

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 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 an appeal filed by Doug Lindseth and Wade Lindseth, with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 5048740 to Bryce Haesloop.

Cite as: *Lindseth v. Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks*, re: Bryce Haesloop (21 July 2022), Appeal No. 20-004-D (A.E.A.B.), 2022 ABEAB 29.

BEFORE:

Ms. Meg Barker, Acting Board Chair.*

PARTIES:

Appellants: Wade Lindseth, and Doug Lindseth.

Director: Mr. Todd Aasen, Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

Approval Holder: Mr. Bryce Haesloop.

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

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Approval under the *Water Act* to Bryce Haesloop (the Approval Holder) to pump surface water from his land to a drainage creek and clear excess vegetation in the drainage creek. The Approval was for twenty years.

Local landowners, Wade Lindseth and Doug Lindseth (the Appellants), filed a Notice of Appeal with the Environmental Appeals Board appealing AEP's decision to issue the Approval. AEP filed a motion to dismiss the Notice of Appeal because the Appellants' land was located upstream from the drainage creek; therefore, they were not directly affected by the Approval.

The Board received submissions from the parties on whether the Appellants were directly affected by the Approval. After the Board received the submissions, the Court of Appeal of Alberta released its decision in *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board (Normtek)*, which addressed the test the Board applies to determine who can appeal to the Board as a "directly affected" person. The Board provided an opportunity for the parties to submit comments on how the Board should apply *Normtek* to the appeal.

Based on the submissions provided, the Board found the Appellants were not directly affected by the Approval and dismissed the Notice of Appeal. This is the Board's decision to dismiss the Appellants' Notice of Appeal.

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I. INTRODUCTION

[1] This is the decision of the Environmental Appeal Board regarding an appeal by Mr. Wade Lindseth and Mr. Doug Lindseth (the “Appellants”) of the decision by the Director, Red Deer-North Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the “Director”), to issue *Water Act* Approval No. 5048741 (the “Approval”) to Mr. Bryce Haesloop (the “Approval Holder”).

II. BACKGROUND

[2] In March 2020, the Approval Holder applied for an approval under the *Water Act*, R.S.A. 2000, c. W-3, to pump surface water from the Approval Holder’s land, located at N½ 15-46-15-W4M, north of the Hamlet of Strome, in Flagstaff County. The Director waived any requirement to provide public notice of the application.¹ On April 24, 2020, the Director issued the Approval to the Approval Holder to annually drain water from their land into a creek and clean out excessive vegetation from the creek bottom to maintain water flow and assist with drainage. Alberta Environment and Parks (“AEP”) provided public notice of the decision on April 24, 2020.²

[3] On April 30, 2020, the Board received a Notice of Appeal from the Appellants. The Appellants requested the Board revoke the Approval until the Appellants and the Approval Holder resolved an ongoing dispute regarding local flooding.

[4] On May 6, 2020, the Board acknowledged receipt of the Notice of Appeal and requested the Director provide contact information for the Approval Holder and the Director’s Record. The Board advised the Approval Holder of the Notice of Appeal on May 11, 2020.

[5] On July 8, 2020, the Director requested the Board dismiss the Appellants’ Notice of Appeal, stating the Appellants were not directly affected by the Approval for the following

¹ Director’s Letter, February 5, 2021, at pages 1 and 2.

² Director’s Letter, August 11, 2020, Exhibit 3.

reasons:

- (a) the Appellants do not own or rent land downstream of the dewatering area authorized by the Approval;
- (b) the works approved by the Approval would not interfere with drainage upstream of the dewatering area; and
- (c) the Appellants' reasons for the Notice of Appeal are not related to the activities authorized under the Approval.

[6] On July 9, 2020, the Board requested that the Director provide the following documents from the Director's Record:

- the application for the Approval and supporting documents;
- reports and maps;
- any statements of concern and related correspondence;
- communications with the community; and
- the plans specified in the Approval.

The Board also set a schedule for the Appellants to provide written submissions explaining how they are directly affected by the Approval and for the Director and the Approval Holder to provide written responses, followed by a rebuttal written submission by the Appellants.

[7] The Director provided a limited Director's Record on July 20, 2020, in response to the Board's July 9, 2020, request for documents.

[8] The Board received written submissions from the Appellants, the Director, and the Approval Holder (the "Parties") between July 27, 2020, and August 28, 2020. On September 22, 2020, after reviewing the legislation, the Parties' written submissions and comments, the Director's limited record, and relevant case law, the Board determined the Appellants were not directly affected, and reasons for its decision would be forthcoming.

[9] On January 20, 2021, the Board noted that since the Parties provided submissions, the Court of Appeal of Alberta had released its decision in *Normtek Radiation Services Ltd. v.*

Alberta Environmental Appeal Board (“*Normtek*”),³ which addressed the Board’s directly affected test. The Board provided an opportunity for the Parties to comment on how the *Normtek* decision related to the Appellants’ directly affected status. The Board received comments from the Appellants on January 21, 2021, and a submission from the Director on February 5, 2021.

