

2021 ABEAB 7

March 24, 2021

Via E-Mail

Martin Kaup
(Appellant EAB 20-025)

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Landrex Hunter Ridge Inc.
(Appellant EAB 20-022 & Approval Holder)

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Dear Ladies and Gentlemen:

**Re: Decision* Landrex Hunter Ridge Inc./Water Act Approval
No. 00425700-00-00/Our File No.: EAB 20-025**

This is the Environmental Appeals Board’s decision regarding the Director’s preliminary motion to dismiss the appeal of Martin Kaup (the “Appellant”) of *Water Act* Approval No. 00425700-00-00 issued to Landrex Hunter Ridge Inc. based on the Appellant’s Notice of Appeal not being validly before the Board. The Board’s Acting Chair, Meg Barker, and panel members Chidinma Thompson and Dave McGee made this decision.

Background

Notice of the application was published by Alberta Environment and Parks (“AEP”) in the St. Albert Gazette from May 8 through to May 28, 2019. The notice was regarding Landrex Hunter Ridge’s application for a *Water Act* approval for removing and modifying wetlands, constructing stormwater management works and constructing drainage and back flood works, all

* Cite as: *Kaup v. Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Landrex Hunter Ridge Inc.* (24 March 2021), Appeal No. 20-025-D (A.E.A.B.), 2021 ABEAB 7.

within W½ 21-54-25-W4M.

The Appellant submitted a statement of concern to AEP on April 9, 2020, some 11 months later. In a letter dated April 27, 2020, the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the “Director”), notified the Appellant that his April 9, 2020, letter was not considered a statement of concern because the Appellant’s letter was submitted outside of the statement of concern period. The letter further advised that AEP would still consider his concerns during the review of the application.

The Appellant contacted AEP on June 25, 2020, to ask if an approval had been issued to Landrex Hunter Ridge. On June 26, 2020, the Appellant forwarded AEP a copy of a flooding report prepared by BEAR Land Services in support of his concerns. In a letter dated July 15, 2020, the Director again informed the Appellant that his letter was not accepted as a statement of concern. However, AEP would consider his concerns during its review of the application.

On August 26, 2020, the Director issued *Water Act* Approval No. 004257-00-00 (the “Approval”) to Landrex Hunter Ridge Inc. (the “Approval Holder”) for altering, infilling, removing wetlands; constructing, dewatering, operating, and carrying out maintenance of the following: drainage works, bypass ditch, erosion control works, culverts and berms; and constructing, dewatering, operating, and carrying out maintenance of storm water management systems, located at the Erin Ridge North developments in St. Albert, Alberta. The notice of decision was posted on AEP’s Authorization Viewer on AEP’s website¹ starting August 26, 2020.²

The Appellant contacted AEP on September 15 and 17, 2020, and received confirmation on September 17, 2020, that the Approval was issued two weeks earlier.

The Board received the Appellant’s Notice of Appeal on September 18, 2020.³ On September 21, 2020, the Board wrote to the Appellant, the Approval Holder, and the Director acknowledging receipt of the Notice of Appeal. The Board also requested the Director provide the Board a copy of the Director’s records related to the appeal.

On September 25, 2020, the Director filed preliminary motions with the Board to have the appeal dismissed based on the Appellant not having filed his Notice of Appeal within the legislative time frame as required by section 116(1)(a) of the *Water Act*⁴ and not being directly

¹ Alberta Environment and Park’s Authorization Viewer is located on a website at: <https://avw.alberta.ca/ApprovalViewer.aspx>

² Note: AEP issued the notice of decision in error. The Appellant did not rely on the notice of decision.

³ The Director’s preliminary motions only pertains to the Appellant’s appeal in EAB No. 20-025. The Board also received a notice of appeal from the Approval Holder (EAB 20-022) on September 1, 2020. The Approval Holder is not referred to as an appellant or treated as an appellant for this decision.

