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# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Report and Recommendations

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Date of Report and Recommendations – May 25, 2017

**IN THE MATTER OF** sections 91, 92, 95, and 97 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 Judy McLay with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Approval No. 00251587-00-00 to Jack and Donna Minsky.

Cite as: *McLay v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Minsky* (25 May 2017), Appeal No. 16-004-R (A.E.A.B.).

**BEFORE:**

Ms. A.J. Fox, Panel Chair;  
Mr. Jim Barlishen, Board Member; and  
Ms. Susan McRory, Board Member.

**BOARD STAFF:**

Mr. Gilbert Van Nes, General Counsel and  
Settlement Officer; Ms. Marian Fluker,  
Associate Counsel; and Ms. Denise Black,  
Board Secretary.

**SUBMISSIONS BY:**

**Appellant:** Ms. Judy McLay.

**Approval Holders:** Mr. Jack and Ms. Donna Minsky.

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

**WITNESSES:**

**Appellant:** Ms. Judy McLay; and Ms. Janet Reeve.

**Approval Holders:** Mr. Jack Minsky; Mr. Steven Ferner,  
Millennium EMS Solutions Ltd.; and Mr. Gary  
Van der Vinnie, Northwest Hydraulic  
Consultants.

**Director:** Mr. Mohammad Habib, Director, Red Deer-  
North Saskatchewan Region, Alberta  
Environment and Parks; and Mr. Andrew  
Patton, Water Engineer, Alberta Environment  
and Parks.

## EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Approval under the *Water Act* to Mr. Jack and Ms. Donna Minsky for the construction, operation, and maintenance of a surface water drainage system, including the construction of drainage ditches and ditch blocks, installation of culverts, and modification of two ponds.

Ms. Judy McLay appealed the decision to issue the Approval to the Environmental Appeals Board (the Board).

The Board received and reviewed the written submissions, assessed the oral evidence and arguments presented at the hearing, and reviewed the AEP record on the following issues:

Does the Approval adequately address the impact of water flows on adjacent properties? This issue includes ensuring there are no negative impacts to neighbouring properties and ensuring adequate water flows to any wetlands in the area.

The Board recommended the Approval be varied. Although there was no evidence to demonstrate the approved project has had or will have an adverse effect on Ms. McLay's property, certain terms and conditions in the Approval were varied to improve its clarity for all parties. The Board believed most of the concerns raised by Ms. McLay were the result of naturally occurring changes in the local environment.

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## **I. INTRODUCTION**

[1] This is the Environmental Appeals Board's report and recommendations in respect of an appeal of Approval No. 00251587-00-00 (the "Approval") issued to Mr. Jack and Ms. Donna Minsky (the "Approval Holders"). Alberta Environment and Parks ("AEP") issued the Approval to the Approval Holders under the *Water Act*, R.S.A. 2000, c. W-3, for the construction, operation, and maintenance of a surface water drainage system.

[2] Ms. Judy McLay (the "Appellant") appealed the decision to issue the Approval.

[3] The Environmental Appeals Board held a hearing to hear submissions and evidence on the following issue:

Does the Approval adequately address the impact of water flows on adjacent properties? This issue includes ensuring there are no negative impacts to neighbouring properties and ensuring adequate water flows to any wetlands in the area.

[4] After reviewing the oral evidence and arguments, written submissions, and the record, the Board is recommending the Approval be varied. The Board does not believe the approved project has had or will have an adverse effect on the Appellant's property. The Board believes most of the concerns raised by the Appellant are the result of naturally occurring changes in the local environment.

## **II. BACKGROUND**

[5] On May 19, 2016, the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director"), issued the Approval to the Approval Holders. The Approval allows for the construction, operation, and maintenance of a surface water drainage system, including drainage ditches and ditch blocks, the installation of culverts, and the modification of two ponds, at SW 07-55-24-W4M in Sturgeon County.

[6] On May 27, 2016, the Board received a Notice of Appeal from the Appellant appealing the Approval.

[7] On June 1, 2016, the Board wrote to the Appellant, the Approval Holders, and the Director (collectively, the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holders and Director of the appeal. The Board asked the Director for a copy of the documents upon which the Director made his decision (the “Record”). The Record was received on July 15, 2016, and provided to the Appellant and Approval Holders on July 21, 2016.

[8] On July 26, 2016, the Board confirmed that, based on the Parties’ schedules, a mediation meeting would be held on September 2, 2016.

[9] The mediation meeting was held on September 2, 2016, in Edmonton. No resolution was reached.

[10] On October 18, 2016, the Board asked the Parties to provide a list of any preliminary motions. The Board did not receive any notice of preliminary motions.

