
ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 31, 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 Caroline McDonald-Harker and Silvertip Ranch Committee with respect to *Water Act* Licence Nos. 00392654-00-00, 00430926-00-00, 00464165-00-00, 00464185-00-00, 00464187-00-00 issued to Foothills County by the Director, Regulatory Assurance Division, South Region, Alberta Environment and Parks.

Cite as: *McDonald-Harker and Silvertip Ranch Committee v. Director, Regulatory Assurance Division, South Region, Alberta Environment and Parks, re: Foothills County* (31 March 2022), Appeal Nos. 20-030-039-D (A.E.A.B.), 2022 ABEAB 15.

BEFORE:

Ms. Meg Barker, Acting Board Chair;*
Dr. Nick Tywoniuk, Board Member; and
Mr. Chris Powter, Board Member.

SUBMISSIONS BY:

Appellants: Dr. Caroline McDonald-Harker and Silvertip
Ranch Committee.

Licence Holder: Foothills County, represented by Mr. John
Gruber, MLT Aikins LLP.

Director: Mr. Andun Jevne, Director, Regulatory
Assurance Division, South Region, Alberta
Environment and Parks, represented by Ms.
Jodie Hierlmeier and Ms. Jade Vo, Alberta
Justice and Solicitor General.

Previous Licence Holders: Mr. Terry Schmautz, Mr. Randy Schmautz,
and Mr. Fred Schmautz, represented by Mr.
Davin MacIntosh, Water Transfer Alberta; and
Western Feedlots Ltd., represented by Mr.
Cam Crawford, The Catalyst Group.

* Ms. Barker was Acting Chair of the Board at the time the decision was made.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued five Licences to Foothills County under the *Water Act* to allow Foothills County to operate works and to divert water for municipal purposes (regional water supply) in relation to the Aldersyde Regional Utility Servicing Project Area. The Licences transfer water to Foothills County from licences previously held by Messrs. Terry, Randy, and Fred Schmautz and Western Feedlots Ltd.

Dr. Caroline McDonald-Harker and Silvertip Ranch Committee (Appellants) appealed the issuance of the Licences. Foothills County filed a motion to dismiss the appeals on the basis the Appellants were not directly affected by AEP's decision to issue the Licences.

The Appellants argued they were directly affected given the raw water pipeline was to be constructed next to their properties, which could impact the currently high water table in the area. The Appellants also expressed concern about the location of the water reservoir and the lack of detail for the location of the reservoir.

The Board found the Appellants were not directly affected by the issuance of the 2020 Licences. Their concerns related primarily to the associated pipeline and reservoir, which were approved under a *Water Act* Approval and *Environmental Protection and Enhancement Act* Approval issued to Foothills County in 2018. The pipeline and reservoir could be constructed pursuant to the 2018 Approvals even if the 2020 Licences were reversed. The Appellants did not provide any evidence to demonstrate their concerns were more than speculation.

Based on the submissions provided and the information before the Board, the Board found the Appellants were not directly affected. The Board dismissed the appeals.

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | BACKGROUND | 1 |
| II. | SUBMISSIONS | 3 |
| A. | Appellants' Initial Submission..... | 3 |
| B. | Licence Holder's Submission | 8 |
| C. | Previous Licence Holders' Submissions..... | 12 |
| 1. | Western Feedlots | 12 |
| 2. | Terry, Randy, and Fred Schmautz | 13 |
| D. | Director's Submission..... | 14 |
| E. | Appellants' Rebuttal Submission..... | 15 |
| III. | DIRECTLY AFFECTED..... | 22 |
| IV. | DISCUSSION | 28 |
| V. | DECISION | 34 |

I. BACKGROUND

[1] On October 15, 2020, the Director, Regulatory Assurance Division, South Region, Alberta Environment and Parks (the “Director”), issued Licence Nos. 00392654-00-00, 00430926-00-00, 00464165-00-00, 00464185-00-00, and 00464187-00-00 (the “2020 Licences”) to Foothills County (the “Licence Holder”). The Director issued the Licences under the *Water Act*, R.S.A. 2000, c. W-3, to allow the Licence Holder to operate works and to divert water for municipal purposes (regional water supply) in relation to the Aldersyde Regional Utility Servicing Project Area in Foothills County.¹ The 2020 Licences transfer water from licences previously held by Messrs. Terry, Randy, and Fred Schmautz and Western Feedlots Ltd. (collectively, “Previous Licence Holders”) to Foothills County.

[2] On November 14, 2020, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Dr. Caroline McDonald-Harker and the Silvertip Ranch Committee² (the “Appellants”) appealing the issuance of the 2020 Licences.

[3] On November 20, 2020, the Board acknowledged receipt of the appeals and requested the Director provide all documents and electronic media he reviewed and were available to him when making his decision to issue the Licences, including policy documents (the “Record”).

[4] On January 20, 2021, the Board acknowledged the Licence Holder’s request to dismiss the appeals due to the Appellants’ lack of standing. The Board scheduled a submission process on the motion to dismiss the appeals. The Appellants, Licence Holder, Director, and the Previous Licence Holders (collectively, the “Participants”) were asked to respond to the following question:

¹ The Aldersyde Regional Utility Servicing Project Area (“Aldersyde Project”) is a proposed development along Highway 7 within the Highway 2A corridor in Foothills County.

² The Silvertip Ranch Committee consists of Dr. Caroline McDonald-Harker, Ms. Colleen Hanke, Mr. Marty Moncrieff, Ms. Christa and Mr. Rick Barnhart, Ms. Josephine and Mr. Richard Birks, Ms. Share Spencer and Mr. Brent Stradeski, Ms. JoAnn Farrow, Mr. Glen and Ms. Marg Brosinsky, and Mr. Barry and Ms. Arlene Throness.

“Are the Appellants directly affected by Alberta Environment and Parks’ decisions authorizing the transfer of water licences belonging to Messrs. Terry, Randy and Fred Schmautz and Western Feedlots Ltd. to Foothills County?”

[5] On January 27, 2021, the Board received the Appellants’ initial submission.

[6] On February 2, 2021, the Board acknowledged receipt of the Record, and copies were forwarded to the other Participants.

[7] On February 3, 2021, the Board received response submissions from the Licence Holder, Previous Licence Holders, and the Director.

[8] On February 10, 2021, the Appellants provided their rebuttal submission.

[9] On March 11, 2021, the Board requested the Licence Holder and Director to clarify what document authorizes the construction of the proposed raw water intake pipeline and whether any additional authorizations would be required to construct, operate, or reclaim the proposed raw water intake pipeline. The Board asked the Director to provide documents authorizing the construction of the raw water intake pipeline and documents related to the Licence Holder’s applications for the 2018 Licences.³

[10] On March 31, 2021, the Licence Holder and Director provided their responses to the Board.

[11] On April 8, 2021, the Appellants provided a response to the Licence Holder’s and Director’s comments.

[12] On April 12, 2021, the Board notified the Participants, with reasons to follow, the Appellants were not directly affected by the Director’s decision to issue the 2020 Licences. These are the Board’s reasons.

³ In 2018, the Director granted *Water Act* Licence Nos. 00353831-00-00 and 00353841-00-00 (the “2018 Licences”) to Foothills County for municipal purposes (regional water supply). Alberta Environment and Parks (“AEP”) also issued *Water Act* Approval No. 00387112 (“*Water Act* Approval”), on March 7, 2018, authorizing the disturbance associated with the construction of the intake, and EPEA Approval No. 385390 (“EPEA Approval”), issued May 4, 2018, authorizing the construction, operation, and reclamation of the Highwood Regional Waterworks System. The EPEA Approval was issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).

II. SUBMISSIONS

A. Appellants' Initial Submission

[13] The Appellants stated that, as homeowners whose properties border on or are in close proximity to the proposed pipeline, they were persons directly affected by the Director's decisions to issue the 2020 Licences. The Appellants explained their properties have a high water table which requires them to take measures to manage water in the soil and mitigate the risk of damage caused by water seeping into their homes. The Appellants argued the water pipeline could introduce more water into the already saturated soil exacerbating the risk to their homes. The Appellants said if the pipeline did not function as intended or if there was any malfunction, there was a risk of flooding of the Appellants' homes and properties. The Appellants stated this would be an impairment of the exercise of their rights as household users.

