

ALBERTA ENVIRONMENTAL APPEALS BOARD DECISION

Date of Decision – March 21, 2022

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Bob Fedyna and Desmond McClure with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 5041876 to Shaun Larsen.

Cite as: *Fedyna and McClure v. Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Larsen* (21 March 2022), Appeal Nos. 20-006 and 008-ID2 (A.E.A.B.), 2022 ABEAB 14.

BEFORE:

Ms. Meg Barker, Acting Board Chair.*

SUBMISSIONS BY:

Appellants:

Mr. Bob Fedyna; and Mr. Desmond McClure.

Approval Holder:

Mr. Shaun Larsen.

Director:

Mr. Muhammad Aziz, Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, represented by Mr. Paul Maas, Alberta Justice and Solicitor General.

* At the time the decision was made, Ms. Barker was Acting Chair for the Board.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an approval under the *Water Act* to Mr. Shaun Larsen (the Approval Holder) allowing the construction of a diversion ditch for the purpose of flood control at SE-23-58-21-W4M, near Redwater, Alberta (the Approval).

Mr. Bob Fedyna and Mr. Desmond McClure (the Appellants) filed appeals of the Approval on June 8, 2020, and June 30, 2020, respectively, with the Environmental Appeals Board (the Board).

The Approval Holder raised a motion to dismiss the appeals on the grounds the Appellants were not directly affected and the appeals were without merit. The Board received submissions from the parties on the motion.

Based on the submissions and documents before the Board, the Board found the Appellants were directly affected as it appeared water was diverted via the ditch from the Approval Holder's property onto the Appellants' properties.

The Board found there was merit to the Appellants' appeals and the appeals were not frivolous or vexatious.

The Board, therefore, denied the Approval Holder's motion to dismiss the appeals.

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I. BACKGROUND

[1] On December 5, 2019, the Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (the “Director”) issued Approval No. 5041876 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Mr. Shaun Larsen (the “Approval Holder”). The Approval allowed the Approval Holder to change the location of water for the purposes of drainage, flood control, erosion control, or channel, and to construct a diversion ditch for the purpose of flood control at SE-23-58-21-W4M, near Redwater, Alberta.

[2] On June 8, 2020, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Bob Fedyna appealing the issuance of the Approval.

[3] On June 10, 2020, the Board wrote to Mr. Fedyna, the Director, and the Approval Holder acknowledging receipt of the Notice of Appeal. The Board noted that, under section 116(1)(a)(ii) of the *Water Act*, a Notice of Appeal of an approval must be submitted to the Board not later than seven days after receipt of notice of the decision being appealed or the last provision of notice of the decision. Under section 116(2) of the *Water Act*, the Board may extend this time period if it is of the opinion there are sufficient grounds to do so. The appeal was filed past the legislated timeframe. The Board asked Mr. Fedyna to provide reasons why the appeal was filed late and why the Board should consider extending the appeal period.

[4] On June 19, 2020, Mr. Fedyna provided additional information to explain why his appeal was filed outside the seven-day time limit.

[5] On June 24, 2020, the Board acknowledged receipt of Mr. Fedyna's reasons for filing the appeal late and set a process for receiving response submissions from the Approval Holder and Director. The Board asked the Director to provide an abbreviated record (the “Record”).

[6] On June 30, 2020, the Board received a Notice of Appeal from Mr. Desmond McClure. The Board acknowledged receipt of the Notice of Appeal and notified the Approval Holder and Director of the appeal. Mr. McClure was asked to provide the Board with any further

information as to why the appeal was filed outside of the seven-day time limit, and indicate any reasons why the Board should grant an extension of time to appeal.

[7] On July 8, 2020, Mr. McClure provided additional information to explain why his appeal was filed outside the seven-day time limit.

[8] On July 10, 2020, the Director provided the Record, and the Board provided copies to Mr. Fedyna, Mr. McClure, the Approval Holder, and the Director (collectively, the “Parties”) on July 13, 2020.

[9] On July 16, 2020, the Board received the Director's response submission to the issue on whether the appeals of Mr. Fedyna and Mr. McClure (collectively, the “Appellants”) were filed late.

[10] On July 17, 2020, the Board received the Approval Holder's response submission. In his submission, the Approval Holder raised preliminary motions that: (a) the appeals had no merit; (b) the Appellants were not directly affected by the Approval; and (c) the Appellants had not filed statements of concern.¹ The Board notified the Parties the preliminary motions were being held in abeyance pending the outcome of the Appellants’ applications for an extension of the appeal period.