⁴ “Section 116(1)(a)(ii) of the *Water Act*, R.S.A. 2000, c. W-3 (“*Water Act*”), provides:

affected by the Director's decision to issue the Approval. The Director requested that only a limited record be provided at the time containing: the notice of the application, the statement of concern submitted by the Appellant, any responses by AEP to the Appellant regarding his statement of concern, and the notice of decision. On September 29, 2020, the Director provided the Director's Limited Record to the Board. The Director's Limited Record was subsequently provided to the parties.

On September 30, 2020, the Board acknowledged receipt of the Director's letters of September 25 and September 29, 2020. The Board noted that, as the Approval was issued August 26, 2020, it appeared the appeal was filed outside of the seven-day time limit prescribed by the *Water Act*⁵ for filing an appeal of the Approval, and set a process for receiving comments on the Appellant's late filed appeal and whether the Appellant was directly affected.⁶

On October 28, 2020, the Director amended his preliminary motion to dismiss the appeal. The Director stated he no longer objected to the appeal as having been filed out of time, having reviewed the method used to provide the notice of decision. However, the Director stated the issue remained whether the Appellant's appeal was validly before the Board. The Appellant had failed to file a statement of concern. Filing a statement of concern is a prerequisite to filing an appeal where public notice of the application was provided. The Director argued this is not an exceptional or rare case that would allow the appeal to proceed without a valid statement of concern. The Director also restated the Appellant is not directly affected by the Approval.

On October 29, 2020, the Board acknowledged the Director's amended preliminary motion and revised the submission schedule. The parties were asked for submissions on the following question:

116(1) A notice of appeal must be submitted to the Environmental Appeals Board

(a) not later than 7 days after

...

(ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,..."

⁵ The appeal period for an approval is 7 days after receipt of notice of decision that is appealed from or the last provision of notice of decision. See Note 4 above, section 116(1)(a)(ii) of the *Water Act*.

⁶ The Board requested submissions on the following issue: "How is Mr. Kaup and his property, directly affected and impacted by the works and activities authorized by the Approval issued to Landrex?"

Did Mr. Kaup file a valid statement of concern with Alberta Environment and Parks pursuant to section 109(2) of the *Water Act*? Section 115(1)(a)(i) of the *Water Act* provides a notice of appeal may be submitted by any person who submitted a statement of concern under section 109 of the *Water Act*.⁷

The Board received submissions from the Appellant, the Approval Holder and the Director between October 13 and November 17, 2020.

On October 30, 2020, the Appellant wrote to the Board and made a preliminary motion asking the Board to deny the Director's request to amend the Director's preliminary motion. In a letter dated November 2, 2020, the Board advised the Appellant that filing a valid statement of concern and establishing that he is directly affected and therefore has standing, are prerequisites to filing a notice of appeal. Consequently, the Board would proceed with the submissions process as established.

On December 9, 2020, the Board asked the parties to respond by January 8, 2021, and advise if the Director and the Appellant had records of their telephone communications, when the Appellant first found out about the application for the Approval, and if the Approval Holder and the Appellant had records of their communications.⁸ The Board received the responses to these questions between January 5 and 7, 2021. The Board received additional correspondence on January 15, 2021, from the Approval Holder providing additional information that was responsive to the Board's December 9, 2020, letter. The Board acknowledges the Appellant's request that the Board not consider the Approval Holder's letter, having received it after the January 8 deadline. However, the Board is of the view the information contained in the Approval Holder's letter is helpful for providing a more complete understanding of the communications between the parties.

⁷ Note the parties were previously asked for submissions on the following question:

How is Mr. Kaup and his property, directly affected and impacted by the works and activities authorized by the Approval issued to Landrex?

⁸ The Board asked the parties the following questions:

Question 1: The Board would like clarification on whether the Director has any records related to telephone communications Alberta Environment and Parks ("AEP") may have had with Mr. Kaup regarding the application for Approval No. 00425700-00-00 (the "Approval"). The Board would also like clarification on whether Mr. Kaup has any records relating to telephone communications with AEP regarding the application for the Approval. If so, please provide copies of these records.