[14] The Appellants noted the Director had determined all the residential homes in Silvertip Ranch were within the "zone of influence" of the 2020 Licences.

[15] The Appellants stated the Licence Holder plans to build raw water reservoirs directly in and surrounding the Appellants' community to store water diverted under the 2020 Licences and the 2018 Licences. The Appellants noted one of the reservoirs to be built under the 2018 Licences was proposed to be located on municipal reserve land located in Silvertip Ranch. The Appellants said the proposed locations of the reservoir and pipeline were adjacent to and partially overlap a wetland that surrounds Silvertip. The Appellants noted the Licence Holder did not indicate where the water from the 2020 Licences would be stored.

[16] The Appellants stated they were not aware of the 2018 applications or Licences, and they were not aware of opportunities for public consultation on the Aldersyde Project. The Appellants said they were not informed or consulted on the implications of the project until after the 2018 Licences and EPEA Approval had been obtained.

[17] The Appellants said they filed two Statements of Concern with the Director regarding the 2020 Licences.

[18] The Appellants referred to the *Normtek* decision,⁴ stating the Court of Appeal interpreted the term “directly affected” generously, adopting a broader test for assessing an appellant’s standing. The Appellants stated the *Normtek* approach to standing means more than environmental interests can adversely impact individuals.

[19] The Appellants stated the Director’s discretion to approve a water licence transfer needs to consider the adverse effect of the transfer on the environment, rights of household users, and public safety.⁵ The Appellants said section 16(1) of the *Water Act*⁶ requires the Director to consider the purposes of the environmental assessment process in section 40 of EPEA when

⁴ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 (“*Normtek*”).

⁵ The Appellants referenced sections 82(3)(b)-(c) and 82(5) of the *Water Act*, which provide:

- “(3) The Director may approve a transfer of an allocation of water under a licence only if
- (a) the volume of water to be transferred does not exceed the volume of water under the licence from which the transfer of the allocation is to be made,
 - (b) the transfer of the allocation, in the opinion of the Director, does not impair the exercise of rights of any household user, traditional agriculture user or other licensee other than the household user, traditional agriculture user or other licensee who has agreed in writing that the transfer of the allocation may take place, and
 - (c) the transfer, in the opinion of the Director, will not cause a significant adverse effect on the aquatic environment....
- (5) In making a decision under subsection (1), the Director
- (a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in approving a transfer of an allocation of water under a licence, as specified in an applicable approved water management plan,
 - (b) may consider any existing, potential or cumulative
 - (i) effects on the aquatic environment and any applicable water conservation objective,
 - (ii) hydraulic, hydrological and hydrogeological effects, and
 - (iii) effects on household users, traditional agriculture users and other licensees, that result or may result from the transfer of the allocation, and
 - (c) may consider
 - (i) effects on public safety,
 - (ii) with respect to irrigation, the suitability of the land to which the allocation of water is to be transferred for irrigated agriculture,
 - (iii) the allocation of water that the licensee has historically diverted under the licence, and
 - (iv) any other matters applicable to the transfer of the allocation that the Director considers relevant.”

⁶ Section 16(1) of the *Water Act* states:

“Unless the regulations provide otherwise, the Director may not issue or amend an approval, preliminary certificate or licence or approve a transfer of an allocation of water under a licence if the Director is of the opinion that Part 2, Division 1 of the *Environmental Protection and*

determining if the transfer of water should be approved. The Appellants noted the purposes include predicting environmental, social, economic, and cultural consequences of the proposed project and assessing mitigation plans of any adverse impacts.

[20] The Appellants argued that, based on *Normtek*, the Board must recognize an appellant as directly affected for adverse effects to their interest, whether they are environmental or not.

[21] The Appellants stated the Director's arguments were technically irrelevant to the issue of whether his decision directly affected the Appellants or whether they were based on an incorrect understanding of the factors considered when the Director exercised his discretion.

[22] The Appellants noted section 115(1)(r) of the *Water Act*⁷ allows appeals of a water allocation licence transfer approved by the Director. The Appellants stated their failure to appeal the 2018 Licences had no bearing on the current appeals. They further stated that, even if efforts were made to address their concerns prior to issuing the 2018 Approval, the Appellants could still be directly and adversely affected by the 2020 Licences.

[23] The Appellants argued the Director must consider an array of interests that could be impacted by granting a licence transfer. The Appellants stated the concerns raised in their Notices of Appeal were interests the Director was required to consider in exercising his discretion. The Appellants noted their status as directly affected persons was at issue, not the merits of their concerns listed in the Notices of Appeal.

[24] The Appellants stated the Director's decision to issue the 2020 Licences directly affected their environmental and non-environmental interests.

[25] The Appellants said the issuance of the 2020 Licences would impact the Appellants' use of natural resources in the community. They noted that up to 953,485 m³ per year of water will pass through the raw water pipeline that is proposed to be built directly

Enhancement Act, if applicable, has not been complied with.”

⁷ Section 115(1)(r) of the *Water Act* provides:

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

- (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

adjacent to or within a nearby ecological wetland. The Appellants explained the wetland is directly behind, in one case partially on, the Appellants' properties, and it provides important functions for the entire community. The Appellants said the community was developed to have surface and ground water drain into the wetland, which is a natural drainage course.

[26] The Appellants stated the construction and operation of the raw water pipeline would impact the natural flow of water into the wetland, thereby affecting the drainage of water from the residents' properties. The Appellants argued the construction and installation of the pipeline would disturb the topography and ground composition along the pipeline, and it could impede the path of water as it flows from the properties. The Appellants argued any leaks or system failures during operation of the pipeline could inundate the natural drainage site with excess water, impeding water flow from the community and potentially leading to flooding. The Appellants stated the community depends on the uninhibited flow of water from their properties into the wetland, but the location of the pipeline would likely upset this function.

[27] The Appellants submitted the proposed work under the 2020 Licences threatens to disrupt the natural drainage patterns from their properties into the wetland. They said other disruptive works, such as the construction and operation of raw water reservoirs in close proximity to Silvertip Ranch or the wetland, would increase the risk the Appellants would not be able to rely on the wetland as a natural drainage site.

[28] The Appellants noted a separate proposal by the Licence Holder, which was under review by Alberta Environment and Parks ("AEP"), considered two additional pipelines that would pass through the wetland to connect the proposed raw water reservoir to the pipelines proposed under the 2020 Licences. The Appellants argued this would be a more pronounced risk of disturbing, if not destroying, the wetland and the Appellants' use of the site, and remediation of the wetland would not return it to its original form.

[29] The Appellants argued their proximity to and use of the wetland for drainage demonstrates a unique interest in a natural resource that would likely be harmed or impaired by the 2020 Licences.

accordance with section 109 who is directly affected by the Director's decision."

[30] The Appellants stated the wetland serves several ecological functions and is an integral part of the community's landscape. They said the wetland plays an important role in sustaining healthy watersheds by providing water storage and infiltration, providing habitat for wildlife and plant species, and sustaining biodiversity. The Appellants stated the construction of the pipeline would threaten to disrupt the delicate ecosystem.

[31] The Appellants argued they would suffer a distinct harm from the disruption of the wetland because their properties were next to the wetland. They said the wetland regulates the biodiversity and ecology on their properties and surrounding area, and their use of the wetland was due to the fact they are physically connected to it.

[32] The Appellants argued they would be adversely affected as household users and their rights would be impacted. They said the possibility of impaired drainage and system malfunction would increase the risk of flooding for the Appellants, damaging homes and property, and threatening their safety and that of others in the community.

[33] The Appellants noted directly affected status does not require the certainty of a future adverse effect, and "the mere possibility of the proposed activity not working properly establishes the Appellants' *prima facie* status as directly affected persons."⁸ They stated the risk of adverse effect due to the malfunction or failure of the proposed works should establish the Appellants' directly affected status.

