aline Pratch did not submit a Statement of Concern and, therefore, cannot submit a Notice of Appeal.

[21] The Director stated the Board should dismiss the Notices of Appeal of the Applicants and Ms. Aline Pratch, and the Board is required to discontinue its proceeding in respect of Ms. Sue Reilly's Notice of Appeal.³

[22] The Director confirmed the Appellant submitted a Statement of Concern on November 13, 2015, which was before the deadline set out in the Notice of Application. The Director stated the Appellant was the only person who submitted a Statement of Concern in accordance with section 109 of the *Water Act*.⁴

³ Ms. Sue Reilly withdrew her appeal on February 2, 2016, and the Board dismissed her appeal. See: Board's letter, dated February 3, 2016.

⁴ Section 109 of the *Water Act* states:

- “(1) If notice is provided
- (a) under section 108(1), any person who is directly affected by the application or proposed amendment, and
 - (b) under section 108(2), the approval holder, preliminary certificate holder or licensee,
- may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.
- (2) A statement of concern must be submitted
- (a) in the case of an approval, within 7 days after the last providing of the notice, and
 - (b) in every other case, within 30 days after the last providing of the notice, or within any longer period specified by the Director in the notice.”

[23] The Director said the deadline for filing a Statement of Concern was November 17, 2015, and the Applicants acknowledged they were aware of the deadline. The Director noted the Applicants submitted their Statements of Concern on November 18, 2015.

[24] The Director explained that, although AEP's *Administrative Policy: Statements of Concern* provides that a Director may grant an extension for submitting a Statement of Concern, the request must be made in writing prior to the end of the submission period, and whether the extension is granted is at the discretion of the Director.

[25] The Director stated the Appellant asked for an extension to file her Statement of Concern, but her request was made after the expiry of the submission period, and her request only asked for an extension for herself. The Director noted the Applicants and Ms. Aline Pratch were neither referenced in the Appellant's request nor did they make their own requests.

[26] The Director said that, even if an extension was requested prior to the end of the submission period on behalf of the Applicants and Ms. Aline Pratch, the Director considered the request and determined it was not appropriate to grant an extension.

[27] The Director noted that section 115 of the *Water Act* requires that, in order to submit a Notice of Appeal, a person must have previously submitted a Statement of Concern in accordance with section 109 of the *Water Act*. The Director noted that section 109 of the *Water Act* requires that a Statement of Concern be submitted, in the case of an approval, within 7 days after the last providing of the notice.

[28] The Director submitted the Applicants' arguments did not constitute extraordinary or exceptional circumstances. The Director noted the Applicants argued the Statements of Concern were filed after the deadline due to "extraordinary conditions," because the seven-day period for filing Statements of Concern occurred while an AEP employee was on vacation and included a statutory holiday. The Director explained the AEP employee who was the Applicants' contact for the Amending Approval was on vacation during the submission period, but this was irrelevant to whether the Applicants could have submitted their Statements of Concern on time. The Director said that, if the Applicants had any questions or concerns about the Statement of Concern process or deadlines, the Notice of Application included a phone number and a fax

number for AEP's Regulatory Approvals Centre. The Director noted the Applicants did not provide any evidence that they made any attempt to contact the Regulatory Approvals Centre or the Director directly to address their concerns or questions in the absence of their AEP contact. The Director stated other AEP personnel could have assisted the Applicants.

[29] The Director noted the Appellant, who described herself as the representative of the Applicants and Ms. Aline Pratch, was in constant contact with her AEP contact, was aware of the deadline, and submitted her Statement of Concern before the expiry of the submission period. The Director stated there was no rational explanation given why the Applicants missed the deadline for filing their Statements of Concern given the Appellant's role as representative for the Applicants and Ms. Aline Pratch.

[30] The Director stated that, if one or more of the Applicants thought additional time was required to submit a Statement of Concern, they could have requested an extension to the deadline, but none of them did so.

[31] In response to the Applicants' and Appellant's allegations that the Director was not consistent in his decision to accept the Appellant's Statement of Concern but not those from the Applicants, the Director stated the facts show the Appellant's Statement of Concern was submitted before the expiry of the submission period but the others were filed after the deadline. The Director stated that, given the facts, the Director's decision to accept the Appellant's Statement of Concern and not accept the Applicants' Statements of Concern was consistent and reasonable.

