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ALBERTA  
ENVIRONMENTAL APPEALS BOARD  
  
Decision

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Date of Decision – December 6, 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** an appeal filed by Aqua Properties Ltd. with respect to the Refusal to Accept *Water Act* Application No. 001-0342387 by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

Cite as: *Aqua Properties Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (06 December 2016), Appeal No. 16-003-D (A.E.A.B.).

**BEFORE:**

Mr. Alex MacWilliam, Board Chair.

**SUBMISSIONS BY:**

**Appellant:** Aqua Properties Ltd., represented by Mr. Robert and Ms. Margaret Rettie.

**Director:** Ms. Kathleen Murphy, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Michelle Williamson, Alberta Justice and Solicitor General.

## **EXECUTIVE SUMMARY**

Alberta Environment and Parks (AEP) refused to accept an application for an approval under the *Water Act* from Aqua Properties Ltd. (Aqua). The application was for an approval to implement a stormwater management plan for an RV Park adjacent to Little Bow Provincial Park and the Travers Reservoir. AEP determined the application was incomplete and returned it to Aqua.

Aqua appealed AEP's decision, arguing it amounted to a refusal to issue an approval. AEP argued that its actions did not constitute a refusal to issue an approval but merely a rejection of an incomplete application and, therefore, was not an appealable decision under the *Water Act*.

The Board received and reviewed submissions on the issue of whether the appeal was properly before the Board.

Based on the submissions and the Director's record, the Board found AEP's decision was a refusal to accept an incomplete application and, therefore, was not a decision that can be appealed under section 115 of the *Water Act*

The Board dismissed the appeal at this preliminary stage as the Board does not have jurisdiction to consider it.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's decision and its reasons on the preliminary motion raised in respect of Application No. 001-0342387 (the "Application"), filed under the *Water Act*, R.S.A. 2000, c. W-3. The Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks ("AEP" or the "Director") refused to accept the Application on the basis it was incomplete. The decision to refuse to accept the Application was appealed by the applicant, Aqua Properties Ltd. ("Aqua" or the "Appellant"). The Application was for an approval of a stormwater management project for the Travers Ridge RV Resort at NW-2-15-22-W4M.

[2] The Director brought a preliminary motion asking the Environmental Appeals Board (the "Board") to dismiss the appeal as the decision challenged by Aqua is not appealable under the *Water Act*.

[3] The Board received and reviewed the submissions from the Appellant and the Director on the motion.

[4] Based on the submissions and the information before the Board, the Board determined the Director's decision to refuse to accept the Application on the basis it was incomplete is not an appealable decision. Therefore, the Board dismissed the appeal.

## **II. SUBMISSIONS**

### **A. Appellant**

[5] The Appellant explained its development plan was circulated to AEP three times since 2007, and each time AEP was provided the opportunity to provide input and voice their concerns. The Appellant explained that it amended its Area Structure Plan from a residential development to an RV Park, and it received approval from Vulcan County in April 2014 for the amended plan. The Appellant said it initially submitted the Application to AEP in November 2013, but the Appellant asked the file be held in abeyance until it received approval for its Area Structure Plan.

[6] The Appellant described its RV Park as consisting of 106 lots developed in three phases. The Appellant said the delays in receiving approvals from AEP prevented the Appellant from opening the RV Park in May 2015 and again in 2016, resulting in financial hardships.

[7] The Appellant said it received all required approvals from Alberta Safety Codes and Alberta Health for the wastewater system, water systems, and all the utilities. The Appellant said it provided a Phase I environmental study that indicated no issues with the development, two historical resources impact statements which indicated no issues with the development, a water well report, and a suitability study.

[8] The Appellant disagreed with the Director's statement that the Appellant had not provided sufficient information to allow AEP to process the Application. The Appellant argued the Director's decision was a result of a technical difference of opinion. The Appellant disagreed with the Director's statement that there were still substantial questions regarding the technical design of the project. It was the Appellant's belief the points raised by the Director were not insurmountable, and the Director could have provided the Appellant an opportunity to respond to these points before closing the file.

[9] The Appellant expressed concerns regarding the knowledge and experience of the AEP staff involved in the review of the Application and whether they had the ability to accurately assess the technical merits of the proposed stormwater management plan.