[10] On February 6, 2021, the Board stated it would consider the recent correspondence and make a decision on the appeal.

III. ISSUE

[11] The issue the Board had to determine was whether the Appellants were directly affected by the Approval.

IV. SUBMISSIONS

A. Appellants

[12] The Appellants acknowledge that the work to be carried out under the Approval is downstream of their lands. However, according to the Appellants, the Approval Holder is being allowed to pump water off his land to increase the arable acreage on his land at the expense of the arable acreage on the Appellants’ land. The Appellants state that the Approval Holder is being allowed to pump water out of a wetland “as long as the water does not leave his land, which is impossible.”

[13] The Appellants submitted that the Approval Holder had trespassed onto their farm and constructed illegal dams to hold up the flow of a natural waterway. According to the Appellants, he has done this several times. The Appellants also stated that the result of the damming was to introduce scentless chamomile, a noxious weed which grows on the earthen dam. Further, the Appellants stated there are a number of compliance files in the watershed that

³ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456 (“*Normtek*”) addressed the test the Board applies to determine who can appeal to the Board as a “directly affected” person.

the Board should consider in making its decision. According to the Appellants, they have been waiting for AEP Compliance to respond to their concerns for four and half years. The Appellants believe that enforcement action is not being undertaken equally.

[14] The Appellants said the Approval would permit the Approval Holder to send water downstream as he had done without authorization in previous years. The Appellants suggested the Approval Holder had acted maliciously with disregard for his neighbours and their properties and that the Approval Holder had ignored AEP directions. The Appellants also expressed concern that in the May to June period, when the Approval Holder is allowed to pump water, the watershed is already at its maximum flow.

[15] The Appellants submitted that the Approval should be revoked and no other authorizations issued until the watershed issues in the area are resolved. The Appellants also express concern that this Approval is issued for 20 years when their information is that all other Approvals are only issued for 5 years.

B. Approval Holder

[16] The Approval Holder denied acting maliciously and stated the past issues were between himself and Mr. Wade Lindseth. According to the Approval Holder, the “natural watercourse” he is alleged to have blocked is not a natural watercourse but a man-made ditch created by the Appellants.

[17] The Approval Holder noted that the Appellants’ land was upstream from his land and that the Approval did not affect them. The Approval Holder notes that consent was required from a downstream landowner (Shirley Haesloop), but no consent was required from the Appellants as they are downstream. According to the Approval Holder, landowners upstream of the Appellants are causing their problems.

[18] The Approval Holder submitted that he supported finding a resolution to the water drainage issues. In the meantime, it was reasonable for AEP to grant the Approval to limit the amount of water draining into his farmland.

C. Director

[19] The Director noted the Approval authorized the Approval Holder to pump water from his land for a two-month window, April 1 to May 31 of each year. The Director stated there were no compliance issues related to the activity authorized by the Approval but that AEP was aware of other compliance issues in the area, which were reviewed before issuing the Approval.

[20] The Director noted the Appellants did not own any land where the water follows the natural drainage route. The Director stated: “AEP appreciates that the [Appellants] may have a general interest in the water issues in the Wavy Lake area; however, this is not enough to establish they are directly affected by this Approval.”⁴

[21] The Director noted the Board had discussed the issue of “directly affected” in previous decisions and relied on the *Court v. Alberta Environmental Appeals Board*⁵ case to guide its decisions on directly affected status. The Director stated the general principles used by the Board were:

- (a) the onus is on the appellant to demonstrate there is a reasonable possibility that they will be directly affected by the Director’s decision;
- (b) the effect must be reasonable and possible; and
- (c) the effect must be more than an effect on the public at large (it must be personal and individual in nature) and more than a generalized interest shared by all Albertans and protecting the environment.

[22] The Director submitted that the Appellants did not meet the threshold for being directly affected for the following reasons:

⁴ Director’s Response Submission, August 11, 2020, at page 2.

⁵ *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456, 2 Admin LR (4th) 71 (ABQB).

- the Appellants' land is located upstream from the pumping and drainage related to the Approval;
- the Appellants have not indicated how their land or use of the land will be affected by the Approval;
- the Appellants' concerns are related to compliance issues in the Wavy Lake area;
- the Appellants have presented no evidence to demonstrate that the pumping authorized by the Approval will directly or personally affect them; and
- most of the Appellants' concerns were general or related to other people in the area that may have water flow and natural drainage issues.

[23] The Director submitted the appeal should be dismissed.