[11] On August 6, 2020, the Board received Mr. Fedyna's rebuttal submission. Mr. McClure provided his rebuttal submission on August 7, 2020.

[12] On August 24, 2020, the Board notified the Parties that, after reviewing the submissions of the Parties, the Board granted the requests to extend the time to appeal and accepted the appeals as filed on time, and reasons would be provided at a later date.²

[13] In its August 24, 2020 letter, the Board set the schedule to receive submissions on the following question:

¹ The Director issued a Notice of Decision, which does not require Statements of Concern be filed. Therefore, the Board did not consider this preliminary motion.

² See: *Fedyna and McClure v. Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Park*, re: *Larsen* (02 November 2021), Appeal Nos. 20-006 and 008-ID1 (A.E.A.B.), 2022 ABEAB 28.

“How are Mr. Fedyna and Mr. McClure and their properties, directly affected and impacted by the works and activities authorized by the Approval issued to Mr. Larsen? This includes whether the appeals have merit.”

[14] On August 26, 2020, Mr. McClure provided supplemental information to the Board’s question on whether the Appellants were directly affected. Mr. Fedyna did not provide any additional information and relied on the submissions he provided previously.

[15] On September 4, 2020, the Board received response submissions from the Approval Holder and Director.

[16] On September 9, 2020, the Board received a rebuttal submission from Mr. McClure.

[17] On September 22, 2020, the Board notified the Parties, with reasons to follow, the Appellants were directly affected by the issuance of the Approval, and the appeals were not frivolous, vexatious, or without merit. These are the Board’s reasons.

II. SUBMISSIONS

A. Appellants

1. Mr. Fedyna³

[18] Mr. Fedyna stated the Approval Holder started ditching prior to the Approval being issued. Mr. Fedyna said the Approval application was not discussed with downstream landowners, and no advertisement was published in the papers advising of the Approval. Mr. Fedyna noted the Approval required the ditch to match the depth of the existing culvert, but this was not followed since the ditch and culvert were significantly larger than the existing culvert.

[19] Mr. Fedyna noted the Approval was issued December 5, 2019, but he questioned the timeline. Mr. Fedyna said he spoke to Alberta Environment and Parks (“AEP”) regarding the

³ The submissions considered by the Board were provided by Mr. Fedyna in relation to the issue of whether the appeals were filed late. Mr. Fedyna notified the Board he intended to rely on these submissions and did not provide any additional information.

Approval Holder's ditching and the loss of 35 acres of canola that was ready to swath. Mr. Fedyna argued the Approval was issued after the ditch was completed.

[20] Mr. Fedyna commented the Approval Holder said he was concerned about flooding in his yard, impacting agricultural and residential buildings during the spring melt and heavy summer rain. Mr. Fedyna stated that did not seem possible as the Approval Holder hauled in clay in previous years.

[21] Mr. Fedyna stated his farm was flooded within two hours every time it rained, and he lost approximately 35 acres of crop a year, for the past three years. Mr. Fedyna said the ditch caused significant damage to his property, and this year, 50 acres of seeded crop were flooded out. Mr. Fedyna stated the roads and culverts have been washed out since the new flow pattern was created. He said the ditch was built before the Approval was given and is about 20 feet wide and very deep. Mr. Fedyna further stated he is unable to access part of his farmland as a result of the ditch.

[22] Mr. Fedyna stated the Approval Holder, along with neighbouring landowners, ditched and diverted water flow from secondary Highway 829 from the west toward the properties in the east. Mr. Fedyna stated the Approval Holder dug along his fence line to divert the water flow, and this caused the culverts and road to wash away.

[23] Mr. Fedyna stated that as a result of the Approval Holder draining sloughs, the Approval Holder gained additional acres to farm, while many others were negatively impacted, the environment has been altered, and many landowners suffered loss of previous high quality land.

[24] Mr. Fedyna stated it would be appropriate to rescind the Approval and restore the water flow path to its original state.

2. Mr. McClure

[25] Mr. McClure noted the Approval Holder claimed the ditch was not functional, but the ditch caught water diverted onto the Approval Holder's land from the neighbouring property. Mr. McClure said the Approval Holder told him the ditch was constructed to prevent

the Approval Holder's grain yard from being flooded due to the water directed towards his property from the neighbour's ditching work.