Question 2: The Board would like Mr. Kaup to clarify when he found out about the application for the Approval and to confirm when he first contacted Landrex Hunter Ridge Inc. (the "Approval Holder") and AEP regarding the application for the Approval. The Board would also like the Approval Holder to clarify if it has any records regarding any communications it may have had with Mr. Kaup. If the parties have any records of these communications, the Board asks the parties to please provide copies of these records.

In stating this, the Board notes the Approval Holder's letter was explanatory in nature and the Board's decision did not turn on the contents of the letter.

Appellant's Submissions

The Appellant does not know when he became aware of the application for the Approval. He filed a statement of concern accepted by AEP regarding a *Water Act* licence involving the Approval Holder for the same land in 2014. He attended meetings regarding his statement of concern with the same staff that decided the current application. He received a notice of decision dated July 18, 2016, for the previous *Water Act* licence and ultimately appealed that decision.

Despite his prior interest and dealing with the same AEP staff, notice of decision to issue the Approval was not provided to him. He should have been given specific notice of decision and it would be unfair and impractical to dismiss his appeal. He was not provided notice of the decision until September 17, 2020. He appealed September 18, 2020, one day after he received notice.⁹

The Appellant stated he contacted AEP in April 2020 to express concerns regarding the application for the Approval and advised AEP at that time that he had recently received the application documents. In his view, the same problems and concerns remained, and he now opposes the Approval. The Appellant was sent a letter on April 27, 2020, that stated his letter was not considered a statement of concern having been submitted outside the statement of concern period. However, the Director indicated he would consider the issues and concerns raised.

The Appellant contacted or attempted to contact AEP, either by telephone or email, throughout June, July, and September. The Appellant's counsel also wrote to the Approval Holder's counsel on March 10 and left a voicemail on March 13, 2020, requesting additional information related to the application. The Appellant's counsel sent follow-up correspondence to the Approval Holder's counsel indicating they had not received a reply to their earlier communications on March 16, 2020, and advising that he would be seeking the requested information from AEP. The Appellant does not know when he first contacted AEP regarding the Approval application. However, he did request the application documents from AEP and received the Approval application documents on April 6, 2020.

Section 115(1)(a)(i) of the *Water Act* does not say a statement of concern needs to be filed solely and exclusively for the current application and Approval. Section 115 does not refer to an officially recognized statement of concern and his letters should have been accepted as statements of concern. A previously accepted statement of concern for a related matter should qualify. The Appellant argued this is an exceptionally rare case where there is a previously filed

⁹ Although the Board asked for submissions on the late filed appeal, in light of the Director's comments and the manner in which notice of decision was provided, the Board amended the submission process to reflect the Director's amended preliminary motion.

statement of concern accepted as an official statement of concern, and he appealed the previously issued *Water Act* licence and was granted standing. The previously issued *Water Act* licence and the current Approval are interrelated. He argued “[a] previous statement of concern regarding the same land, the same concerns, the same Applicant, and the same development activities should qualify as a statement of concern in this instance.”¹⁰ Additionally, he communicated with the Director regarding his concerns during the Approval application and provided a third-party report supporting his concerns. These factors make it a rare case, and his statements of concern should be considered an official statement of concern.

Regarding the aspect of being directly affected, the Appellant made the following assertions. The Director and the Approval Holder previously agreed he was directly affected, neither having made an application to dismiss his appeal of the 2016 *Water Act* licence. It would be absurd to find that he was now not directly affected by the Approval, which is for much broader activities in a location closer to his land and residence. It was clear he was concerned about the Approval Holder’s activities. The activities are closer to his property and will affect water flow and storage for many years. He was in communication with AEP before and after the Approval was granted regarding his concerns. He is more affected than the average Albertan by the Approval.

He has firsthand knowledge of the effects of water on his property as he resides on it. The Approval relates to activities that include the altering, drainage, and infilling of wetlands, and the construction, maintenance, and operation of stormwater management systems. These are activities that relate to the flow and storage of water. Natural justice and procedural fairness support his standing, and fairness is more important than procedural exactitude. There will be no prejudice to the Approval Holder, as it has also appealed the Approval.