[11] On December 21, 2016, the Board notified the Parties the hearing would be held on April 26, 2017.

[12] On February 13, 2017, the Board provided the Parties with the procedure for the hearing. The Board confirmed the issue to be heard at the hearing as:

Does the Approval adequately address the impact of water flows on adjacent properties? This issue includes ensuring there are no negative impacts to neighbouring properties and ensuring adequate water flows to any wetlands in the area.

[13] The Board published the Notice of Hearing in the Morinville Free Press. The Board also provided a copy of the Notice of Hearing to Sturgeon County to place on its public bulletin board or website. The Notice of Hearing was also placed on the Government of Alberta and Board websites. The Board issued a News Release that was distributed to the media throughout the Province by the Public Affairs Bureau. The Notice of Hearing notified the public of the hearing and requested that if any person, other than the Parties, wanted to make representations before the Board, to contact the Board by March 7, 2017. The Board did not receive any intervenor applications.

[14] The Parties' submissions for the hearing were provided to the Board on April 5 and 10, 2017.

[15] The hearing was held on April 26, 2017, in Edmonton. The issue heard by the Board was:

Does the Approval adequately address the impact of water flows on adjacent properties? This issue includes ensuring there are no negative impacts to neighbouring properties and ensuring adequate water flows to any wetlands in the area.

### **III. SUBMISSIONS**

#### **A. Appellant**

[16] The Appellant stated the Approval does not address ongoing damage to her wetlands, flooding of her farmlands, and interference with an existing watercourse.

[17] The Appellant said the massive ponds, waterways, borrow pits, holes, berms, ditches, plugging of existing drainage ditches and culverts, and rerouting of water by the Approval Holders have contributed to summer drought of her wetlands and flooding of her farmland in the spring.

[18] The Appellant provided a history of drainage issues in the area:

- in the 1970s, six family farms approached Sturgeon County and the Alberta Government to address flooding issues;
- in 1980, Alberta Environment conducted a drainage survey under the Farm Surface Water Management Program;
- the Appellant's family signed an easement agreement with Sturgeon County to allow the ditch to be widened; and
- the east ditch running north and south along Range Road 250 ("RR 250") was widened and culverts installed in 1984.

[19] The Appellant noted Pond 2 in the Approval Holders' plan was originally to be a bird sanctuary but is now proposed as a dugout and has increased in size.

[20] The Appellant stated there is no indication of any drainage ditch or swale as required by the Approval along the 10 metre (33 foot) berm perpendicular to the north boundary of the Appellant's land, because the setback was not sufficient to accommodate the swale or drainage ditch.

[21] The Appellant stated the unnamed creek, or drainage ditch, has existed since the 1980s. The Appellant said this unnamed creek feeds into her wetlands. The Appellant stated the flow of the creek along RR 250 at her access road and the flow of the creek to her wetlands have been interfered with by the construction of roads, ponds, and berms.

[22] The Appellant said the Approval Holders now control the flow of water from the access road on RR 250 and the route from her property line to the eastern wetlands.

[23] The Appellant stated the proposed ditch along the border between her property and the Approval Holders (Ditch 2) is partially constructed and does not consider the existing drainage patterns from the property line to her wetlands and farmlands.

[24] The Appellant argued the Approval Holders are manipulating water at will for their own purposes to the detriment of the proper operation and maintenance of her lands.

[25] The Appellant stated the Approval Holder's project is massive, and the proposed water courses, ponds, ditches, ditch blocks, and berms will continue to negatively impact her wetlands, farmland, and aesthetics of the homestead and family farm.

## **B. Approval Holders**

[26] The Approval Holders explained the remaining work to complete the drainage system involves:

- moving Pond 1 off the adjacent property with consent from the property owner (the infringement onto the neighbouring property was the result of a surveying error);
- construction of a south ditch (Ditch 2) paralleling the Appellant's northern boundary (with a five metre setback) to move water into Pond 2 from the county ditch along RR 250;
- expanding Pond 2;



- constructing ditch blocks to divert water from the existing drainage ditch along RR 250 into the north (Ditch 1) and south (Ditch 2) ditches, leading to Ponds 1 and 2 respectively;
- constructing a spillway from Pond 2 to the ditch leading to Pond 1 which would flow during large runoff events into Pond 2;
- diverting a small volume of water, around 1000 m<sup>3</sup> annually, from the Ponds for gardening and household use; and
- construction of an additional berm from the fill material of Pond 2 on the north side of the property, but this berm would not impact drainage to adjacent properties. (See: Appendix A.)