[34] The Appellants said the 2020 Licences would divert a large quantity of water through Silvertip Ranch, close to the Appellants' homes and properties. They noted the cumulative water allocation under the 2020 Licences would be 743,793 m³ of water per year, but when combined with the 2018 Licences, it would total 953,485 m³ per year of water passing through the pipeline that would be installed in ground that has a high water table.

[35] The Appellants stated the risk of flooding was already a reality for many of the Appellants as they require sump pumps to remove water from their properties. The Appellants argued the risks of impeded natural drainage and malfunction or leakage in the water diversion system threaten to exacerbate flooding risks that already exist in the community. They said there

⁸ Appellants' submission, dated January 27, 2021, at paragraph 29.

would be increased likelihood of water seepage into the Appellants' homes and increased risk of sewage backup, presenting numerous environmental and health risks to the Appellants.

[36] The Appellants said the proposed dewatering during construction or operation would not permanently prevent water returning to impacted areas, and high water levels would return in spring and summer months and snowmelt.

[37] The Appellants argued the cumulative effect of the 2020 Licences and the other projects related to the Highwood Regional Waterworks System put the Appellants at risk of adverse effects due to flooding. They stated they would be at risk during the construction and operation of the project. The Appellants said their use and enjoyment of the nearby wetland would be adversely impacted, as well as their interests as household users and their safety.

[38] The Appellants argued that, because the works can only be undertaken after obtaining approval from the Director, there is causal nexus between the adverse effects on the Appellants and the issuance of the 2020 Licences.

B. Licence Holder's Submission

[39] The Licence Holder explained it was exploring options to develop the Highway 2A corridor, and in 2016, a preliminary plan was developed consisting of a potable water treatment plant and associated infrastructure and a wastewater treatment plant in Aldersyde for the purpose of providing municipal services in the area. As part of the plan, it was working at obtaining sufficient water licences to service the area.

[40] The Licence Holder noted no Statements of Concern were filed with respect to the applications for the 2018 Licences, and no Notices of Appeal were filed when the 2018 Licences were issued.

[41] The Licence Holder explained the segment of the raw water pipeline of concern to the Appellants was shown on drawings in each of the 2018 Licences.

[42] The Licence Holder stated applications were filed with the Director between January 31, 2017, and January 28, 2020, for the transfer of water licences held by the Previous Licence Holders to the Licence Holder. The Licence Holder noted the Appellants filed

Statements of Concern regarding the raw water pipeline depicted in the drawings in the 2018 Licences and 2020 Licences.

[43] The Licence Holder noted the Director accepted the Statements of Concern regarding the pipeline construction, including dewatering during construction and the pipeline operation. The Licence Holder explained K2 Engineering Ltd. (“K2”) provided a detailed response addressing these concerns (the “K2 Report”). The Licence Holder said the terms and conditions of the 2020 Licences reference drawings of the raw water pipeline identical to the drawings in the 2018 Licences. The Licence Holder noted the K2 Report was incorporated into the terms and conditions of the 2020 Licences.

[44] The Licence Holder submitted the Appellants lack standing for the following reasons:

- a) the infrastructure which is the subject of the appeals was approved by the Director pursuant to the 2018 Licences; and
- b) the concerns which were accepted by the Director were fully addressed by the K2 Report, which was provided to and considered by the Director prior to the issuance of the 2020 Licences.

[45] The Licence Holder stated the *Normtek* decision did not change the law related to the directly affected test, and the decision provided guidance with respect to the application of the test, essentially cautioning against an overly narrow approach. The Licence Holder said applying the test as set out in *Normtek*, and given the merits of the appeals, the Appellants did not have standing.

[46] The Licence Holder noted the decision in *Normtek* affirms the principle that Appellants must establish a reasonable possibility they will be affected by the Director’s decision.

[47] The Licence Holder said the Appellants’ concerns relate to a raw water pipeline, which was the subject of an application made to the Director in 2016. The Licence Holder explained the 2018 Licences contain drawings and specifications with respect to the appurtenant infrastructure, specifically the infrastructure that is the subject of the Appellants’ appeals of the

2020 Licences. The specifications of the relevant infrastructure were identical for the 2018 Licences and 2020 Licences.

[48] The Licence Holder stated that since:

“...March 2018, and continuing to the present, Foothills has had the irrevocable right to construct this infrastructure. These specifications and drawings were reiterated in the 2020 Licences, however this had no impact on the rights of Foothills to construct and operate this infrastructure as was authorized by the 2018 Licences.”⁹

[49] The Licence Holder noted the 2020 Licences did not derogate, limit, or qualify its right to construct the infrastructure approved pursuant to the 2018 Licences and, therefore, the decision to issue the 2020 Licences was not capable of having a direct effect on the Appellants. With no direct affect, the Appellants lack standing before the Board.

[50] The Licence Holder argued that any other conclusion would result in a level of uncertainty that would make planning of municipal infrastructure unpredictable and subject to financial risk. The Licence Holder said it would mean infrastructure constructed pursuant to a properly obtained licence or approval could be subject to alteration or removal well after the expiry of any appeal period.

[51] The Licence Holder stated issues accepted in the Statements of Concern were addressed to the satisfaction of the Director. The Licence Holder noted the acceptance of a Statement of Concern does not necessarily translate into standing under section 115 of the *Water Act*.

[52] The Licence Holder said the K2 Report addressed the construction of the pipeline, including the dewatering issue, and the concerns related to the operation of the raw water pipeline. The Licence Holder noted the Director was satisfied the concerns of the Appellants were fully addressed, and the K2 Report was included in the terms and conditions in the 2020 Licences which requires the Licence Holder adhere to the measures set out in the K2 Report.

[53] The Licence Holder stated the Appellants did not provide anything which called into question the efficacy of the measures set out in the K2 Report.

⁹ Licence Holder’s submission, dated February 3, 2021, at paragraph 26.

[54] The Licence Holder pointed out the construction and operation of water lines for municipal purposes is not an inherently dangerous or complex endeavour, and thousands of similar lines are constructed and operated without incident or adverse impacts on the environment.

[55] The Licence Holder reiterated the appeals relate to infrastructure that was approved in the 2018 Licences and was not impacted by the 2020 Licences. Therefore, the issuance of the 2020 Licences could not have a direct effect on the Appellants.

[56] In response to the Board's questions, the Licence Holder explained that, in furtherance of the Aldersyde Project, it applied for and received: the 2018 Licences; *Water Act* Approval No. 00387112 ("*Water Act* Approval"), issued March 7, 2018, authorizing the disturbance associated with the construction of the intake; and EPEA Approval No. 385390 ("EPEA Approval"), issued May 4, 2018, authorizing the construction, operation, and reclamation of the Highwood Regional Waterworks System ("HRWS").

[57] The Licence Holder explained the HRWS is a "waterworks system" as defined in EPEA.¹⁰

[58] The Licence Holder stated the EPEA Approval and *Water Act* Approval are the documents authorizing the construction of the HRWS, including the intake and raw water pipeline, and components of the works used to divert the volume of water set out in the 2018

¹⁰ Section 1(zzz) of EPEA defines "waterworks system" as follows:

"waterworks system" means any system providing potable water to a city, town, specialized municipality, village, summer village, hamlet, settlement area as defined in the *Metis Settlements Act*, municipal development, industrial development, privately owned development or private utility, and includes any or all of the following components:

- (i) water wells connected to water supply lines, surface water intakes or infiltration galleries that constitute the water supply;
- (ii) water supply lines;
- (iii) on-stream and off-stream water storage facilities;
- (iv) water pumphouses;
- (v) water treatment plants;
- (vi) potable water transmission mains;
- (vii) potable water storage facilities;
- (viii) potable water pumping facilities;
- (ix) water distribution systems;

Licences. The Licence Holder stated these are the same works specified for use to divert the volumes of water specified in the 2020 Licences.