[32] The Director submitted that, given the Applicants and Ms. Aline Pratch failed to submit Statements of Concern as required under section 109 of the *Water Act*, the Board should not accept the Notices of Appeal filed by the Applicants and Ms. Aline Pratch.

[33] The Director stated the Applicants did not provide any evidence that Ms. Aline Pratch ever submitted a Statement of Concern, and the Director had no record of receiving one from her. The Director submitted there was no basis for the Board to accept a Notice of Appeal from Ms. Aline Pratch.

4. Rebuttal Submission

[34] The Applicants and Appellant explained Ms. Aline Pratch had just undergone a series of chemotherapy treatment in Edmonton, but the lands owned by Ms. Aline Pratch were included in Mr. Darren Pratch's Statement of Concern as he was her representative in these matters.

[35] The Applicants stated they submitted Statements of Concern on November 16, 2015, before the deadline of November 17, 2015. They stated they notified the Director of their Statements of Concern on November 16, 2015 at 20:38. Therefore, according to the Applicants, their Statements of Concern were submitted before the deadline of November 17, 2016, and they should have standing to file Notices of Appeal.

[36] The Applicants stated their Statements of Concern did not relate to an approval but were with regard to an amendment, which should be considered under section 109(2)(b) of the *Water Act*,⁵ thereby giving them 30 days to file a Statement of Concern instead of seven days.

B. Analysis

[37] In order to have a valid appeal, one of the first prerequisites is that appellants must have filed a valid Statement of Concern in response to a Notice of Application and the Statement of Concern must be submitted to the Director within the specified legislated timeframe.⁶

⁵ Section 109(2)(b) of the *Water Act* states:

"A statement of concern must be submitted

- (a) in the case of an approval, within 7 days after the last providing of the notice, and
- (b) in every other case, within 30 days after the last providing of the notice, or within any longer period specified by the Director in the notice."

⁶ Section 115(1)(a) of the *Water Act* states:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

- (a) if the Director issues or amends an approval, a notice of appeal may be submitted

[38] The Appellant filed her Statement of Concern on November 13, 2015, which was within the legislated timeframe. The Director and Approval Holder concurred the Statement of Concern was filed with the Director in time and was accepted by the Director as a valid Statement of Concern. The Board accepts the Appellant filed her Statement of Concern as required under the *Water Act* and, therefore, her Notice of Appeal will be accepted as valid for further consideration.

[39] In reviewing the Statements of Concern filed, there was no Statement of Concern filed by Ms. Aline Pratch. Although Mr. Darren Pratch explained in his rebuttal submission that Ms. Aline Pratch's lands were included in his Statement of Concern, there is no reference to this in the Statement of Concern. Therefore, based on the Statements of Concern filed with the Director, the Board must dismiss Ms. Aline Pratch's appeal for failing to submit a Statement of Concern.

[40] The Applicants filed their Statements of Concern on November 18, 2016, which was one day past the specified deadline. Although the Appellant had sent a letter indicating the Applicants intended to send in Statements of Concern, the Director did not agree to extend the period to accept Statements of Concern, which was his prerogative. Extending the period to file a Statement of Concern is discretionary.

[41] The Applicants were aware of the time period in which to file Statements of Concern. The Board acknowledges their effort to have the time period extended. Even though the person at AEP who the Applicants normally contacted was not available, that does not demonstrate a valid reason for not meeting the legislated timeframe for filing a Statement of Concern. The Board assumes other AEP staff would have been able to assist the Applicants. They could have also contacted the Approval Holder if they were seeking specific documents.

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- (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or
 - (ii) by the approval holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided...."

Even though the time limit was missed by only one day, the fact remains, the Statements of Concern were filed late with no valid explanation.

[42] Therefore, the Board cannot accept the Notices of Appeal filed by the Applicants because no valid Statements of Concern were filed. Accordingly, these appeals are dismissed.