[27] The Approval Holders indicated they had retained consultants to conduct a hydrologic analysis of pond size, diversion amounts, key elevations of the ditch blocks and pond exits, and for the purpose of calculating a water balance for the proposed project.

[28] The Approval Holders stated the analysis of runoff volume, fill time, water balance, and key elevations ensure the restoration of 1983 flow levels through their property towards the large wetland in the NE 07-55-24-W4M. The Approval Holders noted the design size of Pond 2 was reduced in half based on engineering work to ensure sustainable flow through the ponds. They explained there is separate flow, from separate runoff areas, to Pond 1 and Pond 2, and the project includes design requirements to convey water from Ditch Block 1 to Pond 1.

[29] The Approval Holders explained water will be diverted to Ditch 1 on the north side of their access road at the RR 250 ditch culvert and then flow east along the access road before crossing under the access road to flow between the access road and Pond 2. The Approval Holders said the ditch block will be placed in front of the inlet of the culvert to a level of 0.6 metres above the ditch bottom so that some portion of the higher flows will still flow through the existing culvert.

[30] The Approval Holders explained a ditch block will divert runoff from the second drainage area to Pond 2 by diverting water to Ditch 2 at the southwest corner of their property, south of the culvert under RR 250. The Approval Holders said the water would flow east along the property line before entering an old existing drainage flowing north into Pond 2. The ditch block would be built to a level of 0.5 metres above the existing ditch bottom south of the

diversion so a portion of the existing flow could flow south through the existing culvert during high rainfall events.

[31] The Approval Holders noted the impact of water flows on the Appellant's property as follows:

- the Appellant's land is upstream of the Approval Holders' land;
- no modifications are required to the Appellant's land;
- water will flow off the Appellant's land and flow north in the old existing ditch onto the Approval Holders' land as it had since before 1984;
- there will be no back water upstream of Pond 2;
- water will flow on the Appellant's land as it has since 1984;
- diverted flow from the road ditch will be contained on the Approval Holders' land and not go onto the Appellant's land;
- flow at Ditch Block 1 is diverted to Pond 1 and exits Pond 1, with no impact on the Appellant;
- flow at Ditch Block 2 is diverted to Pond 2 and excess water can spill into the ditch leading to Pond 1 and exits Pond 1 into the large wetland to the east, with no impact on the Appellant;
- Ditches 1 and 2 will convey 100-year peak flows without overtopping;
- Ditch 2 was offset 5 metres from the Appellant's property line;
- excess water (i.e. water not diverted at Ditch Blocks 1 and 2) in the RR 250 ditch during high flow will continue to flow south past the Appellant's land to the unnamed creek south of Township Road 551;
- the only potential impact on the Appellant's land is the reduction of overland flooding during periods of high flows when there are ice and snow blockages in the road ditch downstream of Ditch Block 2 and south of Township Road 551;
- if the road ditch downstream of Ditch Block 2 is free of ice blockage, there will be no impacts to the Appellant;
- runoff from the berm surrounding the Approval Holders' residence is captured and flows in a drainage ditch toward Pond 1 and there would be no impact on the Appellant;
- snowmelt on the berm has not caused any flooding to date; and
- improvements to the drainage ditch on the east side of the berm were completed in 2013 at the request of AEP.

**C. Director**

[32] The Director explained the Appellant owns the property immediately south of the project lands.

[33] The Director said he received an initial application in 2008 and a revised application in 2011, which led to the issuance of the Approval.

[34] The Director stated a compliance investigation was conducted and completed in 2015 after it was discovered the Approval Holder had constructed a portion of the drainage system before the Approval was issued. The Director accepted the submission of an application for an approval as sufficient for AEP to suspend its investigation of the contravention, and the investigation file was closed on October 22, 2015.

[35] The Director said the primary concerns raised during his review and by adjacent landowners were: (1) flooding of private lands; (2) impacts to wetlands; (3) disturbance of wildlife; and (4) impacts to groundwater levels. He stated other concerns raised by Statement of Concern filers were not considered as part of the application review, such as concerns regarding weed growth and vegetation management, and landscaping and design considerations of the berm. Sturgeon County is the responsible authority for these matters.

[36] The Director stated the *Water Act* issues were reviewed thoroughly and all concerns addressed during the application review process.

[37] The Director explained the surface water runoff in the area generally flows south and east to the Sturgeon River. He said the contributing drainage area around the project lands has been farmed and drained for decades, and a drainage system was constructed by Sturgeon County in 1984 to direct runoff around and away from the Appellant's and Approval Holders' lands.