His land is located 1.5-2 miles upstream from lands subject to the Approval. His lands flood every year. The flooding is caused by or contributed by the Approval Holder’s water storage, water flow, and land development activities. The construction schedule and Approval illustrate how he is directly affected. The Approval refers to a drainage works and bypass ditch located at NW21-54-25-W4M. This drainage works and bypass ditch deals directly with water from the drainage basin located north of the Approval Holder’s land; his land and the water that accumulates on it forms part of the drainage basin to the Approval Holder’s land. The Approval Holder’s activities all produce a material influence or alteration in the flooding and water situation at his residence.

Director’s Submissions

There are prerequisites that an appellant must meet before the Board can accept a notice of appeal. Where notice of an application was provided, an appellant must first file a valid statement of concern within the legislated timeframe, and then file a notice of appeal within the

¹⁰ Appellant’s Letter, November 3, 2020, at paragraph 1.

legislated time frame. An appellant must also be directly affected. If an appellant does not meet these requirements, the Board must dismiss the appeal. The Director submitted the Appellant's appeal fails on the grounds of the Appellant having failed to file a statement of concern, and the Appellant not being directly affected.

Filing a valid statement of concern under section 109(1)(a) is a prerequisite for appealing the decision to issue the Approval under section 115(1)(a) of the *Water Act*.¹¹ In numerous cases, the Board has ruled that statements of concern filed outside of the time limit do not meet this prerequisite.¹² The Appellant filed his statement of concern approximately 11 months after the fourteen-day notice period. AEP's letters of April 27 and July 15, 2020, both state the Appellant's letters to AEP will not be considered statements of concern under the *Water Act*.

The Director relies on *O'Neill*.¹³ The Appellant has not provided reasons why he filed his statement of concern 11 months after the expiry of the fourteen-day notice period. He has not argued any problems with the public notice or any other reason that prevented him from filing his statement of concern within the prescribed time limits. The Appellant has not provided any evidence to show this is an unusual or exceptionally rare case where his appeal should proceed even though he did not file a valid statement of concern. The Appellant argued this appeal should

¹¹ Section 109(1)(a) of the *Water Act* provides:

“109(1) If notice is provided
 (a) under section 108(1), any person who is directly affected by the application or proposed amendment, and
 ...
 may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.”

Section 115(1)(a)(i) of the *Water Act* provides:

“115(1) 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,...

¹² Director's Letter, October 28, 2020, at page 3, citing: *Wilkening et al. v. Director, Central Region, Operations Division, Alberta Environment and Water*, re: *Matt Schultz* (22 May 2012), Appeal Nos. 11-060, 064-067, 072-074, 077-96, 113-146, 151-155, 166-168, and 174-ID1 (A.E.A.B.), at paragraph 16.

¹³ Director's Letter, October 28, 2020, at page 3, citing: *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-250-D (“*O'Neill*”), at paragraph 14.

proceed because his prior appeal proceeded.

In the event the Board finds the Appellant has met the high threshold set in *O'Neill*, the Director argues the Appellant is not directly affected by the activities authorized by the Approval. The Director observed a person can be found directly affected by both the Director and the Board under the *Water Act*, at different stages of an activity's authorization. The Director may consider a person directly affected during the review of an application. The Board may later find a person is directly affected at an appeal of the Director's decision to issue an approval. There are cases where a Director has found a person directly affected at the application stage, but the Board has not found the person directly affected at the appeal stage.¹⁴

In this appeal, the Director did not decide if the Appellant was directly affected because his statement of concern was not accepted. The Appellant is correct that the Director found the Appellant directly affected in a previous application for a stormwater management system in SW21. However, AEP has gathered more information since that prior approval application through this current Approval application and site visits. AEP would not find the Appellant directly affected by the activities authorized by the Approval. Filing a valid statement of concern on another application involving the Approval Holder does not mean the Director must accept this statement of concern filed so far out of time.