[59] The Licence Holder said that, as of May 4, 2018, no further authorizations were required to construct and operate the intake and raw water pipeline.

C. Previous Licence Holders' Submissions

1. Western Feedlots

[60] Western Feedlots noted the issuance of the 2018 Licences were not appealed.

[61] Western Feedlots said that, in December 2018, they agreed to sell three water licences to the Licence Holder. Western Feedlots confirmed their licences were cancelled when the 2020 Licences were issued to the Licence Holder.

[62] Western Feedlots agreed with the Licence Holder's analysis of the Appellants' standing. Western Feedlots stated the Appellants were concerned about the infrastructure, which was approved pursuant to the issuance of the 2018 Licences and therefore, would not be impacted by the issuance of the 2020 Licences.

[63] Western Feedlots stated the Appellants' concerns related to the construction of water servicing infrastructure and had no relevance to the commercial transaction between Western Feedlots and the Licence Holder and, therefore, the appeals should be dismissed.

[64] Western Feedlots said the Director's decision to issue the 2020 Licences confirmed the Director was satisfied the Appellants' concerns were fully addressed in the K2 Report, which must be adhered to as it was included in the terms and conditions of the 2020 Licences.

[65] Western Feedlots submitted the issuance of the 2020 Licences could not have a direct effect on the Appellants.

(x) watering points.”

2. Terry, Randy, and Fred Schmautz

[66] The Schmautzs stated the Appellants lacked standing in these appeals because they were not directly affected by the decision of the Director.

[67] The Schmautzs stated section 82 of the *Water Act* lists the conditions that should be considered by the Director when determining whether a transfer may be approved and in evaluating the effects of the proposed transfer and who may be affected.

[68] The Schmautzs noted the Appellants did not claim to be a household user, a traditional agriculture user, or other licensee. The Schmautzs also noted the Appellants did not claim the 2020 Licences would cause a significant impact on the aquatic environment.

[69] The Schmautzs stated that, even if the Appellants' claim of a potential impact on the water table was an effect on the environment, which the Schmautzs believed was incorrect and technically flawed, the claim was adequately addressed in the 2020 Licences. The Schmautzs believed if there was a change resulting from the diversion, it would lower, not raise, the water table in the proximate area.

[70] The Schmautzs noted the Appellants' claim of being directly affected by the approved pipeline because the Appellants had concerns about the integrity of the pipeline. The Schmautzs stated this was not an issue in the Director's decision. The Schmautzs stated these appeals were not the proper forum for issues regarding the location or integrity of a proposed water reservoir or pipeline.

[71] The Schmautzs noted the reference to the "Aldersyde Project" in the 2020 Licences only describes the appurtenance and use of the 2020 Licences.

[72] The Schmautzs stated the works were approved pursuant to the 2018 Licences and are the subject of other authorizations, and they were not at issue in the decision to issue the 2020 Licences.

D. Director's Submission

[73] The Director took no position on the motion to dismiss the appeals nor on whether the Appellants were directly affected. The Director made no comments on the impact of the *Normtek* decision on the Board's directly affected test in these appeals.

[74] The Director explained he accepted the Silvertip Ranch Committee as directly affected in the applications to transfer the water licences held by the Previous Licence Holders. He identified three concerns as being within the jurisdiction of the *Water Act* and specific to the transfer applications, specifically: pipeline construction, dewatering during pipeline construction, and pipeline operation, plus the impacts of these activities on safety. The Director stated other issues raised by the Appellants in the Statements of Concern were found to be not within the jurisdiction of the *Water Act*, not specific to the applications, too vague, or the effects were not direct or did not affect the person expressing concern. The Director noted Dr. Caroline McDonald-Harker did not file a Statement of Concern in her personal capacity.

[75] In response to the Board's questions, the Director explained the raw water intake pipeline is made up of two separate works, a raw water pipeline and an intake from the Highwood River.

[76] The Director stated that, even though the 2020 Licences refer to an "intake" and "raw water pipeline," the intake and pipeline are regulated under EPEA, and the construction of the intake is regulated under a separate *Water Act* approval.

[77] The Director explained the construction, operation, and reclamation of the pipeline is regulated by the EPEA Approval. The Director noted Section 3.2.1 of the EPEA Approval authorizes the construction of the "waterworks system" according to plans and specifications provided. The plans identified the intake and raw water pipeline.

[78] The Director noted no additional authorizations were required for the construction, operation, or reclamation of the raw water pipeline.

[79] The Director noted the engineering consultant for the Licence Holder advised in the application for the EPEA Approval, that the raw water pipeline was designed and installed according to the *Guide for Pipelines Pursuant to the EPEA and Regulations, March 1994*.

[80] The Director stated the *Water Act* Approval authorizes the construction of the intake from the Highwood River. He noted the *Water Act* Approval expired October 31, 2020, and no further approval was required since the intake had been constructed. If changes are required to the intake that would cause a disturbance in the Highwood River, further *Water Act* authorizations may be required.

E. Appellants' Rebuttal Submission

[81] The Appellants reiterated they have environmental and non-environmental interests that would be adversely affected by the Director's decision to issue the 2020 Licences. The Appellants stated the Licence Holder failed to rebut the Appellants' standing before the Board since the arguments raised by the Licence Holder were irrelevant or did not refute the Appellants' arguments.

[82] The Appellants said they raised concerns about significant risks the 2020 Licences would pose to their homes and properties given the high water table in the Silvertip community. The Appellants stated the construction and operation of the raw water pipeline and the diversion of such a large quantity of water through the pipeline could introduce even more water into the already saturated soil, exacerbating the risk of moisture and wastewater seeping into their homes. The Appellants stated that, if the proposed raw water pipeline did not function as intended or malfunctioned, there would be serious risk of flooding for the residents of the Silvertip community.

[83] The Appellants noted the Director accepted their Statements of Concern and found them directly affected by the applications for the 2020 Licences. The Appellants stated the K2 Report did not adequately address their concerns.

[84] The Appellants argued the construction and operation of the works threatens to adversely affect their use and enjoyment of the nearby wetland and their interests as property owners. They said the Director's decision directly affected them.

[85] The Appellants stated the Licence Holder argued the Appellants did not have standing because the appeals were moot given the works had already been approved in the 2018 Licences, and their concerns were no longer valid because of the K2 Report.

[86] The Appellants argued the Licence Holder did not substantiate its position that *Normtek* did not apply in these appeals or how application of the *Normtek* decision would result in a different conclusion than what the Appellants submitted.

[87] The Appellants argued the Licence Holder's position that it had an irrevocable right to construct the raw water pipeline pursuant to the 2018 Licences was unsupportable given the licensing framework under the *Water Act*, the content of the 2020 Licences, and the circumstances of these appeals. The Appellants noted there were provisions in the *Water Act* that grant the Director the ability to amend or cancel previously issued licences in certain circumstances, whether through the Director's initiative, by application of the licensee, or by application by another person if there was a dispute under the *Water Act*. The Appellants said this would allow for amendments to the terms and conditions of the 2018 Licences. Therefore, the Licence Holder's rights were not irrevocable.

[88] The Appellants stated the Licence Holder was relying on the 2018 Licences to claim a right to do something that is not possible under water diversion licences. The Appellants noted a water diversion licence allows the licence holder to divert water or operate a works, which is distinct from constructing a works. The Appellants argued the construction of a works is an "activity" as defined in the *Water Act* and, therefore, it is subject to the approval requirements, not the licensing requirements of the *Water Act*. The Appellants argued the Licence Holder misconstrued the effect of the licence transfers and the function of the water diversion licences.

[89] The Appellants noted the works described in the 2018 Licences and 2020 Licences were identical, except the 2020 Licences required the Licence Holder to follow the mitigation measures in the K2 Report. They said that, as a result, the 2020 Licences are more restrictive than the 2018 Licences. The Appellants stated that, because the 2018 Licences have fewer terms and conditions, it does not mean the terms and conditions in the 2020 Licences do not have to be followed. The Appellants said the Licence Holder must abide by the more restrictive terms and conditions to operate the works.