[38] The Director said the topography in the area is relatively flat, so the surface water drainage can vary directionally on a localized basis. The Director explained there are some portions within the Appellant's and Approval Holders' lands that drain northeast to the Little

Egg Creek, which flows southward to the Sturgeon River and eventually joining the North Saskatchewan River.

[39] The Director said intermittent wetlands exist on the Appellant's and Approval Holders' lands during spring runoff. The Director explained the intermittent wetlands within the Appellant's property occur in low lying areas that collect runoff and rainfall and tend to drain northeast to Little Egg Creek. He noted that in some areas, the surface runoff drains south and is collected by the County drainage system that flows east to west along Township Road 551.

[40] The Director acknowledged he must consider, pursuant to section 38(2) of the *Water Act*,<sup>1</sup> any impacts to the aquatic environment, any hydrological and hydrogeological effect, and any potential impacts to household users, licensees, and traditional agricultural users in the area. The Director stated that, based on the information in the application for the Approval and taking into consideration the Statement of Concern filers' concerns, he found the main potential impact of the proposed project was to the drainage of the neighbours upstream and downstream of the project.

[41] The Director explained the approved drainage system:

- has two large ponds that will collect local runoff and store water diverted from the existing county drainage system;
- will release water collected in Pond 1 at a low flow rate, similar to natural conditions, to prevent aggravating flooding of the neighbour's lands to the north;

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<sup>1</sup> Section 38(2) of the *Water Act* states:

“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.”

- will be beneficial for the wetland in NE 07-55-24-W4M during drought given the additional supply of water; and
- will divert up to 1,000 cubic metres of surface water from the county drainage system to Pond 1 or Pond 2 and then water from Pond 2 will be directed to flow into Pond 1.

[42] The Director stated the project was designed to ensure drainage of upstream and downstream neighbours' lands was not negatively impacted, based on the following:

- the north ditch will collect 70 percent of the water diverted from the county drainage ditch and divert the water to Pond 1, thereby providing additional flood protection to the Appellant's lands;
- Pond 2 provides storage of a large volume of water that will spill into a ditch leading to Pond 1 before causing any backwater effects onto the Appellant's lands to the south;
- ditch blocks that divert water from the county ditch will be removed upon written notice from the Director if adverse impacts occur;
- ditches are designed to ensure drainage moves from the southwest to the northeast away from the Appellant's lands; and
- as-built drawings with survey elevations are required after the construction of the project to ensure the project will operate as designed.

[43] The Director believed the approved drainage system will not have an adverse hydrological or hydrogeological impact and will not cause adverse impacts to the aquatic environment, household users, licensees, or traditional agriculture users.

[44] The Director noted the conditions in the Approval that will ensure the Approval Holders' project is constructed, operated, monitored, and maintained as approved and that potential impacts, if any, will be promptly identified and managed appropriately. The Director specifically noted the following conditions:

- the Approval is for 25 years, meaning the Approval Holder will have to actively operate and maintain the system as designed for 25 years. Similar approvals are normally issued for shorter terms because there is usually less focus on maintenance and management;
- construction must be completed by 2020 and a certificate of completion must be submitted;

- the drainage system must be constructed following the referenced plans and reports submitted as part of the application and reviewed and approved by the Director. The design demonstrated that it will not cause adverse flooding to adjacent landowners;
- “as-built” drawings are required to confirm the project was constructed as designed;
- the drainage system must be maintained as designed during operation;
- the Approval Holders can only construct works that are referenced in the plans and reports, and they cannot construct something other than what is shown in the plans and reports. Disturbance areas are limited to the areas shown on the plans;
- the volume of water the Approval Holder can divert for household purposes from water diverted from the county drainage system into Ponds 1 and 2 is limited to 1000 m<sup>3</sup> annually, which is less than one percent of the water that can be stored in Ponds 1 and 2. The small diversion will not cause any adverse impacts to adjacent landowners;
- the Director can order the Approval Holders to temporarily remove the ditch blocks that divert water from the county ditches, and the drainage pattern will return to conditions that existed prior to this Approval;
- the Approval Holders must develop and implement a siltation and erosion control plan, thereby reducing the risk of siltation and erosion of the proposed ponds, ditches, and downstream wetlands; and
- the Approval Holders must submit a certificate of completion which allows the Director to confirm the drainage system is constructed as approved by requiring as built drawings, photographs, and a report summarizing issues or concerns encountered during the activity.

[45] The Director stated the Approval adequately addresses the impacts of water flows on adjacent properties.

[46] The Director asked the Board to confirm the Approval as issued.

#### **IV. ANALYSIS**

[47] The issue before the Board was:

Does the Approval adequately address the impact of water flows on adjacent properties? This issue includes ensuring there are no negative impacts to

neighbouring properties and ensuring adequate water flows to any wetlands in the area.