[10] The Appellant noted that no one from the approvals division visited the property to gain additional insight into how the plan achieved the required result. The Appellant stated that it did not appear any of the surrounding RV Park developments had stormwater provisions. The Appellant argued the Director did not apply consistent and feasible concepts to be considered and made improper decisions.

[11] The Appellant said delays receiving responses from AEP regarding the Application negatively impacted its operations. The Appellant explained it also had difficulty obtaining responses from Alberta Parks, Public Lands, and the Operations Infrastructure Branch providing consent for drainage over their lands.

[12] The Appellant stated it was given contradictory explanations by the Director's staff on the direction the decision-making process would take. The Appellant said the Director advised she would consider approving the Application even though the Appellant did not receive consent from Alberta Parks and Public Lands, providing the Appellant retained all the water on its property in ponds. The Appellant said this contravened the *Water Act*, which requires pre-development and post-development volumes of water flowing off the lands to remain the same. The Appellant said its consultant did not consider it necessary to revise the stormwater management plan to include ponds in order to achieve the same result, as was explained in the stormwater management plan dated February 15, 2015, with additional information provided on August 17 and 19, 2015. The Appellant said it received an email from AEP staff advising there must be no change to volume, flows, or timing in the pre-development and post-development scenarios. The Appellant stated it received assurances from the Director that the stormwater management plan could be approved under the *Water Act*.

[13] The Appellant said that even though it had been clear that stormwater ponds were not considered in the initial stormwater management plan, the Director notified the Appellant that its options were to :

1. redesign the project so stormwater flow generated by the development is retained on site and would have no impact on adjacent lands;
2. redesign the project so stormwater flow is directed to an adequate outlet via a drainage course where consent from the directly affected parties can be obtained; or
3. withdraw the Application and resubmit a new application when required consents are obtained.

[14] The Appellant said its consultant responded on November 12, 2015, introducing stormwater ponds in order to satisfy the first option provided by the Director. The Appellant said it was advised the revised report met the intent of the Director's letter, but additional information was required. The additional information was provided to the Director on November 20, 2015. The Appellant hoped that, based on those comments and the fact its consultant made revisions to the plan to include stormwater ponds, it would receive approval.

[15] The Appellant noted a report was sent to the Director on January 28, 2016, outlining irregularities with the handling of the Application. The Appellant explained it was told by the Director to either withhold water or obtain consents and if it provided a stormwater management plan that withheld water, it would have to apply for an approval under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”). The Appellants said the plan that included retention ponds was rejected by the Director, forcing the Appellant back into the position of having to obtain consents.

[16] The Appellant stated that, on April 1, 2016, it asked the Director to advise what she wanted to see in the stormwater management plan, but the Director did not provide the information. The Appellant explained it requested its consultant to add retention ponds to accommodate the Director’s view, even though wetlands and wet ponds were not possible within its stormwater management plan because there needed to be a constant water source. The Appellant stated its consultant included stormwater ponds in a revised submission, but the Director did not respond.

[17] The Appellant argued the Director did not provide it with an opportunity to address her concerns prior to her decision to close the Application file.

[18] The Appellant stated the ongoing requests for additional details, calculations, and lack of acceptance of concepts affected its Application.

[19] The Appellant noted the Regional Integrated Approvals Manager of the South Saskatchewan Region indicated in a February 10, 2016 email that: (1) the department does not require construction of storm retention ponds; (2) it is difficult to design the project with no impact on the adjacent land; and (3) the approvals staff could not take an active role in obtaining consent as it could be seen as a conflict.

[20] The Appellant believed AEP was in a conflict of interest given its RV Park would be in direct competition with the adjacent provincial park and the approvals division in Alberta Environment was also advising Alberta Parks.

[21] The Appellant stated the Director: (1) requested more information and calculations than was reasonably required and requested on the application form; and (2)



neglected to consider the proposed park was a rural development and numerous parameters relating to a residential development were, therefore, not applicable.

[22] The Appellant said it removed 70 acres along the waterway from agricultural use, thereby benefiting Little Bow Provincial Park and public lands. The Appellant stated the agriculture industry contributes to the damage and decline of the water quality of the Travers Reservoir.