[24] In the Director's comments on the impact of the *Normtek* decision, the Director stated:

"The merits of the [Appellants'] concerns appear to be related to dams, blockages and other compliance issues in the Wavy Lake area, rather than to the Approval under appeal. The *Normtek* decision in this case should not alter the Board's decision on whether the [Appellants'] are directly affected."⁶

D. Appellants' Rebuttal

[25] The Appellants acknowledged their land was upstream from the area impacted by the water pumping but submitted the Approval Holder's actions would continue to affect them as the water from the Appellants' land should flow into the drainage area and eventually into Wavy Lake. According to the Appellants, the water will enter Wavy Lake, which will affect them and also, the water will back up onto their land as the water is not allowed to flow through.

⁶ Director's Letter, February 5, 2021, at page 1.

[26] The Appellant state that the Approval Holder has admitted to trespassing on their land. The Appellants stated, “if trespassing onto my property to block the flow of water is not affecting me personally, I do not know how else we can define directly affected.”⁷

[27] The Appellants reiterated that the Approval should be revoked until the compliance issues are resolved. According to the Appellants, until the compliance issues are resolved, the Approval Holder should not be able to “set his own rules as to how much water enters his land and then be provided with [an Approval] to pump the remaining water downstream.” The Appellants argue that the Approval Holder is being allowed to force water in both directions to “personally gain in the middle.”

[28] The Appellants submitted that they were directly affected based on the *Normtek* decision.⁸

V. ANALYSIS

[29] An appellant filing a Notice of Appeal must demonstrate they are “directly affected” by the Director’s decision that is being appealed. In *Normtek*, the Court considered the meaning of “directly affected” in appeals before the Board.

[30] The Board reviewed the Court of Appeal’s guidance in *Normtek*, including its consideration and agreement with the reasoning in *Kostuch* and *Leduc No. 25 v. Local Authorities Board*, as it relates to a party’s standing.⁹ Based on this review, the Board finds the directly affected test provided in section 115(1) of the *Water Act* and section 91(1) of EPEA has three components:

⁷ Appellants’ rebuttal submissions, August 28, 2020, at page 1.

⁸ Appellants’ email, January 21, 2021.

⁹ See *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456; *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995) 17 C.E.L.R. (N.S.) 246 (A.E.A.B.); and *Leduc No. 25 v. Local Authorities Board*, 1987 ABCA 172.

1. whether there is an interest being asserted by the person consistent with those identified in *Normtek*,¹⁰
2. whether the person demonstrated on a *prima facie*¹¹ basis that there was an adverse impact on the identified interest; and
3. whether the person demonstrated on a *prima facie* basis that the impact on the identified interest was direct.

For a person to be directly affected, they must meet all three components.

[31] With respect to the interest being asserted that would be directly affected, it is important to remember that in *Kostuch*, at paragraph 28, the Board stated, "...the word 'directly' requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval in question." However, as confirmed in *Normtek*, the qualifying interests might come from a number of sources, including the appellant's use of the natural resource in the vicinity of the approved activity and adverse effects on the appellant's economic, cultural, safety, or human health-related interests, or property rights. In *Kostuch*, one of the considerations was that the interest of a directly affected person had to be greater than "the abstract interest of all Albertans in generalized goals of environmental protection."¹²

[32] Trying to define in advance or limit the circumstances in which an appellant might be found directly affected is to be avoided.¹³ The Board will interpret directly affected as

¹⁰ The interests identified in *Normtek* include adverse effects on environment, safety, human health, or property, and any social, economic, and cultural interests that are directly affected.

¹¹ See *Black's Law Dictionary Free Online Legal Dictionary (2nd Ed.)*, which provides:
"PRIMA FACIE: [Latin] At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably. ...
PRIMA FACIE EVIDENCE: ... [E]vidence that is (1) an established fact but not conclusive, or (2) supportive of a judgement until the presentation of contradictory evidence."

¹² *Kostuch v. Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995) 17 C.E.L.R. (N.S.) 246 (A.E.A.B.) at paragraph 34.

¹³ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 78.

limiting the class of persons who can appeal a Director's decision.¹⁴ However, the Board retains broad discretion to determine who is directly affected.¹⁵ *Normtek* and other decisions provide several principles that will guide the Board's application of its directly affected test:

1. The Board will determine the directly affected status of an appellant on a case-by-case basis, considering the varying circumstances and facts of each appeal;
2. The Board will examine the adverse effects alleged by the appellant of the Director's decision or the activity authorized by the Director's decision on (a) the environment, (b) human health, (c) safety, or (d) property interests. The Board may also examine (a) social, (b) economic, and (c) cultural impacts alleged by the appellants of the Director's decision or the activity authorized by the Director's decision if those impacts directly affect the appellant's identified interests;¹⁶
3. The Board will examine the harm to a natural resource, which an appellant uses, or harm to an appellant's use of a natural resource. This may be sufficient to find an appellant directly affected, but it is not a prerequisite to establishing an appellant is directly affected where other adverse effects are alleged;
4. The Board will interpret "directly" as meaning the Director's decision must have a clear and uninterrupted chain of cause and effect, which links the decision to the appellant's identified interest. The effect must be one that will occur immediately or without delay and not at an undetermined time in the future. Some types of future harm, but not all, maybe too remote or speculative to be considered direct;¹⁷
5. The Board will interpret "affected" as meaning the Director's decision or the activity authorized by the Director's decision will harm or impair the

¹⁴ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 77.