[48] Under section 99(1) of EPEA, the Board must provide the Minister with its recommendations regarding the issue in this appeal.<sup>2</sup>

[49] The Appellant raised a number of concerns regarding the work being conducted on the Approval Holder's property. Some of her concerns were not issues the Board has the jurisdiction to consider, such as the positioning and building of the berms adjacent to her property and the ongoing construction noise from the site. These are issues under the jurisdiction of Sturgeon County.

[50] The Appellant's concerns as they relate to the Approval were how the project will affect her property, either by flooding arable crop land or by diverting water from the wetland on her property and causing it to dry up.

[51] The onus is on the Appellant to provide evidence that supports her arguments that the project is having or will have an adverse effect on her land. The Board finds the Appellant did not meet her onus.

[52] The Appellant provided photographs of standing water in her fields as well as the properties surrounding the Approval Holders' lands. However, there was no evidence to show whether the work done by the Approval Holders or climatic conditions was the cause of this flooding.

[53] The Board understands the concern and confusion resulting from the map provided to the Appellant by the County. The inaccuracy in the drawing of the 1984 ditch location resulted in a misinterpretation by the Appellant of drainage patterns on her land. Recent photographs and maps provided by the Parties showed the actual location of the 1984 ditch. The work proposed by the Approval Holders will not compromise the effectiveness of the 1984 ditch

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<sup>2</sup> Section 99(1) of EPEA states:

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

in protecting the Appellant's land from flooding; it will simply divert water from the County ditch, upstream of the Appellant's land, to the ponds on the Approval Holders' property and then onward to the wetland in NE 07-55-24-W4M. The construction of the 1984 ditch significantly reduced the supply source to this wetland. The project, in part, restores the flow of water to the wetland in NE 07-55-24-W4M.

[54] The Approval Holders and the Director provided historical photographs of the Appellant's and Approval Holders' lands. It is apparent there are ephemeral wetlands on the Appellant's lands. There is a larger wetland on the south end of her property that extends from Township Road 551 north to the Approval Holders' property. The Board understands the wetland extended onto the Approval Holders' lands, but the northern section of the wetland has now been incorporated into the scope of the approved project. The photographs also showed a manmade ditch through this wetland, presumably built years ago in order to provide better drainage to increase the amount of arable land.

[55] The maps that were provided to the Board indicated the flow of surface water on the Appellant's and Approval Holders' properties. The hydrologist from AEP ground truthed the maps. The Board accepts that water flows predominately from the south to the north on the Appellant's land, so water flows from the Appellant's property onto the Approval Holders' property. There are small areas in which the surface water flows in different directions, but these flows do not make a major contribution to the total surface water flows or drainage patterns. The Board also notes the Director directed the Approval Holders to extend the ditch at the south end of the berm abutting the Appellant's property to ensure that south flowing drainage on the east side of the berm moves toward Pond 2 and not onto the Appellant's land.

[56] Based on the evidence presented to the Board, there is no indication the work done by the Approval Holders or the work that will be done under the Approval will negatively impact the Appellant. Based on the maps provided and the evidence given, the ditch blocks should reduce the flooding on the Appellant's arable lands. The maps also indicate the flow of water into the Appellant's wetland does not come from the Approval Holders' property. In fact, the water flows from the Appellant's wetland onto the Approval Holders' property, so any diversion of water on the Approval Holders' property will not impact the Appellant's wetland.



[57] The Appellant explained the wetland has been drying up since 2008 and is now overgrown with weeds. However, based on the topographic maps provided and the maps demonstrating the direction of surface water flow, it appears the wetland on the Appellant's property is filled by very localized runoff, so climatic conditions will have the greatest impact on the Appellant's wetland, not the Approval Holders' project.

[58] The Board commends the Appellant's desire to maintain the wetland on her property. At the hearing, alternative methods of retaining water in the Appellant's wetland were suggested, including blocking the flow in the wetland to prevent it from flowing north or diverting water from the county ditches via a culvert under Township Road 551 on the southern boundary of the Appellant's land. If the Appellant chooses to proceed with any of these options, the Board reminds her authorization would be required from AEP, and potentially Sturgeon County, prior to any work being done.

[59] One of the reasons the Appellant has concerns regarding the project relates to the Approval Holders' past disregard for the approval processes, both with the municipality and AEP. The Appellants had stop work orders issued against them, as well as penalties, for failing to obtain the requisite approvals prior to starting certain works. In reviewing the Approval, the Board notes some of the conditions can be improved to provide a greater level of certainty the project will be constructed, operated, and maintained properly.