[23] The Appellant said its stormwater management plan would improve water quality by:

1. reducing nutrient loading and associated algae blooms, thereby improving water quality of the fishery resource and downstream users;
2. reducing animal fecal matter and associated algae blooms;
3. reducing invasive species; and
4. reducing soil erosion.

[24] The Appellant explained its stormwater management plan, including check dams and infiltration trenches, would allow management of the water flow from its property onto public lands and the park by:

1. eliminating approximately 50 percent of the pre-development flow from entering public lands by retaining overland drainage water in a 0.5 metre ditch;
2. installing swales and check dams that can be adjusted to restrain and slow stormwater as required; and
3. controlling water with swales and check dams located alongside the pedestrian path from the proposed project site to the reservoir.

[25] The Appellant stated the Director should have told it in February 2015 that ponds had to be included before the stormwater management plan would be accepted.

[26] The Appellant believed there would be minimal risk of damage to parks or public lands as a result of the proposed project.

[27] The Appellant did not agree with the Director's statement that the Appellant had not provided sufficient information to allow AEP to process the Application. The Appellant suggested an option that would have allowed the Director to approve the stormwater

management plan, specifically to include a condition that the nine points included in the Director's April 22, 2016 letter be addressed and implemented into the plan.

The Appellant stated the additional information, clarification, and calculations provided by its consultant to justify the stormwater management plan and the inclusion of retention ponds were encouraged by the Director but were not deemed essential by the Appellant's consultant. The Appellant believed it would have been reasonable for the Director to accept the Application based on receiving acceptable responses to her questions in the April 22, 2016 letter.

## **B. Appellant**

[28] The Director stated she clearly set out in her April 22, 2016 letter that the Application was incomplete and was being returned to the Appellant. The Director explained a new application was required before any decision can be made regarding the issuance of an approval. The Director noted the Appellant was provided with a list of the outstanding technical issues that had to be addressed in order for the Application to be considered complete.

[29] The Director stated the Appellant's appeal did not arise from a decision listed in section 115 of the *Water Act*. The Director said the Board does not have the jurisdiction to create rights of appeal. The Director noted section 115 of the *Water Act* clearly identifies certain persons who, in certain circumstances, may file a Notice of Appeal. The Director noted there is no circumstance enumerated in section 115 that enables an applicant to appeal the Director's decision that an application is incomplete. The Director submitted the Appellant has no standing to appeal.

[30] The Director stated the April 22, 2016 letter was clear that no decision had been made regarding the stormwater approval applied for by the Appellant. The Director noted the letter stated the Appellant's recourse was to reapply with the necessary information that was specified in the attachment to the letter.

[31] The Director argued that, in a case like this, the matter appealed is not within the Board's jurisdiction and the Board should dismiss the appeal.

[32] The Director stated it was clear in her decision dated April 22, 2016, that the Application was considered incomplete and was being returned. The Director noted the decision

explained the Application was not provided in the form and manner satisfactory to her pursuant to section 37 of the *Water Act* and it did not contain the information necessary to process the Application. The Director said she also listed nine outstanding technical issues with the Application.<sup>1</sup>

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<sup>1</sup> The April 22, 2016 letter identified the following outstanding technical issues:

- “1. Plan 102A-TR-SWM shows a sketch of the location of 7 small storm ponds. The sketch also appears to approximate the areas tributary to the respective storm ponds. The cross section drawings provided, although not to scale, appear to meet the grades and elevations required under the Standards and Guidelines. However it is not clear if these are intended to be dry ponds. If they are intended to be dry ponds, detention time should be a maximum of 24 hours. Based on the design, there is no outlet other than an overflow. We require confirmation on how water will drain from the ponds, and how they will be operated in order to keep the bottom dry between storm events.
2. We have serious concerns regarding the stability of the banks downstream of the ponds which are proposed to be constructed at the top of very steep erodible coulee, particularly for ponds 4, 5, 6, and 7. Ponds located at the top of the banks may saturate the soils and destabilize the banks. We would expect an Engineer to approve the slope stability analysis to ensure the structures are sound.
3. However there is no indication on the sketch plan on how the storm water is actually conveyed to the storm ponds – in particular, Pond 4 and Pond 5. They seem to be isolated from the water conveyance from the system of swales.
4. Does the addition of Ponds 4 and 5 result in 2 new outfalls? Their outflows appear to be down the edge of the coulee as opposed to directing to the previously identified outfalls.
5. There still remains a discrepancy between pre and post development calculated flow volumes. We have asked for, but not received information on how the pre and post development flows were established. The pre development flow rate is stated as 3681 m<sup>3</sup>/day but there has been no information submitted on how this rate was determined. Further, we cannot replicate the post development stormwater rate which is stated as 5890 m<sup>3</sup>/day.
6. Typically in an acceptable Stormwater Management Plan it would provide the results of a Stormwater Modelling Program used for your calculations of the 1:5, 1:10, 1:25, and 1:100 year storm events. The output of the modeling results we usually see as Appendix to the Plan. The Submitted information does not include the results of any modeling.
7. The minimum post-development stormwater ‘volume’ reduction is stated as 2209 m<sup>3</sup>/day (assuming determination of 5890 – 3681 = 2209). There is no confirmation in the plan that the rate of discharge from the site has been reduced.
8. With values scavenged the previous 8 submissions we attempted to assess the volumes related to the previously stated outfalls. Using the previously identified outfalls 1, 2 & 3. (again we are unsure if Pond 4 and 5 are new outfalls) and the percentage of flow assess for each outfall considering the storage provided as stated on drawing 104A-TR-S, it appears there is still an increase in volume released from the site particularly from Outfalls 1 and 2.  
Further the calculated volumes shown on drawing 104A-TR-S are estimates at best as the plans are not to scale and dimensions are approximated.
9. We have concerns about the construction of the check dams shown on drawing 102ATR-SWM and the height of 1 to 2 meters. Poned water upstream of the dams will serve to

[33] The Director said the Application submitted by the Appellant in November 2013 was for an approval allowing overland drainage of stormwater for an RV Park. The Director noted the RV Park is adjacent to Little Bow Provincial Park and the Travers Reservoir Lands.

[34] The Director said a request for additional information was sent to the Appellant on January 20, 2014, and the Appellant was advised of additional requirements, including the need for additional authorizations as well as consent from other landowners. A further request for this information was sent to the Appellant on May 22, 2014.

[35] The Director noted the Appellant advised the Director that it was waiting for the Area Structure Plan to be finalized by Vulcan County and it was retaining a consultant. The Director said the Appellant sent the additional Application information on February 15, 2015. The Director explained her staff responded to the Appellant advising additional information and authorizations were needed in the Application, including the need for consent from owners of lands containing the outfall channels planned to be used by the Appellant.

[36] The Director explained that between March 23, 2015 and April 22, 2016, there were weekly exchanges between the Appellant and AEP staff. The Director noted the Appellant was unable to obtain consent of the landowners as required in section 37(4) of the *Water Act*<sup>2</sup> and the Director. The Director stated that, on October 5, 2015, she advised the Appellant of the requirements that would have to be met if the consent requirement was not to be triggered, specifically that the plan had to be revised so the outfall channels and other lands owned by adjacent landowners were not impacted by the Appellant without their consent.

[37] The Director said the Appellant tried to revise the stormwater management plan so as not to trigger the need for consents, but was unable to provide sufficient information or plans to complete the Application in that way. The Director explained different attempts by the Appellant triggered different technical issues resulting in additional information required and

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saturate the soils and could likely destabilize the steep slopes.”

<sup>2</sup> Section 37(4) of the *Water Act* states:

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

even the need for additional authorizations. The Director stated the Appellant's attempts were insufficient in manner and form.

[38] The Director stated section 115 of the *Water Act* outlines the types of decisions that can be appealed.<sup>3</sup> She noted a decision returning an application on the basis it is incomplete is not appealable.