[43] As stated, the Board will accept Ms. Valerie Pratch's Notice of Appeal as valid, because she filed a Statement of Concern within the legislated timeframe and filed her Notice of Appeal in time. However, the Board must also determine if Ms. Valerie Pratch participated in an AUC hearing where all the issues in her Notice of Appeal were adequately addressed and if she was directly affected by the Director's decision to issue the Amending Approval.

IV. PARTICIPATION AT AUC HEARING

A. Submissions

1. Appellant

[44] The Appellant stated she was represented at the AUC hearing. The Appellant said the Letter Report did not address her concerns at the AUC hearing, and this new information is the basis on which she should be considered to have standing to maintain an appeal of the Amending Approval.

[45] The Appellant said the AUC held a hearing in November 2013 to consider the construction and operation of a new 144-kilovolt (kV) transmission line proposed by the Approval Holder. The Appellant noted AEP did not have intervenor status in this proceeding, and none of the AUC panel members "represented" EPEA or the *Water Act*.

[46] The Appellant noted that, in its decision, the AUC asked the Approval Holder to follow old and not current legislation regarding avoidance and compensation for wetlands and, therefore, the AUC did not adequately deal with all of her concerns.

[47] The Appellant stated the Letter Report did not allow the "best" information to come forth to allow the Director to adequately do his job. The Appellant noted the following regarding the Letter Report:

- (a) it did not include Wetland 123 (Julien Lake) even though it was included in the 2013 Tetra Report⁷ from which the AUC formulated its decision. Since the Letter Report was deficient, the Director had no justification to issue the Amending Approval. The AUC did not have any of the information brought forth in the Letter Report so the AUC could not have adequately addressed the issues.
- (b) it indicated no wildlife was noted in all eight wetlands studied. This raised concerns regarding the accuracy of the Letter Report. The two wetlands contained in the Letter Report that were on the Appellant's property are, according to the Appellant, living, breathing ecosystems of amphibian and bird life. Since no wildlife was observed at any of the wetlands, the Appellant questioned what else was missed in the Letter Report. The AUC could not have dealt with all the matters adequately given the deficiencies in the Letter Report.
- (c) the data collection for the Letter Report was conducted at a time that was unfavourable for studying the wildlife species, making the report deficient. The Director's staff questioned the timing of the field site visit for the Letter Report. The AUC failed to apply current legislation in its decision in 2013, and the information collected in 2015 should have been required for the AUC prior to it making its 2013 decision.

[48] The Appellant stated that, as a result of the Amending Approval, more detailed information has come forth than was given to the AUC in November of 2013.

[49] The Appellant stated that, at the AUC hearing, she urged the AUC to look into the scope of AEP's policies, procedures, guidelines, and provincial regulations to protect a sensitive wetland environment and endangered or threatened species from irreparable harm. The Appellant questioned where in the AUC Decision the wetland policy of avoidance was discussed beyond using the existing transmission line. She also questioned who gave authority under the *Water Act* for the Approval Holder to construct the transmission line without further consideration of avoidance.

[50] The Appellant stated the AUC did not consider current legislation at the hearing and the requirements of the Provincial Wetland Restoration/Compensation Guide (September 2013). She noted this guide requires a consideration of avoidance of wetlands, mitigation if the wetland cannot be avoided, and compensation when avoidance and mitigation cannot occur. The Appellant said the Alberta Wetland Policy (2013) states that it is the responsibility of the

⁷ See: Tetra Report EBA Inc., *2013 Wetland Impact Assessment – St. Paul Transmission Project C22203120-05* (Calgary: 2013) (“2013 Tetra Report”).

proponent to adequately demonstrate that alternative projects, project designs, or project sites were thoroughly considered and ruled out for justifiable reasons. The Appellant explained the Amending Approval allows the transmission line to go through three wetlands on her property. The Appellant stated the AUC Decision failed to address the issue of avoidance and the Approval Holder failed to demonstrate an alternative project, project designs, or project sites were thoroughly considered and ruled out for justifiable reasons on the Pratch lands. The Appellant added the Amending Approval also failed to address this issue. The Appellant noted the Provincial Wetland Restoration/Compensation Guide (September 2013) was not referenced in the AUC Decision and, therefore, the AUC could not possibly have made an adequate decision using the old policy.