[60] Counsel for the Director argued the conditions in the Approval are standard conditions to ensure consistency among all administrative regions throughout the Province. The Board agrees there should be consistency in the way the *Water Act* is enforced by the regional Directors. However, each project is site specific and the concerns are specific to the area. The approval template is the minimum that should be included in an approval to ensure the basic requirements are covered. This does not mean the conditions cannot be changed to suit the circumstances of the application or the need to include additional conditions when warranted.

[61] In the Director's submission, he stated the Approval Holders will divert up to 1,000 cubic metres of surface water from the county drainage system to Pond 1 or Pond 2. The Board notes the Approval Holders may divert up to 1,000 cubic metres of surface water for

household use, but this is not the total amount of water that will be diverted as a result of the surface water drainage system.

[62] During questioning from the Board, the Director agreed some of the conditions could be written with more specificity to ensure clarity for the Approval Holders to ensure they understand their obligations under the Approval, for the Appellant and the public to understand what can be done under the Approval, and to assist the Director, present and future, to know the intent of the specific conditions.

[63] The Director relied on the incorporation of the reports submitted with the application to argue the maintenance and operation aspects of the project were adequately covered in the Approval. The Board does not find the reports included with the application provide enough detail on the maintenance and operation of the works to ensure the Approval Holders understand their obligations and for the public to have confidence in the way the works are operated and maintained, and for the Director to ensure the conditions of the Approval are being followed. The Approval Holders are responsible for the construction, operation, and maintenance of the approved works for 25 years. The Board notes the term “activity” is not defined in the Approval. The Board recommends the Approval be varied to include the definition of “activity” as:

“the construction, operation, and maintenance of a surface drainage system including, but not limited to:

- 1) constructing drainage ditches;
- 2) constructing ditch blocks;
- 3) installing culverts; and
- 4) modifying Pond 1 and Pond 2.”

[64] Ditch 2 is to be built as designed except the setback will be five metres from the Appellant’s property line. This modification was agreed to by the Approval Holder to minimize any effects should the ditch overflow in high water events. In order to ensure the ditches and ditch blocks operate as designed, the Board is recommending the Approval be varied to include a condition requiring annual maintenance of the ditches. This would require the removal of

unwanted debris, ensuring the erosion control and siltation measures are continuing to be effective, and the ditch blocks are repaired or modified as required.

[65] As part of the Board's questioning, the Board asked for clarification concerning how an approval can be issued allowing for the diversion of water. In most circumstances, the diversion of water requires the applicant to submit an application for a water licence in addition to an approval.

[66] As pointed out by the Director's counsel, section 49(2)(c) of the *Water Act* allows for such a condition in an approval.<sup>3</sup> The Director's counsel explained it would not be reasonable or practical to issue a priority call on the water allocated in a project such as this. One of the reasons licences are issued with a priority number is to determine the priority to water should a water shortage occur and a water call (i.e. rationing) is implemented. However, quantities of water licenced by type of use is very important in understanding water use trends and would be crucial should an annual water licence fee structure ever be implemented in the province. The Director explained the diversion of the water under the Approval is for household use on the SW 07-55-24-W4M. The Board believes it is appropriate to specify the use of the water in the Approval. Therefore, the Board recommends condition 3.7 of the Approval be varied by limiting the 1,000 cubic metres of water diverted from the water drainage system to be used for household purposes only on the SW 07-55-24-W4M.

[67] Condition 3.8 requires the Approval Holders remove the ditch blocks if the Director notifies them in writing to do so. The ditch blocks would have to be removed if the Director finds they are causing a negative impact to neighbouring properties or the environment. This limits the ability of the Director to either require complete removal of the ditch blocks or the blocks remain as built in the original design. The Board anticipates there may be certain times when some of the water can be diverted to the Approval Holders' property but additional water should be allowed to flow down the 1984 ditch along RR 250. Varying condition 3.8 to include an option allowing the Director to require removal, reinstallation, or modification of the

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<sup>3</sup> Section 49(2)(c) states:

“A person who commences or continues the diversion of water or operates a works pursuant to an approval is not required to hold a licence for that diversion of water or operation of works.”

ditch block will provide the Director more flexibility in dealing with water flow issues in the area. Therefore, the Board recommends condition 3.8 be varied to allow the Director to require the complete removal, reinstallation, or a specific modification of the ditch blocks.

[68] As the Approval is currently written, there is no time limit for the Approval Holders to remove, reinstall, or modify the ditch blocks if required. Although the Director explained the deadline for complying would be included in the written notice, the Board considers it appropriate to include a two-week time period to comply with any request by the Director unless otherwise stated. Therefore, the Board recommends condition 3.8 be varied to include a two-week time limit, or a time limit stated by the Director, to comply with any direction from the Director to remove, reinstall, or modify the ditch blocks.