[26] Mr. McClure stated the Approval Holder passed his problem of flooding land due to his upstream neighbour's ditching onto Mr. McClure's land. Mr. McClure said if it had not been for the ditching on the Approval Holder's neighbour's land, the Approval Holder's yard would have been dry and, therefore, Mr. McClure's land would also be dry.

[27] Mr. McClure noted photographs show the water erosion path running directly to the Approval Holder's ditch and the erosion cutting into the opposite side of the culvert, running to Mr. McClure's property.

[28] Mr. McClure stated the ditch was in place in 2018, but the application for the ditch was submitted on May 29, 2019, with the Approval being issued on January 9, 2020. Mr. McClure said his land started flooding in 2018 and each year it became successively worse. Mr. McClure noted the level of precipitation was fairly consistent over the past eight years, except low levels in 2014 and 2015, but there was no flooding or personal damage in any of the other years, including those years that had higher rain levels or snow pack.

[29] Mr. McClure provided photographs which he explained showed the full ditch on the Approval Holder's property spreading water to the road ditch, which flowed through the culvert, and across to the ditch in the field on the other side of the road, "...creating a river towards our home."⁴ Mr. McClure said the erosion was unlike what is caused by typical runoff.

[30] Mr. McClure argued the Approval Holder's suggestion that the flooding problem was solely due to the amount of rain received, was disingenuous as Mr. McClure's land flooding predated the rain. Mr. McClure stated the flooding issues resulted from the heightened water table from redirected runoff, the accelerated flow of water towards his property, the increased volume of water, and the amount of time the water sits on his property before the culverts can drain the additional water. Mr. McClure noted every time his property floods and cannot drain the redirected water, it seeps into the ground and raises the water table around his house.

⁴ Mr. McClure's submission, dated August 26, 2020.

[31] Mr. McClure submitted redirecting water should not be allowed without approval from all potentially affected landowners downstream.

[32] Mr. McClure stated the ditch was approved without public knowledge, and posting notice on a website that a person would not have reason to regularly visit should not constitute public knowledge. Mr. McClure noted that, after he received the information, he searched for the Approval by Approval number, area, legal land description, and name, and no results came up.

[33] Mr. McClure noted numerous suggestions were given by AEP staff for the Director to consider, but none were included in the Approval. Mr. McClure stated the Approval Holder began the project three years ago and was completed before the application was filed.

[34] Mr. McClure noted AEP staff recommended the length of the Approval should be shorter. Mr. McClure said the Approval should be for one year and further approvals would be required if the ditch was to remain in operation.

[35] Mr. McClure stated the Approval Holder had informed him the ditch was functioning and protecting the Approval Holder's yard from the diverted runoff from the neighbouring property.

[36] Mr. McClure said he provided evidence to show the water flow had been altered or enhanced, but the Approval Holder had not provided any evidence to show the water flow had not changed.

[37] Mr. McClure stated the vegetation and trees on his property indicate the land is in a naturally dry area, and he had not had any flooding on his land until the Approval Holder built the ditch in 2018. Mr. McClure argued the saturation and damage to his land was evident and was caused by the Approval Holder's ditch.

[38] Mr. McClure stated that, prior to the ditch being in place in 2018, there was no excess water on his land, but since 2018, the ditch has caused flooding, damaging his land and the county road, and in 2020, it caused damage to his home.

B. Approval Holder

[39] The Approval Holder stated the Approval was granted in relation to a ditch built to divert water flow around the Approval Holder's farmyard, instead of through it. The Approval Holder stated the preliminary work was completed on the ditch, but it was not finished and not connected to the drainage system on his land.

[40] The Approval Holder requested the Board dismiss the appeals as neither Appellant was directly affected, and neither appeal had merit.

[41] The Approval Holder argued the Appellants did not provide any evidence that indicated water on their properties was a direct result of the ditch. The Approval Holder stated there was no merit to the appeals contemplated by the Appellants. The Approval Holder noted the Appellants claimed the ditch increased the water flow rate to the Appellants' properties, which are downstream from the Approval Holder's land.

[42] The Approval Holder stated the ditch was not functional and remained a trench, unconnected to any dugout, drainage undertaking, or other ditching project. The Approval Holder stated aerial drone footage⁵ showed standing water in the ditch, indicating the ditch had not resulted in a diversion of water around the property. The Approval Holder said the project could not have increased the flow of water from his property to the Appellants' properties. The Approval Holder argued this meant the claims made in the Notices of Appeal that the Appellants' properties were being flooded as a result of the ditch, were currently not possible.