[51] The Appellant noted the AUC did not issue the Amending Approval to the Approval Holder, and AEP was not present at the AUC hearing to issue the Amending Approval. She argued the matters currently before the Board were not dealt with by the AUC.

2. Approval Holder

[52] The Approval Holder submitted that all of the matters included within the Appellant's Notice of Appeal were adequately dealt with by the AUC.

[53] The Approval Holder stated that evidence and an opening statement were filed on behalf of the Appellant prior to the AUC hearing, and the Appellant provided testimony at the hearing. The Approval Holder noted that, in her initial submissions, the Appellant alleged: (1) there would be potential harm to the wetlands as a result of the construction of the transmission line; (2) the Approval Holder failed to consider "avoidance of the wetlands;" and (3) there were potential health risks associated with electric and magnetic fields ("EMFs").

[54] The Approval Holder stated that in its decision, the AUC considered and assessed potential harm the transmission line could cause to the environment, including Julien Lake, as well as avoidance of the wetlands. The Approval Holder said it was recommended to the AUC that the focus should be to avoid wetlands that are productive for waterfowl. The Approval Holder noted the AUC approved the preferred east route, which came in proximity to 96 wetlands, over the alternative west route, which came in proximity to 112 wetlands. The

Approval Holder stated the AUC found the Approval Holder had addressed anticipated environmental impacts associated with the transmission line.

[55] The Approval Holder stated the AUC addressed potential harm associated with EMFs in its decision and concluded there would be no adverse effects associated with EMFs produced by the proposed transmission line.

[56] The Approval Holder submitted that, since the matters within the Appellant's Notice of Appeal were dealt with by the AUC, the Board must dismiss the appeal.

[57] The Approval Holder submitted that, contrary to the Appellant's submissions, it is not uncommon for project proponents to obtain the *Water Act* approvals from AEP after obtaining AUC approval for the project.

[58] The Approval Holder submitted there was no basis established by the Appellant for an appeal of the Amending Approval that was not already considered by the AUC.

[59] The Approval Holder requested the Appellant's Notice of Appeal be dismissed.

3. Director

[60] The Director submitted the Appellant received notice of and participated in the AUC hearing at which all of the matters included in her Notice of Appeal were adequately dealt with.

[61] The Director noted the AUC stated the matters raised in the Notice of Appeal were the subject of a review and hearing by the AUC. The Director summarized the AUC's response, indicating:

- (i) the AUC considered the construction and operation of a new 144-kilovolt (kV) transmission line proposed by ATCO Electric Ltd. in Decision 2013-446;
- (ii) the preferred route of the transmission line traversed the lands subject to the Notices of Appeal;
- (iii) the AUC identified the Appellant as a joint tenant on a piece of land potentially affected by the proposed transmission line;
- (iv) the Appellant was directly mailed the AUC's Notice of Application;

- (v) the Appellant registered as a participant in the AUC hearing, was a member of an intervenor group, and was represented by counsel;
- (vi) the AUC directly mailed a notice of the hearing to the Appellant and a copy was sent to her counsel;
- (vii) the intervenor group submitted expert evidence at the hearing that included analysis of the impact of the proposed transmission line on wetlands; and
- (viii) the Appellant read a statement to the AUC stating her concerns, including asking the AUC to consider AEP's policies, procedures, and guidelines and provincial regulations to protect a sensitive wetland environment and endangered or threatened species from irreparable harm.

[62] The Director noted the AUC considered the impact on wetlands on the lands subject to the Notice of Appeal, and the Approval Holder included an assessment of the impact of the wetlands, which included a map showing the relevant wetlands and classification of each.

[63] The Director stated the AUC considered all relevant materials in the record in approving the preferred transmission line route.

[64] In response to the Appellant's allegation that the AUC did not have the Letter Report and the Letter Report was deficient and inadequate, the Director stated these issues were outside the jurisdiction of the Board and not appropriate issues in the appeal.

[65] The Director stated there are no differences between the Letter Report and the 2013 Tetra Report that were relevant to this appeal. The Director said the only issue in this appeal was whether the changes made to the 2013 Tetra Report as reflected in the Letter Report were adequately dealt with by the AUC.