The Director also relies on *Court*.¹⁵ The Appellant is 1.5-2 miles upstream of the Approval Holder's land. "[I]t is difficult to understand how there is a reasonable possibility that his property would be directly affected by the activities, such as disturbing wetlands, under this Approval."¹⁶ A review of the Appellant's April 9, 2020 letter and the Appellant's Notice of Appeal appears to indicate the Appellant's concerns span the last five years and relate to the failure to maintain a drainage ditch. The Appellant's flooding issues appear to be more reasonably related to localized drainage issues around this property than activities 1.5-2 miles away. They are not directly related to the Approval. The Appellant has not met the onus of showing he is directly affected by the activities authorized by the Approval.

Approval Holder's Submissions

The Approval Holder stated it:

¹⁴ Director's Letter, October 28, 2020, at page 4 citing: *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment*, re: *Ouellette Packers (2000) Ltd.*, at paragraphs 24 and 25.

¹⁵ Director's Letter, October 28, 2020, at page 5 citing: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.), at paragraphs 67-75.

¹⁶ Director's Letter, October 28, 2020, at page 5.

“... agrees with and repeats the Director’s submissions with respect to the Director’s preliminary motion to dismiss the Notice of Appeal. Mr. Kaup did not file a valid statement of concern, in accordance with the requirements of s. 109(1)(a) of the *Water Act*, and in any event has not established that he is directly affected by the Director's decision...”.¹⁷

The Notice of Appeal does not satisfy the requirements of section 115(1)(a) of the *Water Act*, and based on the evidence before the Board, the Board should dismiss the Notice of Appeal in its entirety.

The notice of application was published in the St. Albert Gazette from May 8 to May 28, 2019. The Appellant did not submit his statement of concern until April 9, 2020. The Appellant has not provided sufficient, or any reasons, to indicate why his appeal should be permitted to proceed, notwithstanding that his statement of concern was submitted significantly outside the thirty day period set out in section 109(2)(b). There are no exceptionally rare circumstances to warrant allowing his appeal to proceed in the present case.

The Appellant suggests filing any statement of concern pursuant to section 109 will satisfy the requirements of section 115(1)(a)(i) whether or not it was filed in response to the application for the Approval in question. The Approval Holder relies on *Calder v. Alberta*, and argues the principles of statutory interpretation require legislation to be read in its entirety and in a manner to avoid an absurd result.¹⁸ The Appellant’s proposed interpretation of section 115(1)(a)(i) does not take into account the context of the enactment or accord with the enactment’s scheme, object, and the intention of the legislature.

“It is illogical and absurd to suggest that the filing of any statement of concern would be sufficient to give rise to the right to appeal an approval, whether or not the statement of concern was filed in response to the application for said approval; this interpretation is contrary to the intent of section 115(1)(a)(i), which Landrex submits is to limit appeals to those who have been determined to be affected by the approval in question and facilitate a fair and efficient decision making process.”¹⁹

The Appellant has not met the evidentiary burden to establish he is directly affected as set out in the Director’s submissions dated October 28, 2020. There is no evidence that the Appellant is directly affected by the Approval. The Appellant’s lands are 1.5-2 miles upstream of the lands subject to the Approval. Schedule “A” to the Notice of Appeal identifies that the Appellant’s concerns do not relate to the activities authorized by the Approval or the lands subject to the Approval but relate to alleged drainage concerns regarding a ditch located north of the

¹⁷ Approval Holder’s Letter, October 28, 2020, at page 1.

¹⁸ Approval Holder’s Letter, November 13, 2020, at pages 1 and 2, citing *Calder v. Alberta*, 2019 ABCA 289 at paragraph 31.

¹⁹ Approval Holder’s Letter, November 13, 2020, at page 2.

subject lands.

The Appellant's allegations regarding past flooding on his lands are not relevant. The alleged flooding predates the Approval and the commencement of any activities under it, highlighting that the issues raised in the Notice of Appeal are unrelated to the Approval. Any suggestion that the activities would exacerbate or worsen the alleged pre-existing drainage concerns and flooding issues is speculative and insufficient to establish that the Appellant is directly affected.