[43] The Approval Holder argued the Appellants were not directly affected by the ditch. The purpose of the ditch was to divert existing water flow around the yard instead of through it. The Approval Holder explained that no contouring or drainage had been conducted to his land that could increase water flow from the Approval Holder's property to the Appellants' properties.

[44] The Approval Holder argued the ditch could not result in any meaningful increase in water flow to the Appellants' properties now or at any point in the future and, therefore, the Appellants were not directly affected by the Approval. The Approval Holder explained he

⁵ Aerial Drone Footage, attached as SL-1 to Approval Holder's Response Submission, July 16, 2020.

retained outside experts, Matrix Solutions Inc. (“Matrix”) to evaluate the hydrology, surface drainage, and the project, and they concluded the project was not responsible for any increased flow to downstream properties.

[45] The Approval Holder stated that, although the Appellants are neighbours, the Appellants had not, prior to the date of the appeals, visited the property to observe the ditch, written, or called about the ditch. If the Appellants had done so, it would have been obvious the intent of the ditch was to reroute existing water. The Approval Holder explained the ditch was not a part of a drainage plan conducted by the Approval Holder in conjunction with others as alleged by the Appellants.

[46] The Approval Holder argued there was nothing in the Appellants’ submissions that demonstrated their water troubles were a direct result of the Approval of the project, and there was no merit to the appeals.

[47] The Approval Holder stated Thorhild County was in a state of agricultural emergency due to extreme flooding in 2020. The Approval Holder, along with the Appellants and their neighbours, lost a significant portion of arable land due to flooding. The Approval Holder noted more than 30 county roads had been closed for portions of the spring and more than 30 culverts had been overloaded.⁶

[48] The Approval Holder explained the Appellants, along with a neighbour, launched an incident investigation with AEP into unapproved ditching upstream of the Approval Holder’s property. The Approval Holder noted the investigation was independent of the Approval and expects the results to prove the Approval was not a contributing factor to the Appellants’ downstream water concerns.

[49] The Approval Holder stated the Appellants wanted to extend the appeal period for a project the Appellants were aware of for three years, but they did not approach the Approval Holder to discuss the project. The Approval Holder stated the ditch was not complete, and argued the ditch had not affected the Appellants to date, nor would the ditch affect the

⁶ Thorhild County Road Closures Document, June 23, 2020, attached to the Approval Holder’s Response Submission, July 16, 2020, at SL-5.

Appellants when it was completed and becomes subject to the terms and conditions of the Approval.

[50] The Approval Holder stated the Appellants provided photographs and charts indicating there were a couple of wet years that flooded basements and rendered arable farmland useless due to flooding.

[51] The Approval Holder noted Matrix concluded the diversion ditch would not result in any increased flow downstream. The Approval Holder argued this refuted the Appellants' claim the ditch increased water flow onto their properties.

[52] The Approval Holder submitted neither Appellant was, nor could be, directly affected.

C. Director

[53] The Director took no position on whether the Appellants were directly affected by the Director's decision to issue the Approval.

[54] The Director noted that, in the application for the Approval, the Approval Holder indicated there was an existing culvert on the property. The Approval Holder had explained his agricultural land and residential buildings on the property were subject to frequent flooding due to spring melt and summer rain. The Director noted the Approval Holder stated the purpose of the diversion ditch was to divert water around the property as opposed to directly through the property, and there would be an outlet at the same area as the existing culvert.

D. Appellants' Rebuttal Submissions

1. Mr. Fedyna

[55] Mr. Fedyna noted the Approval Holder neglected to mention the Approval Holder's neighbours had changed the water flow onto the Approval Holder's farm, which led to the Approval Holder's decision to ditch and divert the excess water to Mr. Fedyna's farm.

[56] Mr. Fedyna stated the ditching had occurred over the previous three years, prior to permits being issued, with no notice, discussion, or advertising of the Approval Holder's intent or identifying effects downstream.

[57] Mr. Fedyna stated the ditch negatively impacted him, his farm, and his neighbours. Before the ditch, there was very little flood damage to crops, but Mr. Fedyna said he lost a substantial amount of crop in each of the last three years.