[66] The Director stated that, at all times, he and other AEP staff followed the applicable laws and considered the relevant policies when deciding to issue the Amending Approval.

[67] The Director said the conduct of the AUC hearing was outside the jurisdiction of the Board and was not at issue in this appeal.

[68] The Director submitted the matters in the Notice of Appeal were adequately dealt with by the AUC, and the appeal should be dismissed.

4. Rebuttal Submission

[69] The Appellant submitted the matters included in her Notice of Appeal were not adequately dealt with in the AUC hearing.

[70] The Appellant stated that, even though both the Approval Holder and Director felt the Appellant provided testimony with regards to avoidance at the AUC hearing, the AUC Decision placed the responsibility to show that avoidance was considered to both the Approval Holder and Director. The Appellant argued the Approval Holder and Director did not provide evidence this was adequately dealt with. The Appellant stated the Approval Holder did not follow the direction given by the AUC. She said the AUC found the Approval Holder was committed to avoiding wetlands, however when the Amending Approval was applied for, the Approval Holder did not provide evidence it had avoided wetlands to the greatest extent feasible. Therefore, according to the Appellant, the matter was not adequately dealt with.

[71] The Appellant explained the purpose of the Letter Report was to assess eight wetlands that could not be accessed at the time of the AUC hearing. She noted two of these wetlands were on the Pratchs' lands. The Appellant argued the AUC could not have adequately dealt with the field assessment of these wetlands in 2013 when they were not in the 2013 Tetra Report. The Appellant explained the 2013 Tetra Report was based on desktop data, and the Letter Report was based on a field assessment.

[72] The Appellant stated that, had the AUC Decision adequately dealt with all the matters, the Letter Report would not have been required, and the Approval Holder would have submitted a complete application with all the requirements.

[73] The Appellant argued the AUC did not adequately deal with the issuance of avoidance of wetlands given that structures were placed in eight wetlands.

[74] The Appellant stated the AUC did not adequately address the issue of the failure of the Approval Holder to use current legislation, specifically as it relates to the avoidance of wetlands. The Appellant noted the Amending Approval allows the Approval Holder to construct the transmission line without considering avoidance, which is contrary to the AUC Decision.

[75] The Appellant explained the wetlands could have been avoided by positioning structures to span wetlands rather than having structures in the middle of the wetlands. She said the structures were not included in the 2013 Tetra Report so the AUC could not have addressed the issue of avoidance to wetlands on the placement of the poles as this was not information presented to them. The Appellant said the AUC was unable to adequately deal with avoidance given that information was not available.

[76] The Appellant noted the Director argued the Letter Report and the 2013 Tetra Report were the same and, therefore, there were no substantive differences between the Amending Approval and the original Approval. She argued that, even if the results of the reports were the same, the Amending Approval allowed the Approval Holder to proceed with its project without considering avoidance of the wetlands. The Appellant stated the 2013 Tetra Report and the Letter Report were only part of the application, and it was up to the Director and Approval Holder to ensure the application was complete and any applicable policies were followed.

[77] The Appellant noted the 2013 Tetra Report said eight wetlands encountered by the preferred east route were crossed for a distance of at least 150 meters, the maximum stand distance between the standard pole structures. She said the 2013 Tetra Report allowed the Approval Holder to put structures in eight wetlands, but the Letter Report showed that, due to the actual size of the wetlands, more structures could have avoided the wetlands by spanning them. The Appellant stated that without this information, the AUC could not make an adequate finding on whether the Approval Holder had considered avoidance to the wetlands.

[78] The Appellant noted that in the Director's submission, he did not include the word "avoidance" in his argument for the AUC adequately dealing with the matters at hand.

[79] The Appellant argued an assessment of the impact on the wetlands, including a map showing the relevant wetlands and classification of each, does not constitute avoidance. She stated the Approval Holder failed to demonstrate that alternative routes were considered and ruled out for justifiable reasons, both at the AUC hearing and during the Amending Approval application process.

[80] The Appellant stated the application for the Amending Approval did not consider avoidance, only compensation, and the Director did not ask for supporting information to explain why the wetlands could not be avoided. In addition, she stated that compensation should also be considered for impacts on wetlands resulting from ongoing maintenance, not just during construction.