¹⁵ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 78.

¹⁶ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraphs 79, 83, 85, and 135.

¹⁷ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraphs 79 and 81. As discussed in *Normtek*, the adverb "directly" restricts or limits the effects that 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." Further, "directly" is defined as "at once, without delay."

appellant's identified interests.¹⁸ Directly affected connotes an adverse impact;¹⁹

6. The Board will consider the nature and merits of the appellant's notice of appeal when considering if they are adversely affected by the Director's decision or the activity authorized by the Director's decision.²⁰ The appellant must provide *prima facie* evidence to support their position that they are directly affected.²¹ This evidence need only establish a reasonable possibility that they will be directly affected;²² and
7. The Board may summarily dismiss a notice of appeal where it determines the appellant is not directly affected, but such summary dismissal can only be made after there has been some consideration of the merits of the appellant's appeal.²³

The Board will apply these principles to its consideration of whether the Appellants are directly affected by the Approval or the Director's decision to issue the Approval.

[33] In this particular appeal, the Board considered the factors outlined above and applied them to the facts of the appeal. The Director and Approval Holder argued the Appellants were not directly affected as their land was upstream of the area impacted by the Approval. The Appellants acknowledged they were located upstream but maintained the other issues in dispute

¹⁸ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 79; which cites *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.), 1998 ABEAB 42, at paragraph 25. The *Concise Oxford Dictionary* defines the adjective "affected" as "acting on physically" or "producing a material effect on." The Court in *Normtek* agreed with the Board previously defining "affected" as meaning "harmed or impaired."

¹⁹ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 79.

²⁰ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 135.

²¹ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 140, and Rule 29 of the Board's *Rules of Practice*.

²² *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 141. This paragraph referred to *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, at paragraphs 24 and 26, and relied on *Leduc (No 25) v. Local Authorities Board* (1987), 84 AR 361 at paragraphs 11 and 12, 54 Alta LR (2d) 396 (ABCA).

²³ *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 136.

between the Appellants and the Approval Holder needed to be resolved before the work authorized in the Approval could proceed.

[34] Applying the directly affected test prescribed by the *Normtek* case, the first step is determining whether an interest is being asserted by the person that is consistent with those identified in *Normtek*. In terms of *Normtek*, property rights are allegedly being impacted. Specifically, the Appellants are arguing that their land is being physically impacted by water coming from the activity authorized by the Approval, either by the water backing up on their land or entering Wavy Lake. This is an interest consistent with the *Normtek* case; therefore, the first part of the directly affected test has been met.

[35] The second part of the directly affected test is whether the person demonstrated on a *prima facie* basis that there was an adverse impact on the identified interest. Respectfully, the Appellants have not met this part of the test. The Appellants have provided no evidence that what they suggest is actually happening; their statements are suppositions.

[36] The evidence before the Board, as presented by the Director, shows the opposite to be true. It shows that the Appellants are upstream of the activity authorized under the Approval and that the act of pumping water from one wetland to another on the Approval Holder's land does not have an upstream impact. Specifically, the Director provided the Board with (a) a pumping plan, (b) a map showing titled land ownership, and (c) a conceptual image showing the general flow direction of water in the area. The pumping plan showed the activity authorized in Approval, which allowed water to be pumped from points 1 to 2 and 2 to 3, with water flowing naturally from points 3 to 4 towards the south. This shows water flowing away from the Appellants' land.

[37] No *prima facie* evidence has been presented by the Appellants to support their directly affected claim. Therefore, the Board finds they are not directly affected. The Board need not address the third part of the directly affected test, which is whether the person demonstrated on a *prima facie* basis that the impact on the identified interest was direct.

[38] The Board finds the Appellants' land is located upstream from the area impacted by the Approval. The Approval authorized the pumping of water from the Approval Holder's land into drainage areas downstream of the Appellants' land. There is no merit to the Appellants' claim that the activities authorized in the Approval would directly affect the Appellants' land.

[39] The Board finds the ongoing dispute between the Approval Holder and the Appellants, which included compliance issues, is a matter separate to the Director's decision to issue the Approval and is not a relevant consideration for the Board in this appeal.

VI. DECISION

[40] The Board finds the Appellants are not directly affected by the Approval, and therefore, the Board dismisses the Appellants' Notice of Appeal.

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

"original signed by"

Meg Barker
Acting Board Chair