[39] The Director said that, if the Board cannot review the decision, it does not have the jurisdiction to consider whether: (1) the decision was reasonable; (2) the Director misinterpreted the legislation or any of its requirements; (3) the Director was qualified to determine what information was required to complete the Application; (4) the Appellant was provided sufficient notice of the decision and opportunities to respond; (5) the consent of the landowner was required and should have been granted; (6) the Appellant's expectation that an approval would be granted was well founded, realistic, or represented; or (7) the Appellant misunderstood or was misled about the requirements to complete the Application.

[40] The Director noted the Board does not have the jurisdiction to direct landowners to consent to a project.

[41] The Director said the decision of whether to require consent as part of the Application is within the discretion of the Director and goes to determining completeness of the Application. The Director stated she has no authority or control over third party consents.

[42] The Director explained her authority for these matters is found in section 37(1)(a) and (b) and (2) of the *Water Act*.<sup>4</sup> The Director also identified the guidelines and fact sheets in place regarding the application process and requirements for stormwater management activities.

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<sup>3</sup> See Appendix A for section 115 of the *Water Act*.

<sup>4</sup> Sections 37(1)(a) and (b) and (2) of the *Water Act* provide:

- “(1) A person who applies for an approval must
- (a) make an application to the Director in a form and manner satisfactory to the Director,
  - (b) submit the information, including but not limited to plans and specifications, required by the Director....”
- (2) The Director may require an applicant to submit any additional information including but not limited to plans and specifications the Director considers necessary within any time period required by the Director.”

[43] The Director noted her authority to refuse to issue an approval is set out in section 38(1) and (2) of the *Water Act*.<sup>5</sup>

[44] The Director explained an overview of the regulatory process was provided to the Appellant in March 2014 and in April 2016. The Director noted the overview identified a review of the Application for completeness is the first step the Director takes when an application is received. She stated the review to determine whether an approval should be granted does not take place until after the application is considered complete.

[45] The Director stated it was clear she decided the Application was incomplete, and she made the decision at the urging of the Appellant who essentially refused to provide any further information or documents. The Director said the Appellant advised her that it considered the Application complete, the technical information was correct and sufficient for a decision to be made, and demanded the Director make a decision by April 22, 2016. The Director said the Appellant was aware the Application had not yet been deemed complete.

[46] The Director stated no steps were taken to require the Appellant to provide public notice since the Application had not progressed to that point.

[47] The Director noted the Appellant was concerned about whether the Director's decision was correct and reasonable and whether the Director correctly interpreted the *Water Act* and applicable standards and guidelines.

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<sup>5</sup> Sections 38(1) and (2) of the *Water Act* state:

- “(1) Subject to section 34, the Director may issue or refuse to issue an approval to an applicant to commence or continue an activity.
- (2) In making a decision under this section, the Director
  - (a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan,
  - (b) may consider any existing, potential or cumulative
    - (i) effects on the aquatic environment,
    - (ii) hydraulic, hydrological and hydrogeological effects, and
    - (iii) effects on household users, licensees and traditional agriculture users, that result or may result from the activity, and
  - (c) may consider
    - (i) effects on public safety, and
    - (ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant.”

[48] The Director stated the Appellant was asking the Board to review the Director's decision, to review the landowners' decisions to not provide consent, and to determine if there was bias and conflict of interest on the part of AEP staff who spoke with the landowners. The Director said consideration of these issues was beyond the Board's scope of what it can review.

[49] The Director identified the documents in the Record that showed the Director and her staff were concerned with the completeness of the Application and the technical deficiencies. Other documents were identified that showed outstanding issues regarding the Application were discussed internally, as well as with the Appellant.

[50] The Director submitted the April 22, 2016 decision was about the completeness of the Application and is not appealable to the Board.

[51] The Director requested the appeal be dismissed.

### **C. Rebuttal Submission**

[52] The Appellant disagreed with the Director's decision that the stormwater management plan application submitted on February 15, 2015, and subsequently amended, was not provided in the form satisfactory to receive approval.

[53] The Appellant confirmed that its letter of April 16, 2016, requested the Director make a decision on the Application. The Appellant believed the Director manipulated her response in order to prevent an appeal of the decision.

[54] In response to the Director's statement that the Appellant was unable to obtain consent from landowners as required, the Appellant noted that in previous correspondence, the Director explained consent was not required if it could be proven there would be no effect on the adjacent landowner. The Appellant said this was not feasible in a stormwater management plan.