[69] Under condition 4.2, the Approval Holders must prepare a Siltation and Erosion Control plan, but the plan does not have to be prepared by a qualified consultant or be provided to the Director for review to ensure the plan is sufficient to minimize erosion and siltation. The Board recommends the Approval be varied to require the Siltation and Erosion Plan be prepared by a qualified consultant and be submitted to the Director within a specified time frame.

[70] Clause 5.0 requires the Approval Holders submit a Certificate of Completion to the Director, but there is no time limit by which it must be submitted. It is unclear if the Certificate of Completion is to be provided within days, weeks, months, or potentially years after the undertakings are completed. The Board believes there needs to be some specific timeframe by which the Certificate of Completion should be provided to the Director. This will ensure it is provided within a reasonable amount of time, and it will protect the Approval Holders from being in non-compliance if the Director's expectation is different from the Approval Holders' understanding.

[71] During questioning by the Board, the Director responded it was reasonable to have the Certificate of Completion submitted within six months of completion of the undertakings. Therefore, the Board recommends that condition 5.0 of the Approval be varied to include the Certificate of Completion must be provided to the Director within six months of completion of the undertakings contained in the Approval.

[72] As stated previously, the Appellant expressed concerns as to whether the Approval Holders will actually comply with the terms and conditions of the Approval. The Certificate of Completion is the document that demonstrates the project is actually constructed to the specifications in the Approval. As condition 5.0 is currently written, and as confirmed by the Director in response to the Board's questioning, the Approval Holders are responsible for completing the Certificate of Completion. The Board considers it appropriate in this circumstance, that a qualified engineer should prepare and submit the Certificate of Completion to the Director. This will ensure a third party will assess the construction of the project, thereby providing reliable information and data to the Director and provide assurances to the Appellant the Approval Holders complied with the Approval conditions regarding construction of the project. Therefore, the Board recommends condition 5.0 be varied to require the Certificate of Completion be prepared and submitted by a professional engineer registered with the Association of Professional Engineers and Geoscientists of Alberta.

## **V. RECOMMENDATIONS**

[73] The Board recommends the Minister vary the Director's decision to issue the Approval as follows:

1. Amend term 1.1 by adding the following:

“(e) “activity”, for the purpose of this approval, means the construction, operation, and maintenance of a surface drainage system consisting of the following works:

- 1) drainage ditches;
- 2) drainage ditch blocks;
- 3) culverts;
- 4) Pond 1; and
- 5) Pond 2

as reflected in Figure 3 of a letter report dated June 17, 2011 from Northwest Hydraulic Consultants Subject entitled “Jack Minsky – Drainage Modifications Results of Additional Analysis – Final” and identified as plan 00251587-R001.

2. Delete the following:

“Notwithstanding the generality of 3.2 the Approval Holder shall undertake the activity in accordance with the following plan(s)/report(s) that form part of the application:”

and replace it with the following:

“Notwithstanding the generality of 3.2, the Approval Holder shall construct the surface water drainage system referred to in 3.2 in accordance with the following plans which form part of this approval and which were identified by the numbers adopted by the Director.”

3. Delete condition 3.5 and replace it with:

“3.5.1 The Approval Holder shall maintain the works that comprise the surface water drainage system in accordance with the plans referred to in 3.3

3.5.2 Notwithstanding the generality of 3.5.1, the Approval Holder shall, at a minimum, once every calendar year, inspect the ditches which form part of the surface water drainage system and remove any debris or repair any works that are not operating as designed.”

4. Delete condition 3.7 and replace it with:

“3.7.1 The Approval Holder shall not divert more than 1000 cubic metres per calendar year of water from the surface water drainage system which is the subject of this approval.

3.7.2 The diversion authorized by clause 3.7.2 shall only be used for household use exclusively on the Approval Holder’s lands identified as the SW 07-55-24-W4M.”

5. Delete condition 3.8 and replace it with:

“3.8.1 When directed to do so by the Director in writing, the Approval Holder shall remove, reinstall, or modify the ditch blocks identified in this approval in plans 00251587-P010 and 00251587-P011.

3.8.2 Where the Director makes a direction in writing pursuant to 3.8.1, that work shall be completed within two weeks or such other time period specified by the Director.”