This is not a matter of "procedural exactitude" over fairness. Procedural requirements such as those contained in section 115(1)(a)(i) and administrative law principles with respect to standing, ensure the approval and appeal process is effective, fair and accountable to all parties.

The Approval Holder advised the Appellant's March 16, 2020, letter was sent before the Approval Holder's legal counsel had an opportunity to respond to the Appellant's March 10, 2020, letter. The March 16, 2020, letter specifically advised the Appellant was seeking information directly from AEP. The Approval Holder advised the March 16, 2020, letter did not appear to need a response as it was understood that the Appellant was obtaining the requested information elsewhere. The Approval Holder's counsel also spoke to the Appellant's counsel on April 6, 2020. During the telephone call, the Appellant's counsel "... did not request any information regarding, or otherwise refer to the *Water Act* application."²⁰

Analysis

There are two issues before the Board. These are:

1. Has the Appellant filed a valid statement of concern,²¹ and if not are there rare or special circumstances for the Board to exercise its discretion to accept a Notice of Appeal without the Appellant having filed a statement of concern?
2. If the Board accepts the Appellant's Notice of Appeal, is the Appellant directly affected by the Director's decision to issue the Approval?

²⁰ Approval Holder's Letter, January 15, 2021.

²¹ The Director required notice of application to be published. Notice of the application was published in the St. Albert Gazette from May 8 through to May 28, 2019. Section 115(1)(a)(i) of the *Water Act* makes filing a statement of concern a prerequisite to filing a notice of appeal where notice of the application was provided.

1. *Has the Appellant filed a valid statement of concern, and if not are there rare or special circumstances for the Board to exercise its discretion to accept a Notice of Appeal without the Appellant having filed a statement of concern?*

There are two pieces of legislation which govern the issue currently before the Board. Section 95(5)(a)(iii) of the *Environmental Protection and Enhancement Act*²² and Section 115(1)(a)(i) of the *Water Act*. Section 95(5)(a)(iii) of EPEA provides:

“95(5) The Board

- (a) may dismiss a notice of appeal if...
 - (iii) for any other reason the Board considers that the notice of appeal is not properly before it,...

Section 115(1)(a)(i) of the *Water Act* provides:

“115(1) 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...” (Emphasis added)

Section 115(1)(a)(i) makes filing a statement of concern a prerequisite to filing a notice of appeal if notice of the application was previously provided in accordance with section 108(1)(a). The statement of concern and notice of appeal processes under EPEA and the *Water Act* are almost identical, and the Board has previously observed “...that the same principles should apply.”²³ Consequently, it is helpful in the present appeal to draw guidance from those previous decisions where the Board has discussed this requirement, notwithstanding the decision relating to an authorization under EPEA.

²² *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).

²³ *St. Michael Trade and Water Supply Ltd. v. Director, Environmental Service, Parkland Region, Alberta Environment*, re: *Cam-A-Lot Holdings*, (17 July 2001), Appeal Nos. 01-055-D (A.E.A.B.), at paragraph 14.

The statement of concern is an important part of the regulatory process. It does more than reserve the filer's right to appeal. As discussed by the Board in *Vipond*:²⁴

“Filing a Statement of Concern reserves the filer's right to appeal, but it also provides the filer with the opportunity to bring concerns forward early in the application process. The Director takes these valid concerns into consideration and can incorporate terms and conditions in the approval to address the concerns. Statements of Concern also notify the proponent of the project of these concerns, allowing the proponent the opportunity to mitigate the concerns. Filing a Statement of Concern also balances the interests of those involved, because it provides notice to the Director and project proponent of the concerns early in the process, rather than waiting until the approval is issued and bringing the concerns forward for the first time in an appeal.”²⁵

It is not disputed by the parties that a valid statement of concern is required where public notice of the application has been given under section 108(1)(a). The parties also agreed the Appellant previously filed a statement of concern in 2014 regarding an application for a *Water Act* approval (the “2014 Statement of Concern”). The 2014 Statement of Concern involved a *Water Act* approval issued to the Approval Holder in 2016. The *Water Act* approval authorizes activities on land close in proximity to the Appellant's land and residence. The Director accepted the 2014 Statement of Concern and found the Appellant directly affected by the *Water Act* approval. The Appellant argued the 2014 Statement of Concern is a valid statement of concern for this Approval as it involves the same subject matter and parties in the same area. In the alternative, he argues his letters sent in April and June 2020 should have been accepted as statements of concern. The Appellant argued this is a matter of “fairness over procedural exactitude.”