[55] The Appellant referred to minutes taken from a meeting between the Appellant and AEP staff in which it was noted AEP staff had a different interpretation of the stormwater

guidelines than the Appellant and its consultant.<sup>6</sup> The Appellant stated this confirmed there was a technical difference of opinion between its consultant and approvals personnel.

[56] In response to the Director's comment that the Application was insufficient in manner and form, the Appellant explained its consultant provided numerous emails and letters of clarification, calculations, and additional information as requested.

[57] The Appellant said the AEP water approvals engineer advised that all questions regarding the stormwater management plan had been sufficiently answered.<sup>7</sup> Based on this statement, the Appellant believed AEP was satisfied with the stormwater management plan and the plan was complete except for obtaining consent from Alberta Parks and Public Lands.

[58] The Appellant stated the Director should have accepted the stormwater management plan as complete and proceeded to public notice.

[59] The Appellant noted a November 16, 2015 email from AEP staff to the Appellant and its consultant, indicating the concept included in the updated report appeared to be good and consent from Alberta Parks, Public Lands, and the Operations Infrastructure Branch would not be required.<sup>8</sup>

[60] The Appellant disagreed with the Director's comment that it revised the stormwater plan so as not to trigger the need for consents when it was actually responding to correspondence from AEP staff.

[61] The Appellant stated that section 38(1) of the *Water Act* allows the Director to either "issue an approval" or "refuse to issue an approval."<sup>9</sup> Therefore, according to the Appellant, since the Director did not issue an approval, then the only other decision the Director

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<sup>6</sup> See: Director's Record at Tab 119.

<sup>7</sup> See: Director's Record at Tab 40.

<sup>8</sup> See: Director's Record at Tab 57.

<sup>9</sup> Section 38(1) of the *Water Act* provides:  
"Subject to section 34, the Director may issue or refuse to issue an approval to an applicant to commence or continue an activity."



could make was to refuse to issue an approval, which is appealable under section 115(1)(d) of the *Water Act*.<sup>10</sup>

[62] The Appellant said there is no provision in the *Water Act* that allows the Director to choose to close a file due to incompleteness without making a decision to issue or refuse to issue an approval. The Appellant argued that “closing” the file indicated a decision was made, which was not supported by the *Water Act*. The Appellant said the Director’s statement that the Appellant could reapply indicated the file was closed and, therefore, the decision made was to refuse to issue an approval.

[63] The Appellant argued that, after more than a year in the application process, there were significant extenuating circumstances regarding the application process related to unclear decision-making direction, conflicts, delays, and lack of experience and expertise, which were relevant and influenced the Director’s decision to close the file.

[64] The Appellant stated Alberta Parks and Public Lands unreasonably withheld consent. The Appellant said that obtaining consent from adjoining government landowners proved more challenging than if its neighbour was a farmer. The Appellant said that, given the adjoining landowner was also a branch of the Government, there was a conflict of interest.

[65] The Appellant argued the improved stormwater drainage conditions would improve water quality and reduce stormwater flow rates and volumes onto the adjacent lands. The Appellant said there would be no justifiable negative impacts on the adjacent lands.

[66] The Appellant said its Application was not reviewed by Public Lands as an individual file, but Public Lands was using any decision regarding the Appellant’s file as a precedent for any future development on Travers Reservoir. The Appellant noted Public Lands commented that the federal Department of Fisheries and Oceans did not support the project and would not sign any consent because the concerns would not be able to be mitigated.

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<sup>10</sup> Section 115(1)(d) 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...  
(d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence....”

[67] The Appellant stated that once it received notice the adjacent landowners did not intend to provide consent and once it addressed the Director's concerns, the Director had the opportunity to approve the Application without consent and direct public notice be given.

[68] The Appellant stated that issues related to qualifications of staff, delays, misleading expectations, and inconsistencies with the approval process and technical requests were within the Board's jurisdiction since these factors led to the decision of the Director.

[69] The Appellant noted the stormwater management plan was provided to other AEP engineers to review, but they were not provided with the complete stormwater management plan information and, as a result, their assessments could not be considered accurate.