6. Delete Condition 4.2 (a) and replace it with:

“(a) have a qualified consultant develop a written Siltation and Erosion Control Plan and provide it to the Director by the date specified by the Director;”

7. Delete condition 5.0 and replace it with:

“Within six months of completion of the undertakings specified and as further described in 3.2, or when requested in writing by the Director, the Approval Holder shall submit to the Director a certificate of completion that has been prepared and signed by a qualified member of the Association of Professional Engineers and Geoscientists of Alberta.”

[74] With respect to sections 100(2) and 103 of EPEA, the Board recommends that copies of this Report and Recommendations, and the decision of the Minister, be sent to the following:

1. Ms. Donna McLay;
2. Mr. Jack and Ms. Donna Minsky; and
3. Ms. Michelle Williamson, Alberta Justice and Solicitor General, on behalf of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

[53] The Board notes none of the Parties reserved their right to ask for costs.

Dated on May 25, 2017, at Edmonton, Alberta.

“original signed by”  
A.J. Fox  
Panel Chair

“original signed by”  
Jim Barlishen  
Board Member

“original signed by”  
Susan McRory  
Board Member

**Ministerial Order  
36/2017**

*Environmental Protection and Enhancement Act*  
R.S.A. 2000, c. E-12;

and

*Water Act*  
R.S.A. 2000, c. W-3.

**Order Respecting Environmental Appeals Board  
Appeal No. 16-004**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 16-004.

Dated at the City of Edmonton, Province of Alberta, this \_\_\_31\_\_\_ day of \_\_\_July\_\_\_, 2017.

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Shannon Phillips  
Minister



## Appendix

### Order Respecting Environmental Appeals Board Appeal No. 16-004

With respect to the decision of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the “Director”), to issue Approval No. 00251587-00-00 (the “Approval”), under the *Water Act*, R.S.A. 2000, c. W-3, to Jack and Donna Minsky, (the “Approval Holder”) I, Shannon Phillips, Minister of Environment and Parks, order that:

1. The decision of the Director to issue the Approval is varied as follows.
2. The Approval is amended by adding the following after condition 1.1(d):
  - “(e) “activity”, for the purpose of this approval, means the construction, operation, and maintenance of a surface drainage system consisting of the following works:
    - 1) drainage ditches;
    - 2) drainage ditch blocks;
    - 3) culverts;
    - 4) Pond 1; and
    - 5) Pond 2as reflected in Figure 3 of a letter report dated June 17, 2011 from Northwest Hydraulic Consultants Subject entitled “Jack Minsky – Drainage Modifications Results of Additional Analysis – Final” and identified as plan 00251587-R001.”
3. The Approval is amended by deleting the following phrase in condition 3.3:

“Notwithstanding the generality of 3.2 the Approval Holder shall undertake the activity in accordance with the following plan(s)/report(s) that form part of the application:”

and replacing it with the following:

“Notwithstanding the generality of 3.2, the Approval Holder shall construct the surface water drainage system referred to in 3.2 in accordance with the following plans and reports which form part of this approval and which were identified by the numbers adopted by the Director:”
4. The Approval is amended by deleting condition 3.5 and replacing it with:

- “3.5.1 The Approval Holder shall maintain the works that comprise the surface water drainage system in accordance with the plans referred to in 3.3.
- 3.5.2 Notwithstanding the generality of 3.5.1, the Approval Holder shall, at a minimum, once every calendar year, inspect the ditches which form part of the surface water drainage system and remove any debris or repair any works that are not operating as designed.”
5. The Approval is amended by deleting condition 3.7 and replacing it with:
- “3.7.1 The Approval Holder may divert no more than 1000 cubic metres per calendar year of water from the surface water drainage system which is the subject of this approval.
- 3.7.2 The diversion authorized by clause 3.7.1 shall only be used for household use exclusively on the Approval Holder’s lands identified as the SW 07-55-24-W4M.”
6. The Approval is amended by deleting condition 3.8 and replacing it with:
- “3.8.1 When directed to do so by the Director in writing, the Approval Holder shall remove, reinstall, or modify the ditch blocks identified in this approval in plans 00251587-P010 and 00251587-P011.
- 3.8.2 Where the Director makes a direction in writing pursuant to 3.8.1, that work shall be completed within two weeks or such other time period specified by the Director.”
7. The Approval is amended by deleting condition 4.2(a) and replacing it with:
- “(a) have a qualified consultant develop a written Siltation and Erosion Control Plan and provide it to the Director by the date specified by the Director;”
8. The Approval is amended by deleting condition 5.0 and replacing it with:
- “Within six months of completion of the undertakings specified and as further described in 3.2, or when requested in writing by the Director, the Approval Holder shall submit to the Director a certificate of completion that has been prepared and signed by a qualified member of the Association of Professional Engineers and Geoscientists of Alberta.”