[58] Mr. Fedyna said he has been a lifelong resident on the family farm and had never seen the extreme amount of water now present on the Approval Holder's property before the Approval Holder's neighbour began his ditching project. Mr. Fedyna stated it was this water that caused the Approval Holder to ditch towards Mr. Fedyna's property.

[59] Mr. Fedyna stated there is an ongoing investigation by AEP into the ditching by the Approval Holder's neighbour. Mr. Fedyna suggested the neighbour's ditching may be the root of the Approval Holder's problem, which in turn is causing Mr. Fedyna's flooding.

[60] Mr. Fedyna stated he was looking for answers to the following questions:

- (a) why did the Approval Holder not advertise in the local papers of his intent to build the ditch prior to obtaining the Approval?
- (b) where is the erosion plan?
- (c) how did he get an Approval to complete the ditching in December 2019, when a formal complaint was registered in September 2019?
- (d) why was the ditch built well before the Approval was issued in December 2019?
- (e) what is the flow rate for the ditch? and
- (f) what action should be taken to solve the erosion and flooding issues on Mr. Fedyna's property as a result of the ditching?⁷

2. Mr. McClure

[61] Mr. McClure argued that, while the ditch may not be functional for the reason the Approval Holder claimed it was required, it was functional for catching water diverted onto his land from his neighbour.

⁷ Mr. Fedyna's Rebuttal Submission, August 6, 2020, at page 2.

[62] Mr. McClure stated that when he spoke to the Approval Holder about the flooding on his land in mid-April, the Approval Holder advised the Appellant the ditch was to prevent his grain yard from flooding due to the ditching directed towards the Approval Holder's property from the neighbouring property. Mr. McClure noted this was not given as the reason the Approval Holder applied for the Approval, but instead the Approval Holder stated the reason for the application was due to "spring melting and heavy summer rains."⁸

[63] Mr. McClure stated that when he opened a file with AEP to investigate the ditching by the Approval Holder's neighbour, the Approval Holder read the information over and provided corrections to the information. Mr. McClure understood the Approval Holder's neighbour had ditched 400 acres of land into the quarter section adjacent to the Approval Holder, and Mr. McClure was told this was done without approval from AEP. Mr. McClure stated the Approval Holder ditched, with approval, just behind the Approval Holder's grain bins to prevent his grain yard and home site from flooding. Mr. McClure stated the Approval Holder did not correct him. The Approval Holder provided maps to Mr. McClure showing the ditching in the neighbour's property and the subsequent flow of water through the Approval Holder's yard.

[64] Mr. McClure stated, but for the Approval Holder's ditch, the Approval Holder's yard would be flooded with water from the neighbour, as had been the case in the previous two years.

[65] Mr. McClure said the Approval Holder passed the flooding problem from the upstream neighbour onto Mr. McClure's land. Mr. McClure noted the Approval Holder provided all of the information regarding the neighbour's ditching.

[66] Mr. McClure stated the Approval Holder acknowledged witnessing the neighbour ditching, and the Approval Holder intended to dam off the water entry points. Mr. McClure stated that when asked why this had not been the first course of action, the Approval Holder responded he did not want to alienate his neighbour, and the ditch diverted the water away from his property.

⁸ Mr. McClure's Rebuttal Submission, August 7, 2020, at page 1.

[67] Mr. McClure noted the Approval Holder did not correct the Appellant's belief that the Approval Holder's attempt to save the Approval Holder's own property directly affected Mr. McClure's property, and were it not for the ditching from the Approval Holder's upstream neighbour, both the Approval Holder and Mr. McClure would have a dry yard.

[68] Mr. McClure noted the Approval Holder's SL-1 photograph showed the water erosion path running directly towards the ditch. Mr. McClure stated the same photograph showed the level of erosion cut into the opposite side of the culvert running towards his property and the water coming from the Approval Holder's ditch.⁹

[69] Mr. McClure said the Approval Holder's ditch was in place in 2018, as shown by a Google Earth image dated August 19, 2018.¹⁰ Mr. McClure noted the application was submitted on May 29, 2019, and the Approval was issued in January 2020. Mr. McClure stated his land began to flood in 2018, and became worse with each successive year.

[70] Mr. McClure noted rain levels for the past eight years had been consistent, with the exception of 2020 and the low levels in 2014 and 2015, and in earlier years, rainfall levels were higher with no flooding. Mr. McClure stated the snow pack had been higher in previous years, yet flooding had not reached the levels it did in 2018, 2019, and 2020.