[90] The Appellants argued the terms and conditions of the 2018 Licences were irrelevant to the question of whether the Appellants were directly affected. They stated if the

Appellants suffered an adverse effect, it would still be an adverse effect even if the works that caused it were approved under a previously issued licence or approval.

[91] The Appellants considered the Director's finding that the Appellants were directly affected should be persuasive evidence for the Board to support the Appellants' position.

[92] The Appellants submitted they established they were directly affected, and the Licence Holder was required to refute that position.

[93] The Appellants stated the Licence Holder relied on the inclusion of the K2 Report in the 2020 Licences as evidence the Appellants' concerns were addressed. The Appellants acknowledged a decision of the Director could alleviate an appellant's concerns, and then the appellant could not be considered directly affected. The Appellants said the additional terms and conditions may or may not address an appellant's concerns.

[94] The Appellants' stated their concerns persist and, therefore, they are directly affected by the issuance of the 2020 Licences. The Appellants explained that, in their Statements of Concern, they included their concern about the proposed location of the raw water pipeline. They said it passed through ground with a high water table, and they questioned whether it was feasible to construct the infrastructure in that location.

[95] The Appellants stated the K2 Report did not provide concrete solutions to the problems identified by the Appellants since K2 Engineering did not have enough information on the site, and mitigative measures were described in vague terms. The Appellants argued the K2 Report cannot be considered as effectively addressing the concerns raised by the Appellants in their Statements of Concern. The Appellants did not believe the 2020 Licences sufficiently protect the Appellants' interests.

[96] The Appellants said the K2 Report did not consider adjusting the path of the raw water pipeline if the current proposed path was found to increase the risk of adversely impacting the Appellants. The Appellants argued it was irresponsible to grant the presumptive right to operate a works near their properties without first determining if the proposed path was feasible. They said their concerns would persist until there was a review by industry experts and testing and analyses were completed. The Appellants stated that, until additional assessments are done,

the mitigation measures proposed by the Licence Holder did not reduce the risks to the Appellants and, therefore, they were directly affected.

[97] The Appellants argued the content of the 2018 Licences had no bearing on the impacts the 2020 Licences would have on the Appellants.

[98] In response to the Board's March 11, 2021 questions asked of the Licence Holder and Director and the answers provided, the Appellants noted the information requested by the Board was "...somewhat removed from the licence approvals that are under appeal in these proceedings."¹¹

[99] The Appellants stated they were concerned with the construction and operation of the works described in the EPEA Approval, intake approval, and the 2018 Licences as they were described the same in the 2020 Licences.

[100] The Appellants argued that, while the Director approved the HRWS and construction of some of the associated works, neither the EPEA Approval nor the intake approval granted the Licence Holder the right to construct the raw water pipeline associated with the HRWS. The Appellants explained EPEA provides the procedure an applicant must follow to obtain an approval for certain activities identified in EPEA. The Appellants noted EPEA contemplates activities that require approval under the *Water Act* that are also subject to an EPEA approval.¹² The Appellants argued the construction of the raw water pipeline was one activity that required approval under EPEA and the *Water Act*.

¹¹ Appellants' submission, dated April 8, 2021, at paragraph 2.

¹² The Appellants referenced Schedule 1, section 9 of EPEA for the definition of "activities" as follows:

"(1) Any activity, diversion of water, operation of a works or transfer of an allocation of water under a licence for which an approval, licence or an approval of a transfer of an allocation of water under the *Water Act* is required.

(2) The definitions in the *Water Act*, except the definition of activity, apply to subsection (1).

(3) For the purposes of subsection (1), "activity" means

(a) placing, constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material or carrying out any undertaking, including, but not limited to, groundwater exploration, in or on any land, water or water body, that

(i) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including, but not limited to, water in a water body, by any means, including drainage,

[101] The Appellants noted a water supply line falls under the definition of a “waterworks system” in the *Activities Designation Regulation*, Alta. Reg. 276/2003,¹³ and the construction of a pipeline should be characterized as an “activity” under the *Water Act*.¹⁴

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- (ii) changes, may change or may become capable of changing the location of water or the direction of flow of water, including water in a water body, by drainage or otherwise,
 - (iii) causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body, or
 - (iv) causes, may cause or may become capable of causing an effect on the aquatic environment;
- (b) altering the flow, direction of flow or level of water or changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control, channel realignment or a similar purpose;
 - (c) drilling or reclaiming a water well or borehole;
 - (d) anything defined as an activity in the regulations under the *Water Act* for the purposes of that Act.”

¹³ The Appellants referenced section 4(i) of the *Activities Designation Regulation* for the definition of “waterworks system” as follows:

““waterworks system” means any system providing potable water to a city, town, specialized municipality, village, summer village, hamlet, settlement area as defined in the *Metis Settlements Act*, municipal development, industrial development, privately owned development or private utility, and includes any or all of the following components:

- (i) water wells connected to water supply lines, surface water intakes or infiltration galleries that constitute the water supply;
- (ii) water supply lines;
- (iii) on-stream and off-stream water storage facilities;
- (iv) water pumphouses;
- (v) water treatment plants;
- (vi) potable water transmission mains;
- (vii) potable water storage facilities;
- (viii) potable water pumping facilities;
- (ix) water distribution systems;
- (x) watering points.”

¹⁴ The Appellants referenced section 1(b) of the *Water Act* for the definition of “activity” as follows:

- “(i) constructing, operating, maintaining, removing or disturbing works, maintaining, removing or disturbing ground, vegetation or other material, or carrying out any undertaking, including but not limited to groundwater exploration, in or on any land, water or water body, that
 - (A) alters, may alter or may become capable of altering the flow or level of water, whether temporarily or permanently, including but not limited to water in a water body, by any means, including drainage,
 - (B) changes, may change or may become capable of changing the location of water or the direction of flow of water, including water in a water body, by drainage or otherwise,
 - (C) causes, may cause or may become capable of causing the siltation of water or the erosion of any bed or shore of a water body, or

[102] The Appellants noted the term “works” is broadly defined in the *Water Act*.¹⁵ The Appellants said the purpose of the raw water pipeline would be to transfer water from the point of diversion in the Highwood River to the raw water reservoirs in the HRWS and, therefore, construction of the pipeline would be capable of changing the location or flow of direction of water in a water body. They argued the raw water pipeline was an activity under the *Water Act* and cannot be started unless there is a *Water Act* approval.

[103] The Appellants stated the construction of the raw water pipeline could also be described as an “activity” under the *Water Act* because of the potential impact on the land under which it is to be installed. The Appellants stated the pipeline threatens to disrupt the natural drainage course of nearby underground water. The Appellants argued the definition of “activity” in the *Water Act* is broad enough to capture the alteration of the flow of non-waterbody water, and the definition of “water body” is broad enough to include underground water in the Silvertip Ranch community and along the proposed path of the pipeline.

[104] The Appellants disagreed with the Director’s explanation that no *Water Act* approval was required for the raw water pipeline itself because it does not cross through any waterbody or wetland. The Appellants argued the approval requirement in section 36 of the *Water Act*,¹⁶ as it relates to raw water pipelines, should not be contingent on the pipeline crossing a water body or wetland.

(D) causes, may cause or may become capable of causing an effect on the aquatic environment;

(ii) altering the flow, direction of flow or level of water or changing the location of water for the purposes of removing an ice jam, drainage, flood control, erosion control or channel realignment or for a similar purpose;

(iii) drilling or reclaiming a water well or borehole;

(iv) anything defined as an activity in the regulations for the purposes of this Act but does not include an activity described in subclause (i) or (ii) that is conducted by a licensee in a works that is owned by the licensee, unless specified in the regulations.”

¹⁵ Section 1(1)(mmm) of the *Water Act* defines “works” as”
“any structure, device or contrivance made by persons, or part of it, including a dam and canal, and
(i) land associated with it, and
(ii) mitigative measures associated with it,
and includes anything that is defined as a works in the regulations for the purposes of this Act.”

