

**2021 ABEAB 23**

October 19, 2021

**Via E-Mail**

Ms. Carlee and Mr. Justin Leliuk  
(*Appellants*)

Ms. Jodie Hierlmeier  
Assistant Director  
Environmental Law Section  
Alberta Justice and Solicitor General  
8<sup>th</sup> Floor, Oxbridge Place  
9820 – 106 Street  
Edmonton, AB T5K 2J6  
(*representing the Director, Alberta  
Environment and Parks*)

Dear Mr. and Ms. Leliuk and Ms. Hierlmeier:

**Re: Decision\* - Carlee and Justin Leliuk/*Water Act Compliance*  
Letters/Our File No.: EAB 21-009**

This is the Board's decision concerning whether the appeal filed by Ms. Carlee and Mr. Justin Leliuk (the "Appellants") is properly before the Board. Ms. Meg Barker, Acting Board Chair, made the decision.

Background

The Appellants received two letters dated November 6, 2020, and April 16, 2021, from Alberta Environment and Parks ("AEP") regarding certain lands, categorized as wetlands by AEP, located at SW-09-54-17-W4M (the "Lands") in Lamont County near Mundare. The November 6, 2020 letter advised the Appellants AEP was conducting an investigation related to the potential draining of a wetland located on the Lands. AEP warned the Appellants compliance action might be taken without further notice, and steps should be taken to comply with the notice.

The April 16, 2021 letter ("Request for Compliance"), issued by an Environmental Protection Officer ("EPO"), explained a wetland delineation assessment indicated three wetlands were impacted on the Lands, and trenching had occurred in an area classified as a seasonal marsh. The Request for Compliance noted an EPO had spoken with the Appellants on January 15, 2021, and according to the EPO's investigation, the following was observed on February 25, 2021:

---

\* Cite as: *Leliuk v. Environmental Protection Officer, Regulatory Assurance Division, North Region, Capital District, Alberta Environment and Parks* (19 October 2021), Appeal No. 21-009-D (A.E.A.B.), 2021 ABEAB 23.

1. a trench, which was started inside Wetland 3 where cattails were present, was present on the north side of Wetland 3;
2. Wetland 3 was intact, except a trench leading northeast from the wetland could pose an ongoing risk to the wetland;
3. dark soil, considered to be soil removed from a trench, was found in low areas, including Wetlands 1 and 2; and
4. activities within a water body were not authorized under the *Water Act*.

The Request for Compliance required the Appellants to remove soil from Wetlands 1 and 2 and place it back in the trench, thereby preventing Wetland 3 from draining over time and allowing Wetlands 1 and 2 to restore naturally.

On May 8, 2021, the Appellants filed a Notice of Appeal of the Request for Compliance and requested a stay of the investigation. The Board acknowledged receipt of the Notice of Appeal on May 10, 2021. The Board advised that, as the letters received from AEP appeared to be requests for compliance and not water management orders, enforcement orders, or environmental protection orders issued by the Director, they did not appear to be an appealable decision as listed under Part 4, section 91 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) nor section 115 of the *Water Act*, R.S.A. 2000, c. W-3 (“*Water Act*”).

The Board requested the Appellants provide further comments and information regarding the appeal. The Appellants provided additional information to the Board on May 12, 2021.

#### Appellants’ Comments

The Appellants stated they showed the EPO aerial photos from the past which indicated the land in question had been seeded in previous years. The Appellants explained Wetland 1 is 0.2 acre, Wetland 2 is 0.1 acre, and Wetland 3 is just over 1.25 acres. Surplus water from Wetland 3 flows to a 60 acre wetland/bush area on their property.

The Appellants said they were not told what their options were as landowners, nor was the investigation process clearly explained to them. The Appellants said the EPO requested remedial work on Wetland 1, but there had not been any work done on that wetland.