[71] Mr. McClure stated the Approval Holder acknowledged there was no water flow on his property prior to the Approval Holder's upstream neighbour ditching his property.¹¹ The Approval Holder advised Mr. McClure the ditch was to prevent the Approval Holder's grain yard from flooding, and he allowed Mr. McClure to include this reason in an email sent to the AEP investigator.

[72] Mr. McClure provided a photograph of the ditch full of water and explained it showed the water had spread to the road's ditch, through the culvert, and across the ditch in the

⁹ Mr. McClure's Rebuttal Submission, August 7, 2020, at page 2.

¹⁰ Google Earth Image, dated August 19, 2018, attached to the Appellant's Rebuttal Submission, August 7, 2020, at page 10.

¹¹ Email from the Approval Holder to the Mr. McClure, April 23, 2020, attached to the Appellant's Rebuttal Submission, August 7, 2020, at page 7.

field on the east side of Range Road 211, which Mr. McClure described as creating "... a near river" to his home.¹² Mr. McClure described the erosion as substantial and unlike typical runoff.

[73] Mr. McClure said he spoke to the Approval Holder several times about the ditch prior to filing the appeal, and he had been in contact with the Approval Holder since April 20, 2020, including meeting at the Approval Holder's yard on July 14, 2020, to tour the ditch.

[74] Mr. McClure stated he did not travel past the Approval Holder's property, so he had no way of knowing the project was happening, and the Approval Holder did not advise him that he knowingly planned to divert water towards Mr. McClure's home. The Approval Holder did not provide public notice of the proposed ditch, and the Approval Holder explained that, by the time the ditch was approved, it had been worked on for two years.¹³

[75] Mr. McClure stated his complete file was sent to the AEP investigator on April 24, 2020. Mr. McClure said this was a month and a half before Thorhild County received immense rainfall which began on May 28, 2020. Mr. McClure noted the state of local emergency was not declared until June 8, 2020. Mr. McClure explained the flooding on his property predated the rain.

[76] Mr. McClure stated that, while his basement flooding coincided with the heavy rainfall received, a heightened water table from redirected runoff, accelerated flow towards his property, elevated volume of water flow, and the subsequent increased time water sits on his property before his culverts can drain the additional volume, must be taken into consideration. Every time his property floods and cannot drain the redirected water, it seeps into the ground and raises the water table around his house.

[77] Mr. McClure argued the approval process was flawed. Mr. McClure submitted redirection of water should not be allowed without explicit approval from all of the affected landowners downstream, including homeowners that live in the affected area.

[78] Mr. McClure noted it was acknowledged in the documents provided that the ditch was approved without public knowledge and without any notice being placed in the newspaper

¹² Mr. McClure's Submission, August 26, 2020, at page 3.

¹³ Mr. McClure's Submission, August 26, 2020, at page 3.

giving notice. Mr. McClure noted this was apparently a requirement, which was not done, and yet the Approval was granted.

[79] Mr. McClure argued a notice posted on a website that a regular layperson would never have reason to regularly visit should not constitute public knowledge. Mr. McClure stated he has been unable to locate the Approval on the Public Notices Viewer, even though he has searched for it.

[80] Mr. McClure said there were numerous suggestions made during the application process that were not considered, and he argued an environmental engineer must, at minimum, give approval for the ditch.

[81] Mr. McClure noted an AEP staff member cited a concern about the length of the Approval being more than 15 years. Mr. McClure argued that, by default, the term of the Approval should be shorter. Mr. McClure argued that, given the rapid changes in climate and landscape and the nature of the project, the Approval should be for a much shorter term, one year, with further approvals if a project of this nature was to remain.

[82] Mr. McClure said the Approval Holder had already completed the ditch to its current state prior to applying for the Approval. Mr. McClure stated that, given the Approval Holder was able to acquire the Approval despite there being inconsistencies, suggested a lack of due diligence by the Director.

[83] Mr. McClure asked why the ditch was incomplete and non-functional for three years given the Approval Holder applied for the Approval to reroute water that was purportedly running through and flooding the Approval Holder's yard. Mr. McClure believed if that was the case, it would be a priority to the Approval Holder to complete the ditch. Mr. McClure stated the ditch was, in fact, functional and protecting the Approval Holder's yard from the neighbour's diverted runoff, as the Approval Holder had previously advised Mr. McClure.