[70] The Appellant argued the Application contained sufficient information for the Director to deem it complete.

### **III. Analysis**

[71] In order to have a valid appeal of a decision made under the *Water Act*, the decision being appealed must be included in the matters listed in section 115 of the *Water Act*. The Board does not have the jurisdiction to hear appeals of decisions not specified in the legislation. What is at issue before the Board is whether the April 22, 2016 letter from the Director to the Appellant was a decision to return the Application to the Appellant because it was incomplete, in which case it is not appealable, or whether it was, in fact, a refusal to issue an approval, and therefore an appealable decision under section 115 (1)(d) of the *Water Act*.

[72] The Board has reviewed the submissions of the Appellant and Director and the Director's Record to assess the Director's intent. The Board recognizes the confusion that resulted from some of the correspondence previously sent between the Director and Appellant, and emails and memos between AEP staff regarding the Application.

[73] Although lack of adjacent landowner consent was one of the reasons the Application was deemed incomplete, there were additional concerns about the information

provided by the Appellant. In the Director's April 22, 2016 letter, she specifies what additional technical information she considers relevant and must be provided before she accepts the Application. The information requested included information on water flows to and from the stormwater ponds, pre and post-development water flow volumes modelling data, confirmatory data on water volumes released from the site, and plans prepared to scale. It appears this information was deemed by the Director to be relevant to her decision whether to grant the approval. Without this information, the Director would have insufficient basis on which to make a reasoned decision as to the effect the proposed project would have on the environment and adjoining properties.

[74] The Appellant argued the Director can only make two decisions - either to issue or refuse to issue an approval. In this case, the Director did not refuse the application. She sought additional information to complete the Application. She was of the view she did not have sufficient information to make one of the decisions.

[75] The Director's Record demonstrates that, throughout the application process, the Director was explicit about the process and the need for supplemental information before the Application could be considered complete. The Director or AEP staff asked for additional information to complete the Application on numerous occasions starting at the time the initial Application was submitted to the Director. The Director also provided explanations to the Appellant as to what information was required and why it was necessary. These explanations were provided by emails to the Appellant or its consultant and during face-to-face meetings. This back and forth exchange is part of the iterative process generally followed with this type of application, but the Director was also seeking additional technical information to fill in the requirements to achieve a completed application. However, the specific information needed was not provided by the Appellant. The Director does not design the project for the proponent, but it is her responsibility to review the application and determine, based on the information provided, whether the project applied for should be issued an approval and the terms and conditions that should be included in the approval.

[76] The Appellant explained to the Director the difficulty it had obtaining consents from adjoining landowners. Under section 37(4) of the *Water Act*, the Director may require a

project proponent to acquire consents from adjacent landowners if the Director considers there will be an impact on their properties. Although it is discretionary, in this case, the Director determined landowner consents were required before the Application could be considered. It is not the Director's responsibility to obtain the consents and it is not appropriate for the Director to reverse her decision regarding consent simply because the adjoining landowners were not cooperative or were another government entity such as Alberta Parks or Public Lands. In many cases, it may be advisable to obtain the consents, or at least determine if it is feasible to obtain consent, prior to submitting the application in order to efficiently move through the application process and to prevent resources being needlessly spent from the project proponent's perspective as well as the Director's. In this case, the Director asked the Appellant to obtain the adjacent landowners' consents and, without these consents, the Application was incomplete.

[77] The Appellant argued the requirements changed as the application process proceeded. The application process is an iterative process with back and forth exchanges between the project proponent and the Director. The exchange of information and requests for additional information is a process used to ensure all of the information necessary to make a sound decision and approval is in front of the Director. The Director's Record indicates the Director and her staff provided specific direction as to what supplemental information they required prior to the Director making a decision. However, the Appellant did not provide sufficient information to satisfy the Director's requirements.

[78] As part of the iterative process, the Director may require alternative approaches be considered as additional information becomes available. This may result in the requirement of additional approvals or consents. This is not an indication the Director was inconsistent in her review of the Application or the requests for additional information.