¹⁶ Section 36 of the *Water Act* states:
“(1) Subject to subsection (2), no person may commence or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.

[105] The Appellants stated the construction of the raw water pipeline requires both EPEA and *Water Act* approvals. The Appellants noted the Licence Holder did obtain other approvals and licences.

[106] The Appellants argued the Licence Holder is required to obtain a *Water Act* approval for the construction of the raw water pipeline given disruption of the ground associated with construction. The Appellants acknowledged the intake approval allows the construction of a portion of the raw water pipeline between the intake from the Highwood River to the proposed pump station. The Appellants said they have no concerns with construction of that section of the pipeline.

[107] The Appellants stated their concerns were the construction of the raw water pipeline from the pump station to the raw water reservoirs since the pipeline would pass directly beside Silvertip Ranch, increasing the risk of adverse effects on the Silvertip Ranch community. The Appellants argued the Licence Holder should be required to obtain separate approval under the *Water Act* to construct any part of the raw water pipeline that was not approved under the intake approval.

[108] The Appellants stated the Licence Holder provided little detail with respect to the construction of the raw water pipeline. The Appellants said there were few design details in the approval application or in other documents provided by the Licence Holder to assess whether the raw water pipeline would be designed according to AEP standards.

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- (2) No person shall commence or carry out an activity that is designated in the regulations as an activity in respect of which notice must be provided to the Director unless that person provides notice to the Director, in accordance with the regulations, of the intention to commence the activity or to carry out the activity.
 - (3) A person who commences or continues an activity
 - (a) that is designated in the regulations as exempt from the requirement for an approval or is part of a class of activities that is designated in the regulations as exempt from the requirement for an approval,
 - (b) that is an activity or part of a class of activities within an area of the Province that is designated in the regulations as an area where an approval is not required for that activity or class of activities, or
 - (c) that is an activity or part of a class of activities that is designated in the regulations as an activity or class of activities that does not require an approval but that must be carried out in accordance with the regulations,is not required to obtain an approval under this Act.
 - (4) An activity and class of activities described in subsection (3)(c) must be carried out in accordance with the regulations.”

[109] The Appellants considered the Licence Holder's efforts to ensure all affected parties understood and had the opportunity to provide input on construction of the pipeline under the 2018 Licences applications was inadequate. They said they only received further details of the raw water pipeline design after raising concerns during the public consultation for the 2020 Licences transfer applications. The Appellants stated the Licence Holder did not attempt to establish early and ongoing discussions with affected persons, such as Silvertip Ranch, regarding the raw water pipeline as required in the *Guide for Pipelines Pursuant to the EPEA and Regulations, March 1994*.

[110] The Appellants were particularly concerned with the lack of transparency and engagement regarding the route selection of the raw water pipeline, and it appeared the Licence Holder did not consider the environmental constraints of the proposed path of the raw water pipeline. The Appellants noted the K2 Report indicated it did not know the subsurface geotechnical conditions or groundwater conditions, so it was difficult to provide specific mitigative measures. The Appellants said they cannot be assured the route selection avoids environmentally sensitive areas, including water bodies like underground aquifers.

[111] The Appellants argued that, given the deficiencies in communication and route selection for the raw water pipeline, the design was not in accordance with AEP standards as asserted in the 2016 applications for the 2018 Licences.

III. DIRECTLY AFFECTED

[112] To have a valid appeal before the Board under section 115(1)(i) of the *Water Act*,¹⁷ an appellant must be able to demonstrate they are directly affected by the Director's decision being appealed. The Board has previously considered the term "directly affected" in

¹⁷ Section 115(1)(a)(i) of the *Water Act* provides:
"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

numerous decisions, providing a framework to determine if an appellant should be given standing before the Board. Although this framework is in place, the Board recognizes there must be some flexibility in determining who is directly affected, and the decision whether an appellant is directly affected will be governed by the particular circumstances of each case.¹⁸

[113] The Board has addressed the matter of directly affected in previous decisions based on the directly affected test articulated by the Court of Queen's Bench in *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456 ("*Court*").¹⁹ However, in *Normtek*, the Court of Appeal considered the meaning and application of the phrase "directly affected" in section 91(1)(a)(i) of EPEA²⁰ and modified the test. The directly affected test was assessed by the Court of Appeal as it applies under EPEA, but section 115(1)(a)(i) of the *Water Act* also requires the appellant to be "directly affected," and the general principles would apply whether the appeal is made under the *Water Act* or EPEA.

[114] The Court of Appeal modified the Board's "directly affected" test to require the Board to consider effects beyond an appellant's use of a "natural resource" by considering the effects of the Director's decision on safety, human-health, or property rights, or any environmental, social, economic, or cultural impacts of the activity if those impacts directly affect the appellant.

[115] The Court of Appeal assessed the meaning of "directly affected" based on the ordinary sense of the words that support the purpose and intent of the legislation.

decision, if notice of the application or proposed changes was previously provided under section 108,...."

¹⁸ See: *Fred J. Wessley v. Director, Alberta Environmental Protection* (2 February 1994), Appeal No. 94-001 (A.E.A.B.).

¹⁹ See: *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456 ("*Court*").

²⁰ Section 91(1)(a)(i) of EPEA states:

"A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), 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 73 and is directly affected by the Director's

[116] The Court of Appeal in *Normtek* stated the following on the meaning of “directly:”

“The adverb, ‘directly’ also restricts or limits the effects which can give rise to standing. The *Concise Oxford Dictionary* defines ‘directly’ as meaning ‘in a direct manner’. It defines ‘direct’ as ‘straight, not crooked or roundabout, following an uninterrupted chain of causes and effect’. There also appears to be a temporal aspect to ‘direct’ and ‘directly’. ‘Direct’ is defined as ‘immediate’. And ‘directly’ is defined as ‘at once, without delay.’ It is acknowledged that some types of prospective harm may be too remote or too speculative, but not all will be.”²¹

[117] In *Normtek*, the Court of Appeal approved, at paragraph 79, the Board’s interpretation of “affected” in the Board’s decision in *Bildson v. Alberta (Acting Director, North Eastern Slopes Region)*, (19 October 1998) Appeal No. 98-230-D (A.B.E.A.B.), 1998 ABEAB 42:

“The dictionary employed by the [Board] yielded ‘harmed or impaired’ as one meaning for ‘affected.’ On that basis, the [Board] concluded that an appellant must be harmed or impaired by the activity authorized by the approval being appealed. In other words, the [Board] interpreted ‘affected’ to mean adversely affected. The distinction between directly affected and adversely affected arises when others who are directly benefitted by the approval seek standing to support the Director’s decision, which is being appealed by a party who is directly and adversely affected. The *Concise Oxford Dictionary* which we consulted similarly defines the adjective ‘affected’ as ‘attacked (as by a disease)’ or ‘acted upon physically’. It defines the verb ‘affect’ as ‘attack (as disease)’ and as ‘producing a material effect on’. These meanings are not unlike those found by the [Board] over 20 years ago. And so, we too conclude that, without more, ‘directly affected’ connotes directly affected in an adverse fashion.”

[118] Based on these definitions, the Court of Appeal then looked at how “directly affected” should be applied when determining an appellant’s standing before the Board:

“[83] ...What is defined and employed is the term ‘adverse effect’. It is defined in s. 1(b) of [EPEA] as the impairment of or damage to the environment, human health, safety, or property. In other words, if one’s health, safety or property is potentially impaired by the decision of the Director’s approving an activity, that person may be directly affected and therefore have standing to appeal the Director’s

decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)...”

²¹ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 at paragraph 81.

decision, regardless of whether that person's use or enjoyment of the environment or a natural resource is likely to be impacted....