[84] In Mr. McClure's opinion, the Approval Holder stating that his water flow was not altered or enhanced did not make it so.

[85] Mr. McClure requested a decision not be made on the appeal until the report by the AEP investigator was supplied and taken into consideration.

[86] Mr. McClure stated the ditch was in place prior to the application for the Approval and the subsequent issuance of the Approval. Mr. McClure stated that if he had known of the application, he would have taken issue with the application.

[87] Mr. McClure argued the Approval Holder misrepresented the reason he needed the ditch, which had caused damage to Mr. McClure's property. Mr. McClure stated the reason for the application for the Approval was to protect the Approval Holder's property from excess water from the neighbouring property. Mr. McClure said his property was damaged and would continue to be damaged every spring due to accumulating water and runoff from the Approval Holder's property and his neighbour's property.

[88] Mr. McClure said the Approval Holder told him water was being drained onto the Approval Holder's property from his upstream neighbour's property.

[89] Mr. McClure stated that, instead of the Approval Holder resolving the problem with his neighbour, the Approval Holder diverted the water downstream to the Appellants. Mr. McClure noted the ditch protected the Approval Holder's yard site from the water diverted from his upstream neighbour.

[90] Mr. McClure said the ditch was functional in diverting runoff from the south, away from the Approval Holder's yard, and diverting it downstream. Mr. McClure stated that, before the ditch was dug, the diverted runoff would flood the Approval Holder's property, but since the ditch was dug, Mr. McClure's property was flooded instead.

[91] Mr. McClure stated Matrix did not account for the enhanced water flow onto the Approval Holder's property from the neighbour's property. Mr. McClure said Matrix did not survey the property belonging to the Approval Holder's neighbour, so the entire scope of the ditch was not assessed. Mr. McClure submitted that, given the full scope of the complaint was not fully represented, the report presented by Matrix Solutions Inc. was not useful in these appeals.

[92] Mr. McClure reiterated his property experienced extreme flooding every year since the ditch was dug in 2018, but his property did not flood in prior years even with similar rainfall and snow pack levels.

[93] Mr. McClure questioned why the ditch, which was already dug, was approved without confirming no damage had already been done. Mr. McClure said he was not consulted, as a surrounding landowner immediately downstream, by the Approval Holder before or during the construction of the ditch.

[94] Mr. McClure said procedures were not followed in approving the ditch, recommendations were not followed or explored, and there was missing information relevant to the approval process.

III. DIRECTLY AFFECTED

[95] Before the Board can accept a Notice of Appeal as being valid, the person filing the appeal must show they are directly affected by the Director's decision.¹⁴ The Board has considered the term "directly affected" in a number of previous appeals and has developed a framework to determine if appellants should be given standing to appear before this Board. Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and it will be governed by the particular circumstances of each case.¹⁵

¹⁴ Section 115(1)(c) of the *Water Act* states:

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

- (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...."

¹⁵ See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

[96] The Board received guidance on the issue of “directly affected” from the Court of Queen’s Bench in *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) (“*Court*”).¹⁶

[97] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant’s use of a natural resource. The greater the proximity between the location of the appellant’s use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is ‘extremely significant’ is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant’s use of a natural resource. The greater the proximity between the location of the appellant’s use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

¹⁶ The Board notes the Alberta Court of Appeal clarified the Board’s directly affected test in *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456. However, this decision was made prior to the Court of Appeal releasing the *Normtek* decision. Therefore, the Board relied on the directly affected test as set out in *Court*.

[T]he ‘preponderance of evidence’ standard applies to the appellant’s burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm. The Board believes that the Department’s submission to the [A]EUB, together with Mr. Bildson’s own letters to the [A]EUB and to the Department, make a *prima facie* showing of a potential harm to the area’s wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson’s factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”¹⁷

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its

¹⁷ *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.). See also: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“Bildson”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“Mizera”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”¹⁸

The Board notes Justice McIntyre’s decision in *Court*, responds directly to many of the arguments advanced by the Appellants, including the argument that standing should be decided on a *prima facie* basis.