[81] The Appellant stated the AUC, in its decision, noted the Approval Holder's commitment to avoid wetlands. She said there was no indication the Approval Holder changed its project to accommodate avoidance of wetlands. The Appellant argued that, had the AUC adequately dealt with the issue of avoidance, then it would have been evident for both the Approval Holder and Director that they were to respond specifically to this preferred method of dealing with all wetlands.

[82] The Appellant submitted the AUC did not adequately deal with all matters given the Approval Holder did not provide a Siltation and Erosion Plan. The Appellant believed the Approval Holder failed to submit the Wetland Impact Assessment Form which should have been attached to the application to the AUC and would have provided reasons why the wetlands could not be avoided or mitigation measures taken. She noted the form was not completed as part of the application for the Amending Approval. The Appellant stated the Director made no effort to ensure the missing information was provided before he made his decision to issue the Amending Approval or the original Approval.

[83] The Appellant stated the issue of wetland loss in the St. Paul area and the implications of the construction of the transmission line to the wetlands in the area were not adequately dealt with at the AUC Hearing.

[84] The Appellant stated the Approval Holder was aware of the Alberta Wetland Policy (2013) at the time of the AUC hearing, but never at any point did the Approval Holder mention the Alberta Wetland Policy (2013) that had been released in September 2013 and the requirements that would have been placed on the project. The Appellant said the Approval Holder should have indicated there was some kind of consultation with AEP on this matter. She argued the Approval Holder and Director had another chance to adhere to the Alberta Wetland Policy (2013) requirements but failed to do so with the Amending Approval.

[85] The Appellant said the Approval Holder had the responsibility, under the AUC decision, to demonstrate to the Director the avoidance of the wetlands but it only addressed the issue of mitigation.

[86] The Appellant stated the comparison of the preferred route to the alternative route at the AUC hearing did not consider avoidance of the wetlands as the highest priority. She said the alternative route may have shown greater potential to avoid wetlands than did the preferred route. The Appellant stated that, if the AUC had been given the information of how avoidance to the wetlands would be achieved at the hearing using either the 2007 or 2013 Wetland Policies, it may have impacted the decision of which was the best route, or perhaps the AUC would have directed the Approval Holder to go back and develop yet another route. The Appellant questioned how the AUC could have adequately dealt with the matters if it was not brought forward at the hearing.

[87] The Appellant argued that, if the AUC adequately dealt with the matters at hand, then the Approval Holder should be able to give substantial evidence that it was committed to avoiding wetlands to the greatest extent feasible as stated in the AUC decision, and it should also be able to give evidence that it followed through on its commitments. The Appellant stated the AUC did not consider the 2007 or the 2013 wetland policies to the fullest extent possible by ensuring avoidance of wetlands.

[88] The Appellant submitted the AUC could not have dealt with the matters within the Letter Report, including avoidance of the wetlands contained within the 2015 Tetra Report. The Appellant stated the AUC passed the responsibility of avoidance of wetlands onto the Approval Holder and Director. She argued both the Approval Holder and Director failed to follow the applicable laws and policies relevant to the avoidance of wetlands when deciding to issue the Amending Approval.

[89] The Appellant requested her Notice of Appeal be heard by the Board.

B. Analysis

[90] Under section 95(5) of EPEA, the Board must dismiss an appeal if the appellant had an opportunity to participate in hearing held by the AUC and all matters in the Notice of Appeal were adequately dealt with.⁸

[91] The Appellant stated she attended the AUC hearing held in 2013 and she was identified as a participant to the proceedings in the AUC Decision 2013-446. Therefore, there is no question the first part of section 95(5)(b)(i), that the Appellant had an opportunity to participate in an AUC hearing, was met. The question before the Board is whether all of the matters included in the Appellant's Notice of Appeal were adequately dealt with by the AUC.

[92] In her Notice of Appeal, the Appellant raised a number of issues, but in her submission she focused on the avoidance of wetlands.⁹

[93] In order for the Board to consider a matter included in a Notice of Appeal, the matter must be relevant to the decision being issued and be within the Board's jurisdiction. Some of the matters raised in the Appellant's Notice of Appeal are not relevant to the Amending Approval, including geology of the site, water quantity, waster management, noise, and climate and air quality. Whether these matters were considered by the AUC or not would not result in these matters being included as issues before this Board. Therefore, the Board does not have to determine if these matters were adequately with by the AUC.