[85] Section 40 of EPEA also provides some indication of what effects might have been contemplated as causing a person to be directly affected. Section 40 states that the purpose of environmental assessment, among other things, is to predict the environmental, social, economic, and even cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the activity. While the proposed activity in this case was not deemed to have warranted consideration under the formal environmental impact assessment process established under Division 1 of [EPEA] (ss. 40-59), the Director is nevertheless obliged by [EPEA] to consider the environmental, social, economic and cultural consequences, if any, resulting from the proposed activity, as well as issues related to human health. Considerations relevant to the granting of an approval for a designated activity are not confined to impacts on natural resources. Nor are they even confined to impacts on the environment. And so the phrase 'directly affected' could not be limited to impacts on one's use of natural resources. Social, economic, cultural, safety, human health effects, if established, could also ground standing, as could adverse effects on property rights. They are all specifically mentioned in [EPEA]. If the direct effect on the person seeking to appeal a Director's decision is economic, cultural, safety or health-related or is on a property right, then standing to appeal may be available whether or not there is any connection to an environmental impact to a natural resource proximate to the site of the approval as suggested by the Board and the reviewing court...."²²

[119] The *Water Act* and EPEA both require an appellant to be "directly affected," which the Court of Appeal in *Normtek* found implies adversely affected.

[120] Based on the interpretation of "directly affected" and "adverse effect," the Court of Appeal determined the appellant does not have to show the Director's decision causes harm to a natural resource the appellant uses, but evidence of harm to a natural resource the appellant uses may be good evidence an appellant is directly affected. It is not a necessary prerequisite to establish standing before the Board. If the direct effect on the person seeking to appeal is environmental, social, economic, cultural, safety, or health-related or is on a property right, then standing to appeal may be available whether or not there is any connection to an environmental impact to a natural resource used by the appellant proximate to the site of the approval.

[121] The use of the phrase "directly affected" limits "the class of persons" who can appeal the Director's decision, but it also provides the Board broad discretion to determine who

²² *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 at paragraphs

is directly affected.

[122] On reviewing the directly affected test as articulated by the Court of Appeal in *Normtek, Kostuch*,²³ and *Leduc No. 25 v. Local Authorities Board*,²⁴ the Board finds the “directly affected” test provided in section 115(1)(a)(i) of the *Water Act* and section 91()(a)(i) of EPEA has three basic parts:

- a. whether there is an interest being asserted by the person;
- b. whether there is an adverse impact to the identified interest; and
- c. whether the adverse impact to the interest is direct.

[123] The first part of the test requires the appellant to demonstrate adverse effects of the Director’s decision on safety, human-health, or property rights, or any environmental, social, economic, or cultural impacts of the activity if those impacts directly affect the appellant. This is not an exhaustive list of rights or interests that could afford an appellant the right to appeal if they can show that right or interest will be affected by the Director’s decision. As stated in *Normtek*, the appellant’s use of a natural resource, or the right to use the resource, could also be the basis for finding an appellant directly affected.

[124] The second and third parts of the test require the appellant to provide information to show how the appellant’s rights or interests will be affected by the Director’s decision. Each consideration of directly affected status will be determined on a case-by-case basis, considering the varying circumstances and facts of the appeal. The Board cannot determine in advance or limit the circumstances in which an appellant may be found directly affected.

[125] The determination of directly affected status is a preliminary matter that is to be determined prior to a hearing on the merits, if one is held. Under EPEA, the Board’s enabling legislation, the Board has no authority to grant “provisional standing” to an appellant. The case law is clear: the issue of standing must be decided first, before the merits can be decided.

83 and 85.

²³ *Kostuch v. Alberta (Director, Air and Water Amending Approvals Division, Environmental Protection)* (1995), 17 C.E.L.R. (N.S.) 246 at (Alta. Env. App. Bd.), (*sub nom. Martha Kostuch v. Director, Air and Water Amending Approvals Division, Alberta Environmental Protection* (23 August 1995), Appeal No. 94-017 (A.E.A.B.), 1995 ABEAB 16) (“*Kostuch*”).

²⁴ See: *Leduc (County No. 25) v. Alberta (Local Authorities Board)* (1987), 84 A.R. 361 (Alta. C.A.).

[126] Rule 29 of the Board's Rules of Practice explains the onus is on the appellant to prove they are directly affected. Rule 29 states:

“In cases which the Board accepts evidence, any Party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.”

[127] In *Normtek*, the Court of Appeal noted the appellant has the onus to establish they will be directly affected by the Director's decision. When an appellant's standing is challenged, their onus is not to prove conclusively they are directly affected, but to establish a reasonable possibility they will be directly affected by the Director's decision. The effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find a person directly affected.

[128] The Court of Appeal noted the appellant needs to show a “reasonable possibility” they will be directly affected, and each participant to an appeal is required to submit evidence to support their position.

[129] The potential effect on the appellant's interest must be within reason and plausible for the Board to consider it sufficient to grant standing. The effect does not have to be unique in kind or magnitude.²⁵ 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 must be more than the generalized interest that all Albertans have in protecting the environment.²⁶

[130] When assessing the directly affected status of an appellant, the Board determines how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the possibility of finding the person directly affected.

²⁵ 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.).

²⁶ See: *Kostuch v. Alberta (Director, Air and Water Amending 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 Amending 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 Amending Approvals Division, Environmental Protection)* (1997), 21 C.E.L.R. (N.S.) 257 at paragraph 25 (Alta. Q.B.).

[131] The Board may dismiss an appeal if the Board is of the view the appellant is not directly affected, but such dismissal can only be made after the Board has considered the submissions from all the participants regarding the appellant's request for standing. The Board will make its determination as to whether an appellant is directly affected after the Board has allowed the appellant, approval or licence holder, and Director to provide submissions. The process will allow appellants to provide evidence on how they will be directly affected by the Director's decision, the approval or licence holder and Director will be given the opportunity to respond and, as the onus is on appellants to demonstrate they are directly affected, they are given the opportunity to provide a rebuttal submission. The Board will base its decision on whether an appellant is directly affected on the submissions provided by the participants.

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

IV. DISCUSSION

[133] What is under appeal in this case is the issuance of the 2020 Licences that allow the transfer of water licences previously held by the Previous Licence Holders to Foothills County, the current Licence Holder. The 2020 Licences transfer water, which the Previous Licence Holders no longer required for their operations, to the Licence Holder to use for municipal purposes. The Licence Holder intends to develop the Aldersyde Project, which requires a secure water source. The transfer of the licences provides additional water to the Licence Holder to ensure water is available for the development.

[134] It is the transfer of the water licences that must be the basis for determining if the Appellants are directly affected. The Appellants expressed concerns regarding the potential impacts the additional water flowing through the pipeline adjacent to their properties would have on their rights as property owners. The potential impact on the Appellants' property rights is sufficient to meet the first part of the directly affected test.

[135] To meet the second step in the directly affected test, the Appellants need to demonstrate there is a reasonable possibility an interest, in this case potential impacts the transfer of the water under the 2020 Licences would have on their rights as property owners, would be

affected. The third part of the test requires the Appellants demonstrate there will be a direct impact on their interests. In these appeals, these two parts are interconnected.

[136] The Board notes that, in these appeals, the Director determined the Appellants to be directly affected when assessing the Statement of Concern.

[137] Under section under section 115(1)(a)(i) of the *Water Act*, two requirements must be met to file a valid Notice of Appeal in response to the Director's decision to issue an approval or licence:

1. the person filing the Notice of Appeal must have filed a Statement of Concern; and
2. the person filing the Notice of Appeal must be directly affected.

[138] Under section 109(1)(a) of the *Water Act*, the Director needs to consider if the person filing the Statement of Concern is directly affected. Section 109(1)(a) of the *Water Act* provides:

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

[139] The Board has noted in previous decisions:

"...the decision-making function of the Director and the appellate function of the Board are different and that in keeping with this, it is appropriate for the Director to apply a more inclusive test with respect to directly affected than is applied by the Board. The purpose of the directly affected test with respect to the Statement of Concern process, and the Director's decision, is to promote good decision-making taking into account a broad range of interests. The process that the Director is engaged in is non-adversarial information collection – he is collecting information regarding the views and concerns of a broad range of parties to assist him in making a decision...."²⁷

[140] The Board considers the Director's more inclusive approach to directly affected, for the purposes of his decisions, is entirely appropriate. It is to be encouraged and is in keeping with section 2 of the *Water Act*.