[98] When assessing the directly affected status of an appellant, the Board looks at how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project that is the subject of the appeal will affect the environment, and how the effect on the environment will impact the person’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.¹⁹

[99] The Court of Queen’s Bench in *Court*²⁰ stated an appellant only needs to show there is a potential for an effect on that person’s interests. This potential effect must still be reasonable, plausible, and relevant to the Board’s jurisdiction for the Board to consider it sufficient to grant standing. An effect that is too remote, speculative, or is not likely to impact the appellant’s interests will not support a finding that an appellant is directly affected. Both the reasonableness and the possibility of the effect must be shown. The effect on the appellant does not have to be unique in kind or magnitude.²¹ However, the effect the Board is looking for needs to be more than an effect on the public at large. It must be personal and individual in nature, and it must be something more than the generalized interest that all Albertans have in protecting the

¹⁸ *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

¹⁹ See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

²⁰ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

²¹ See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.).

environment.²² Under the *Water Act*, the Legislature chose to restrict the right of appeal to those who are directly affected by the Director's decision. If the Legislature had intended for any member of the public to be allowed to appeal, it could have used the phrase "any person" in describing who has the right to appeal. Instead it chose to restrict the right of appeal to a more limited class.

[100] The Board must consider the nature and merits of the Appellants' appeals as it applies to the specific circumstances.

IV. ANALYSIS

[101] The Approval Holder argued the Appellants were not directly affected as the water being diverted was not the source of the Appellants' issues with their properties flooding.

[102] The Appellants in these appeals own property directly downstream from where the Approval Holder constructed the ditch to divert water. Their properties are divided only by the county road.

[103] The photographs provided by the Appellants and Approval Holder show there are water flow issues and flooding in the area. The photographs also show water flowing from the Approval Holder's upstream neighbour onto the Approval Holder's property. In reading the Appellants' submissions, they understand the reason the Approval Holder constructed the ditch was to alleviate flooding issues supposedly caused by ditching done by the Approval Holder's upstream neighbour. They did not suggest the Approval Holder and his neighbour were collaborating to divert the water onto the Appellants' properties.

[104] The Board was not provided with details on the water flow patterns across the Appellants' and Approval Holder's properties prior to the construction of the ditch, and no data were provided to demonstrate the change in the amount of water entering the Appellants' properties. It is also not clear whether the ditch resulted in the overland flow from the Approval

²² See: *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at paragraphs 34 and 35 (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection*) (23 August 1995), Appeal No. 94-017 (A.E.A.B.). These passages are cited with approval in *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

Holder's property exiting at a different location than what existed prior to the ditch and whether the ditch concentrated the flow from the Approval Holder's property that could impact the rate of flow into the county ditch resulting in impacts to the Appellants' properties.

[105] Although the details in changes in the overland flow were not before the Board, based on the submissions provided by the Appellants, there appears to be a change in the flow of water entering the Appellants' properties sufficient enough to cause additional flooding. The Board requires further information to determine a more exact cause of the flooding issues. This would be presented in a hearing of the merits of the appeal.

[106] When determining if the Appellants are directly affected, they have to provide sufficient information to show there is a reasonable possibility they are directly affected by the issuance of the Approval. The Approval allows for the diversion of water around the Approval Holder's yard and into the county ditch. The Approval Holder did not explain whether there was an increased amount of water flowing across his property as a result of the upstream neighbour's actions, or whether it was a change in the direction of flow from the neighbour that resulted in the Approval Holder being subjected to flooding.

[107] The Appellants explained they did not experience flooding of their lands to the extent they were currently experiencing until the Approval Holder constructed the ditch. The Appellants provided information on rainfall and snowpack levels to show there had not been an increase in precipitation in the most recent years, except for 2020, to account for the increased flooding of their properties.

[108] The Appellants provided sufficient information to show they are directly affected by the diversion of water from the Approval Holder's property via the approved ditch. Therefore, the Board finds the Appellants are directly affected by the Director's decision to issue the Approval.

[109] As the Board has found there is a reasonable possibility the Appellants are impacted by the issuance of the Approval, the appeals are not frivolous, vexatious, or without merit.

[110] The Board finds the Appellants, as adjacent and downstream landowners, are directly affected. There is a possibility runoff diverted by the approved ditch could contribute to the increased overland flow experienced by the Appellants. Therefore, the Appellants are directly affected and the appeals have merit.

V. DECISION

[111] The Board denies the Approval Holder's motion to dismiss the appeals.

[112] Upon review of the submissions from the Parties, the Board finds the Appellants, Mr. Bob Fedyna and Mr. Desmond McClure, directly affected by the Director's decision to issue the Approval.

Dated on March 21, 2022, at Edmonton, Alberta.

"original signed by"
Meg Barker
Acting Board Chair