In sum, it is the Appellant's position that whether officially recognized statements of concern or not, either his 2014 Statement of Concern or the April and June 2020 letters are sufficient to be recognized as statements of concern to satisfy the requirements of section 115(1)(a)(i) in the present appeal. The Director responded that the Appellant failed to file a statement of concern within the timelines required by the public notice of the application. Accepting a valid statement of concern on another application involving the Approval Holder filed by the Appellant does not automatically require the Director to accept this late filed statement of concern. The Director advised the Appellant his letters of April and June 2020 were not accepted as statements of concern.

The Approval Holder also argued against the Appellant's interpretation of section 115(1)(a)(i). It would lead to absurd results and be illogical in the context of the legislation. The

²⁴ *Vipond et al. v. Director, Southern Region, Environmental Management, Alberta Environment, re: EcoAg Initiatives Inc.* (06 January 2011), Appeal Nos. 09-006, 016, 017, & 019-ID1 (A.E.A.B.) (“*Vipond*”).

²⁵ *Vipond*, at paragraph 20.

Appellant's interpretation that any statement of concern filed gives rise to the right to appeal would be contrary to the intent of the legislation. This is not a matter of "procedural exactitude" over fairness as argued by the Appellant. The Approval Holder argued procedural requirements such as those contained in section 115(1)(a)(i), along with administrative law principles for standing, ensure the approval and appeal process is effective, fair and accountable to all parties.

It is the Board's view that the position advanced by the Appellant regarding the 2014 Statement of Concern would place an impractical burden on the Director. It is not reasonable to expect the Director to remember every person who expressed concerns regarding previous applications and to notify those persons on future applications that may be of interest to them. This interpretation would negate and to some extent reverse the onus that is placed on persons by section 109(1), to self-identify and notify the Director of their concerns if they think they are directly affected by an application.²⁶ The Board is also mindful of the practical difficulties that could arise from setting such a precedent and the administrative burden this would create, even where it is argued that the exact same concerns and issues have arisen on a subsequent application. Practical considerations aside, other legislative objects for requiring a statement of concern such as bringing concerns to the Director and applicant's attention early in the application process and limiting who may appeal the decision would also be undermined. Therefore, the Board rejects the Appellant's arguments for accepting the 2014 Statement of Concern as sufficient for the current appeal.

It is also not disputed by the parties that the Appellant's letters expressing concern were filed well after the deadline for public comment had closed. The Board has commented in previous decisions that there may be exceptions to the general rule where the Board "may be able to process an appeal where a statement of concern was filed late. Or perhaps an appeal could be processed even when a statement of concern has not been filed due to an extremely unusual case".²⁷ On application and in appropriate circumstances, the Board could exercise its discretion to exempt an Appellant from filing a statement of concern.

As raised by the parties to this appeal, this Board has discussed these principles in *O'Neill*:

²⁶ Section 109(1) of the *Water Act* provides:

"109(1) If notice is provided

- (a) under section 108(1), any person who is directly affected by the application or proposed amendment, and
- (b) under section 108(2), the approval holder, preliminary certificate holder or licensee, may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment."

²⁷ *O'Neill*, at paragraph 14. See also *Deneschuk Homes Ltd. v. Director, Approvals, Parkland Region, Regional Services, Alberta Environment*, re: *Town of Sylvan Lake* (6 September 2001) Appeal No. 01-060-D.

“Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed late. Or perhaps an appeal could be processed even when a statement of concern has not been filed-- due to an extremely unusual case (e.g. a directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case. Indeed we cannot imagine a case proceeding to the next step where the appellant, like Mr. O'Neill, refuses to answer Board questions and provide at least some evidence of the requisite statement of concern and its proper filing. His appeal cannot proceed.” (Footnotes omitted.)”²⁸

The Appellant has argued his ongoing interest from a previous application and that he was unaware of the application for the Approval as reasons for allowing his appeal to proceed per *O'Neill*. The Appellant has argued *O'Neill* exceptions apply to his appeal and the 2014 Statement of Concern should be sufficient for the current appeal, arguing it is “the same land, the same applicant, the same problems and the same concerns,” and therefore the same statement of concern should continue to apply. The Appellant also argued that he was in communication immediately before and after the Approval was issued, and that his April and June 2020 letters should have been accepted as statements of concern. The Director and Approval Holder have both argued the Appellant has not provided any extenuating or unusual circumstances to accept the Appellant’s appeal. The Appellant has not argued a deficiency in the public notice of the application.

Notwithstanding the involvement of the same parties in the same proximate area, the Board notes this is a different application from that which the Appellant previously submitted a statement of concern in 2014. It is not an exceptional or unusual circumstance to have a statement of concern filed against the same applicant on different applications by the same person. The concerns arising from the applications may still be unique.

The Director stated the period during which a statement of concern needed to be submitted to be accepted, was within 14 days of June 4, 2019. No evidence was provided by any of the parties that the Appellant contacted AEP to relay his concerns during this period. Rather, the Board notes from the evidence that the Appellant did not submit his letter to AEP outlining his concerns about the Approval until April 2020. The evidence before the Board is that the Director advised the Appellant that while his concerns would be considered during AEP’s review of the application, the statement of concern window was closed and, as such, his April 2020 letter was not accepted as a statement of concern.

²⁸*O'Neill*, at paragraph 14.

Further, the Board notes the Appellant provided no reasons for why he waited 11 months to submit his concerns to AEP, nor any explanation of exceptional circumstances that would warrant an extension of the statement of concern period.

There is no evidence of unusual circumstances or justifiable reason as contemplated by *O'Neill* for the Board to exercise its discretion to exempt the Appellant from the requirement of filing a valid statement of concern as required by section 115(1)(a)(i). There does not appear to be any reason for the Appellant to believe his 2014 Statement of Concern would extend to the current Approval, or that his letters in April and June of 2020 were accepted by the Director as valid statements of concern.

Decision

Upon review of the legislation and the parties' comments, the Board finds the Appellant did not file a valid statement of concern with the Director as required by section 115(1)(a)(i) of the *Water Act*.

Therefore, pursuant to section 95(5)(a)(iii) of EPEA, the Appellant's Notice of Appeal is found to not be properly before the Board and is dismissed.

Having dismissed the appeal, it is not necessary for the Board to decide the issue of whether or not the Appellant is directly affected.

In dismissing the Appellant's appeal, the Board makes the following two observations. In reviewing the parties' comments, it appears the Appellant was in regular contact with AEP staff regarding his concerns about the Approval Holder's activities in the area. While it is not reasonable to expect the Director to engage previous statement of concern filers on any given applicant's future activities, in this particular case, the Appellant appears to have been well known to AEP and the Approval Holder as having longstanding concerns with Approval Holder's activities. The Board also notes that this may have been a project that would have benefited from the Director requiring the project proponent to conduct a proper public engagement program resulting in the Appellant receiving notification of the proposed project, and giving him time to file a valid statement of concern.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 for Gilbert Van Nes, General Counsel and Settlement Officer, 780-427-6569 for Valerie Myrmo, Registrar of Appeals, and 780-427-7002 for Denise Black, Board Secretary. We can also be contacted via e-mail at gilbert.vannes@gov.ab.ca, valerie.myrmo@gov.ab.ca and denise.black@gov.ab.ca.

Yours truly,

Gilbert Van Nes
General Counsel
and Settlement Officer

The information collected by the Board is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.