⁸ Section 95(5)(b)(i) of EPEA provides:

“The Board...

(b) shall dismiss a notice of appeal if in the Board's opinion

(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission at which all of the matters included in the notice of appeal were adequately dealt with....”

⁹ The issues raised in the Notice of Appeal included: (a) water quality and quantity; (b) erosion and sedimentation; (c) soils; (d) geology; (e) fragmentation and habitat loss; (f) vegetation and plant communities; (g) loss of wetland function; (h) migratory bird species and habitat; (i) species at risk; (j) aquatic life; (k) wildlife species and habitat; (l) waste management; (m) noise; (n) groundwater and hydrogeology; and (p) climate and air quality.

[94] Based on her submissions, the Appellant's prime concern was whether the issue of avoiding the wetlands was properly considered by the AUC and, ultimately, by the Director. Avoidance of the wetlands would address the Appellant's concerns regarding water quality, groundwater, and the importance of the wetland function and ecosystem. The Appellant argued the AUC did not consider the most recent policy regarding wetlands. Although the AUC may have considered previous wetland policies, the prime objective in the most recent policy to avoid wetlands was considered.

[95] In the AUC Decision, there was a discussion on the number of wetlands that would be impacted by the two routes being reviewed. The number of wetlands that would be impacted by the proposed project was presented at the AUC hearing. The route that was ultimately chosen had fewer wetlands that would be impacted than the alternate route. The number of wetlands impacted was referred to in the AUC decision, indicating the impacts to wetlands was considered. Given the route with the fewer wetlands was chosen suggests the AUC considered the issue of avoidance of wetlands. In its decision, the AUC discussed the number of wetlands that would be crossed by the two routes and it was a factor in assessing the routes.¹⁰ The AUC also stated it expected ATCO to honour its commitment to avoid wetlands to the greatest extent possible.¹¹

[96] Based on the AUC decision, it is clear the AUC also heard and considered submissions regarding Julien Lake, bird surveys, waterfowl nesting, and the environmental significance of the area.¹² This indicates the Appellant's concerns regarding species at risk would be assessed in the relevant studies. The AUC also heard submissions and considered the impacts on native vegetation, forested areas, biodiversity, bird nesting, wildlife habitat, and amphibians. It also noted the potential for soil erosion and compaction and noted the mitigation measures ATCO was undertaking to minimize the effects.¹³

[97] Based on the Board's review of the Participants' submissions and AUC Decision 2013-446, all the relevant matters in the Appellant's Notice of Appeal were adequately dealt

¹⁰ See: AUC Decision 2013-446 at paragraph 221.

¹¹ See: AUC Decision 2013-446 at paragraph 222.

¹² See: AUC Decision 2013-446 in section 7.3.

with by the AUC. Therefore, pursuant to section 95(5)(b)(i) of EPEA, the Board must dismiss the appeal.

V. DIRECTLY AFFECTED

[98] The Board has determined the appeals filed are not properly before the Board. The appeals of the Applicants and Ms. Aline Pratch have been dismissed for not having filed valid Statements of Concern. The Appellant's appeal has been dismissed because she participated in the AUC hearing where all the issues raised in her Notice of Appeal were adequately dealt with.

[99] Therefore, it is not necessary for the Board to decide the issue of whether the Appellant is directly affected.

VI. CONCLUSION

[100] The Board dismisses all of the appeals. Mr. Cory Wiebe, Ms. Nancy Pratch Wiebe, Ms. Aline Pratch, and Mr. Darren Pratch did not file valid Statements of Concern, a prerequisite for filing a valid Notice of Appeal. Although Ms. Valerie Pratch filed a valid Statement of Concern, she participated in the AUC hearing where all the issues in her Notice of Appeal were adequately dealt with. Therefore, the Board must dismiss her appeal.

Dated on July 29, 2016, at Edmonton, Alberta.

"original signed by"

Alex MacWilliam
Board Chair

¹³ See: AUC Decision 2013-446 at paragraphs 220 and 223.