[79] The Appellant raised concerns regarding the qualifications of the AEP staff member in charge of the file. The Board notes a number of people were involved in reviewing the information attached with the Application and the supplemental information provided. The Board considers the Appellant's concerns about the lead person's qualifications irrelevant to the decision made by the Director.

[80] It was reasonable for the Director to request the information since it was relevant to the actual decision as to whether the approval should be issued. The information requested does not show the Director asked for the information because there was a difference of professional opinion on the scientific data. The Board notes that determining an application is incomplete because there is a difference of opinion on the technical information, would be viewed as a refusal to issue an application. Assessing an application as incomplete to avoid appeal rights would not be viewed favourably. However, in this appeal, the Director had valid concerns with the lack of relevant information.

[81] The Appellant referred to further correspondence in the Director's Record, noting comments that indicated the stormwater management plan would be accepted. However, there were also comments that indicated the plan would not be accepted due to concerns from Public Lands and the federal Department of Fisheries and Oceans. With this additional, relevant information, it was reasonable for the Director to deem the Application incomplete. The Application did not include the required consents and modifications to the plan did not include sufficient information for the Director to find the Application complete.

[82] The Board finds the April 22, 2016 letter from the Director was a decision to reject and return the Application on the basis it was incomplete. It was not a refusal to issue an approval. Therefore, the Board must dismiss the appeal since it does not relate to one of the specific circumstances set out in section 115 of the *Water Act*.

[83] In the Director's April 22, 2016 letter, she informed the Appellant that, even though the Application was returned as incomplete, the Appellant was free to reapply for the approval providing all of the required information is attached.

#### **IV. CONCLUSION**

[84] The Board finds the decision made by the Director was not appealable under section 115 of the *Water Act*. The appeal is therefore dismissed.

Dated on December 6, 2016, at Edmonton, Alberta.

“original signed by”  
Alex MacWilliam  
Board Chair

Appendix A

Section 115(1) 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
  - (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;
- (b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted
  - (i) by the preliminary certificate 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 preliminary certificate 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;
- (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted
  - (i) by the licensee 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 licensee 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 or proposed changes was not provided;
- (d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence;

- (e) if the Director issues or refuses to issue a licence to the Government under section 51(2), the applicant for the licence and any directly affected person;
- (f) the applicant, if the Director refuses to amend an approval, preliminary certificate or licence;
- (g) the approval holder, preliminary certificate holder, licensee or registrant, if the Director suspends or cancels an approval, licence or registration or cancels a preliminary certificate;
- (h) the licensee, if the Director refuses to renew a licence;
- (i) if the Director renews a licence where there has been a public review, any person who previously submitted a statement of concern in accordance with section 109;
- (j) if the Minister takes over any works or undertaking, the approval holder, preliminary certificate holder or licensee or the owner of the works or undertaking;
- (k) if the Director provides notice that no further applications for licences are to be accepted, a person who wishes to apply for a licence for any water that was the subject of the notice;
- (l) the owner of the works, if the Minister issues an order with respect to the use of another person's works under section 52(3);
- (m) if an inspector or the Director issues a water management order or amends a water management order, except an order with respect to administering priority or an order that is only for the purpose of carrying out emergency measures, the person to whom the order is directed;
- (n) if an inspector or the Director issues a water management order or amends a water management order with respect to administering priority, the person to whom the order is directed, or any person whose rights to divert water may be affected by the issuance of the order with respect to who has priority;
- (o) a person who is entitled to divert water pursuant to section 21 and who is affected by a declaration by the Director that a diversion of water must cease;
- (p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing
  - (i) the suspension or cancellation of an approval or licence or the cancellation of a preliminary certificate,
  - (ii) the stopping or shutting down of any activity, diversion of water or operation of a works if the activity, diversion or operation is the subject-matter of an approval or licence,
  - (iii) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an



undertaking, if the works or undertaking is the subject of an approval, or

- (iv) the removal or otherwise rendering ineffective of any works or obstruction;
- (q) if the Director requires a person to pay an administrative penalty, the person to whom the notice of the administrative penalty is directed;
- (r) if the Director approves or refuses a request for a transfer of an allocation of water, the applicant and any person who submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision.”