The Appellants noted that 2016 through 2019 resulted in four of the wettest harvests. Then, in the summer of 2020, a state of emergency was declared for Lamont County due to flooding. The Appellants argued, given the five consecutive wet years, the EPO erred in categorizing the areas as wetlands. The Appellants said they were trying to recover their previously seeded land that had been flooded.

#### Analysis

The issue to be determined is whether or not the Appellants’ appeal is properly before the Board. Section 95(5)(a)(iii) of EPEA provides:

“(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 91 of EPEA and section 115 of the *Water Act* set out matters that may be appealed to the Board. By specifying the matters that may be appealed to the Board, the Legislature has signaled its intent to limit the jurisdiction of the Board and the type of appeals that may come before it. As noted in *Alberta Wilderness Association*, an administrative tribunal’s “... jurisdiction is solely derived from the statute that provides that jurisdiction.”<sup>1</sup> The Court elaborated, stating:

“[Section 95(5)(a) of EPEA] ... does not, and cannot add jurisdiction to the Board in respect of matters arising out of the *Water Act* that was not granted to the Board by the provisions of the *Water Act*.”<sup>2</sup>

The Appellants argued there were deficiencies in AEP's explanation of the investigatory process. They challenged the facts on which the Request for Compliance was based and argued the wetlands in question were not wetlands but were the result of unusually wet years. While the Appellants provided grounds for a possible appeal, the Appellants did not demonstrate how the issuance of the Request for Compliance fits under one of the appealable decisions included in section 115 of the *Water Act*. When reviewing the decisions that can be appealed, the closest types of decision enumerated are water management orders or enforcement orders. Sections 115(1)(m), (n), and (p) provide:

“(1) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:...

- (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;...
- (p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing

<sup>1</sup> *Alberta Wilderness Association v. Alberta (Environmental Appeals Board)* 2013 ABQB 44, at para 23 (“*Alberta Wilderness Association*”).

<sup>2</sup> *Alberta Wilderness Association*, at para 28.

- (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....”

However, the Request for Compliance is not a water management order issued under section 97 nor an enforcement order issued under section 135 of the *Water Act*, which would be appealable under section 115, and the Request for Compliance does not correspond to any other appealable decision made under the *Water Act*.<sup>3</sup> The Board’s ability to hear appeals is limited to whatever jurisdiction the enabling legislation gives to it. The Board cannot expand the scope of issues that can be heard. The Appellants did not provide any arguments as to how the Board may have jurisdiction to hear the appeal. It is clear a Request for Compliance is not an appealable decision under the *Water Act* and, therefore, the Board has no jurisdiction to hear the appeal.

### Decision

Upon review of the legislation and the comments provided by the Appellants, the Board finds it does not have jurisdiction to hear the appeal under section 115 of the *Water Act*. Therefore, the Appellants’ appeal is not properly before the Board, and the appeal is dismissed pursuant to section 95(5)(a)(iii) of EPEA. Given there is no valid appeal before the Board, the Appellants’ request of a stay of the investigation cannot be considered.

Please do not hesitate to contact the Board if you have any questions. I can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 or by email at gilbert.vannes@gov.ab.ca.

Yours truly,

Gilbert Van Nes  
General Counsel  
and Settlement Officer

---

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

Att.

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.

## **APPENDIX A**

Section 115 of the *Water Act* provides:

- (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
    - (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.
- (2) Notwithstanding subsection (1), a notice of appeal may not be submitted
- (a) if, pursuant to an order of the Minister under section 34, the Director
    - (i) refuses to issue an approval, preliminary certificate or licence, or
    - (ii) refuses to approve a transfer of an allocation of water under a licence;
  - (b) with respect to any matter relating to a licence for the temporary diversion of water;
  - (c) with respect to an amendment
    - (i) to correct a clerical error,
    - (ii) of a monitoring, reporting or inspection requirement in an approval, preliminary certificate or licence, or
    - (iii) to extend the expiry date of an approval, preliminary certificate or licence;
  - (d) with respect to an amendment to reflect a disposition of land or an undertaking to which an approval, preliminary certificate, licence or registration is appurtenant.