²⁷ *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment, re: Ouellette Packers (2000) Ltd.* (28 January 2002) Appeal No. 01-076-D (A.E.A.B.) at paragraph 24.

[141] The purpose of Statements of Concern and the Director's decision-making process are reflected in the "*Administrative Policy: Statements of Concern (2014)*." This policy, established by Alberta Environment and Sustainable Resource Development (now Alberta Environment and Parks (AEP)), states:

"... The purpose of [a Statement of Concern] is to notify the Director and the project proponent of the person's concerns and to preserve the person's right to file an appeal following the Director's decision on the application or proposed amendment....

To be considered [a Statement of Concern], the submission must relate to the application or proposed amendment and must identify specific concerns with the application or proposed amendment.

Specific Considerations

Below is a listing of criteria to determine if [a Statement of Concern] should be considered valid.

[To be considered] Directly Affected The person must demonstrate:

1. The application or proposed amendment will affect the person;
2. The effect will be to the person;
3. The effect will be direct; and
4. There is a reasonable probability of the effect occurring.

...

Considerable judgement needs to be exercised in determining what constitutes a valid [Statement of Concern] and where there is any doubt the submission should be considered an [Statement of Concern]...."

[142] The purpose of the directly affected test before the Board is somewhat different. The Board's decision respecting directly affected determines whether a person has a right to appeal. As a quasi-judicial body, the Board must follow the Court of Appeal's decision in *Normtek* and other court decisions regarding standing. The Board must consider the onus or burden of proof in making its "directly affected" decisions. Also, the Board's appeal proceedings are more adversarial. Although the Director will usually provide reasons why they accepted a Statement of Concern filer as directly affected, the Board's determination of directly affected is based on additional information provided by the participants through the submission process as well as taking into consideration the burden of proof in the adversarial role. Therefore, the Director's determination of whether a Statement of Concern filer is directly

affected is not binding on the Board when determining directly affected standing for the purpose of filing a Notice of Appeal.

[143] Under the 2018 Licences, the 2018 *Water Act* Approval, and the 2018 EPEA Approval, the Licence Holder has the authority to construct the pipeline to transfer the water from the Highwood River to a reservoir. If the appeals were allowed and the Board determined the 2020 Licences should not have been issued, which the Board has made no determination on, the Licence Holder can still construct the pipeline and transfer the amount of water allowed under the 2018 Licences. The Appellants argued the 2020 Licences increased the amount of water going through the pipeline, thereby increasing the potential risk for flooding. Although the amount of water flowing through the pipeline may increase, the construction of the pipeline, including the size of the pipe and the location, will be the same as approved in the 2018 Licences and Approvals. The additional water under the 2020 Licences will not have an additional impact on the Appellants.

[144] Looking at the terms and conditions in the 2020 Licences, they are not different from the terms and conditions in the 2018 Licences. The Licence Holder can operate using all the terms and conditions in the 2018 Licences regardless of the 2020 Licences. The Board must determine if the Appellants are directly affected by the terms and conditions that are uniquely in the 2020 Licence.

[145] The pipeline has a limited capacity to carry water. Water can only be withdrawn and piped from the Highwood River when specific instream water flows are reached. This limits the number of days water can be transported through the pipeline. Since the 2020 Licences increases the amount of water that can be withdrawn from the Highwood River from what was allowed under the 2018 Licences, what will be different from the 2018 Licences is the number of days the pipeline will be in actual use. The size of the pipeline has not changed from that approved in the 2018 Licences and 2018 Approvals.

[146] The 2018 Licences and 2020 Licences are appurtenant to the same undertaking. The works the Appellants are concerned about were approved under the 2018 Licences and 2018 Approvals. The concerns expressed by the Appellants in their Notices of Appeal regarding the pipeline location and construction do not relate to the licence transfers currently under appeal.

[147] The Appellants were concerned of the potential for pipeline failures causing additional problems for the adjacent landowners. Pipeline failure is speculation and cannot be used as the basis to find the Appellants directly affected. One of the measures included in the K2 Report is to include alarm systems to alert the operator to shut down the system and to investigate for any possible leakages. With warning systems installed, the amount of water that would leak from the system and potentially impact the Appellants would be minimized.

[148] The 2020 Licences have the same terms and conditions as the 2018 Licences, except for the condition requiring the Licence Holder to abide by the K2 Report mitigation measures. This condition provides additional measures to ensure the pipeline is constructed and operated to minimize impacts on the Appellants. The Appellants were correct when they stated the Licence Holder must operate under the more stringent terms and conditions, which in this case is found in the 2020 Licences. If the decision to issue the 2020 Licences was reversed by the Minister after a hearing, these additional measures would not have to be considered when the pipeline was constructed under the terms and conditions in the 2018 Licences and related approvals.

[149] Many of the concerns expressed by the Appellants are speculative in nature. They are based on the pipeline failing, releasing water that will cause additional flooding onto their properties or water seeping into their homes. This would require the leakage to occur near their homes and the water flow towards their homes. The Appellants did not provide any technical data to demonstrate any increase in groundwater would result in water flowing towards their property, nor any information regarding the potential rate or volume of flow that would result from a pipeline failure due to the 2020 Licences. As stated in *Normtek*, the onus is on the appellant to show how they would be directly affected, and the impact must be causally connected. Without supporting documentation, the Appellants' concerns are speculative and cannot support finding the Appellants directly affected.

[150] The pipeline will be constructed on municipal lands adjacent to the Silvertip Ranch development. It will be installed underground, so it should not impede surface flows of water as suggested by the Appellants, except perhaps for a short period during construction. With proper reclamation of the pipeline, any changes to the topography or soil conditions should

not be perceptible. AEP is responsible for ensuring the site is properly reclaimed by the Licence Holder.

[151] The Appellants argued the pipeline would impact groundwater flows. However, the Appellants did not provide any data to demonstrate a pipeline of the diameter approved would impact natural groundwater flows to an extent, if at all, that would impact the Appellants.

[152] The Appellants said they were not aware of the applications for the 2018 Licences. Unfortunately, it was at that time Statements of Concern should have been filed to have the Director consider the matters raised by the Appellants regarding the location of the pipeline.

[153] The Appellants stated their failure to appeal the 2018 Licences had no bearing on their right to appeal the 2020 Licences. The Board agrees. Whether or not the Appellants appealed or not in 2018 does not affect whether they have the right to appeal the 2020 Licences. They are separate decisions with separate appeal rights. However, the Appellants must still meet their onus of demonstrating they are directly affected by the Director's decision to issue the 2020 Licences.

[154] If the Appellants are concerned regarding the location of the proposed reservoir, and if it is still under review, they should take any opportunity provided to them to present their concerns to the Director. That would be the proper forum to discuss those concerns.

[155] As the Appellants based their arguments on speculation, they failed to demonstrate how they would be directly affected. In addition, as explained above, the 2020 Licences have the same terms and conditions as the 2018 Licences, except for the condition requiring the Licence Holder to abide by the K2 Report mitigation measures. Therefore, even if the Board reversed the 2020 Licences, the construction and operation of the pipeline could still proceed pursuant to the 2018 Licences and 2018 EPEA and *Water Act* Approvals. Based on the above, the Board dismisses the appeals.

V. DECISION

[156] Based on the submissions and documents provided, the Board dismisses the appeals on the basis the Appellants, Dr. Caroline McDonald-Harker and the Silvertip Ranch Community, are not directly affected by the Director's decision to issue *Water Act* Licence Nos. 00392654-00-00, 00430926-00-00, 00464165-00-00, 00464185-00-00, and 00464187-00-00.

Dated on March 31, 2022, at Edmonton, Alberta.

"original signed by"
Meg Barker
Acting Board Chair

"original signed by"
Nick Tywoniuk
Board Member

"original signed by"
Chris Powter
Board Member