



ALBERTA
ENVIRONMENTAL APPEALS BOARD

2022 ABEAB 33

August 15, 2022

Via E-Mail

To Distribution List

Dear Ladies and Gentlemen:

**Re: Decision* - Town of High River/Water Act Approval No. 00419723-00-00
Our File Nos.: EAB 19-089, 093 & 094**

These are the reasons for the Environmental Appeals Board's (the "Board") November 9, 2020 decision concerning the issues for the hearing of these appeals. Ms. Anjum Mullick, Panel Chair, made the decision.

Background

On January 28, 2020, the Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the "Director") issued Approval No. 00419723-00-00 (the "Approval") under the *Water Act*, R.S.A. 2000, c.W5 (the "*Water Act*") to the Town of High River (the "Town"). The Approval authorizes the construction and placement of a berm (approximately 2.6 kilometres long) and swale at Section 35-018-29-W4M and S½-01-19-29-W4M within the Highwood River's floodplain (the "Southwest Dike") resulting in the permanent alteration of the flow, direction of flow and the water levels of the Highwood River. The Approval also changes the location of water for drainage purposes.¹ The Board received Notices of Appeal from Mr. Delbert and Ms. Helen Edey (the "Edeys"), Mr. James and Ms. Lillian Howie (the "Howies"), and Mr. Rod and Ms. Nicole Macklin (the "Macklins") (collectively, referred to as the "Appellants").²

* Cite as: *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Town of High River* (15 August 2022), Appeal Nos. 19-089 and 093-094-ID3 (A.E.A.B.), 2022 ABEAB 33.

¹ *Water Act* Approval No. 00419723-00-00, January 28, 2020, at the Purpose and Conditions 3.0(a).

² The Board received Notices of Appeal from the Edeys on February 7, 2020, from the Howies on February 10, 2020, and from the Macklins on February 17, 2020.

On May 5, 2020, the Board proposed issues for the hearing and asked the Appellants, the Director, and the Town (collectively the “Parties”) to provide comments.³ The Board received comments from the Parties between May 5 and May 22, 2020.

Submissions

1. Appellants’ Comments

The Appellants expressed concern that the single issue proposed by the Board would result in a hearing that was overly narrow and limited in scope. The Appellants further expressed concern that not all of the relevant issues and concerns would be heard.

The Appellants proposed the issues be worded as follows:

“Issue: Accuracy/reliability of the modeling conducted for the Town that forms the basis for the design of the Southwest Dike

- How accurate/reliable are the modeling results?
- What is the margin of error in the model?

Issue: Appropriateness/suitability of constructing a dike in a floodway /floodplain

- Could protection of the Town of High River from flooding coming from the south be achieved in other ways and with different berth alignments that respect the location of the existing floodway zone and natural overflow path?

Issue: Alignment of the proposed Southwest Dike

- Is the alignment proposed for the Southwest Dike appropriate given the cumulative effects of all the dikes previously constructed by the Town and approved by AEP?

³ The Board proposed the following issues:
Are the terms and conditions in the Approval adequate having regard to the potential environmental impacts of the Approval? This includes but is not limited to:

- The impact of the Approval to each of the Appellants’ lands having regard to their flood protection right.

Issue: *Potential Impacts of the Southwest Dike*

- What are the downstream impacts of the Southwest Dike Project and has the Town of High River developed a compensation or protection plan that is defensible, equitable and which appropriately addresses future risks and liabilities?⁴

The Appellants argued the Board should reject the Town's arguments that the *Water Act* does not expressly or impliedly provide a flood protection right. The Appellants argued the Town's arguments were without merit and should be rejected by the Board.

The Appellants stated every property owner has a right to quiet possession and enjoyment of their property. The Appellants further stated that the flooding of land is a recognized type of damage constituting a legal nuisance. The Appellants argued that an activity by a person that causes the release of water onto another person's property is potentially both a trespass and a nuisance, and unreasonable interference with an occupier's interest in the beneficial use and enjoyment of their land. The Appellants commented that they interpreted the Board's proposed issue to be based on the premise that "... when approving an activity as being in the public interest, the Director should have regard to whether that activity will create a trespass and nuisance to the properties of third parties."⁵

The Appellants also argued the Board should reject the arguments that the proposed hearing issue should not contain a reference to their flood protection rights as it would be inconsistent with the Director's acceptance of their statements of concern. The Appellants argued their statements of concern were accepted because the Southwest Dike directly affected their properties. The Appellants argued if they did not have a right to be protected from flooding caused or contributed to by a third party, the Southwest Dike would not have had a direct effect on them. The Appellants commented that the Director and Town's arguments were an indirect argument that the Southwest Dike does not affect them.

2. Town's Comments

The Town commented that the *Water Act* does not expressly or impliedly provide a flood protection right nor does the *Water Act* provide the Director with the mandate to consider the Town's application in the context of a flood protection right. The Town further commented it did not believe a reference to the Appellants' flood protection right should be included in the statement of the issue.

⁴ Appellants' Letter, May 11, 2020, at pages 2 and 3.

⁵ Appellants' Letter, May 22, 2020, at page 2.

The Town proposed the issue be stated as:

“Are the terms and conditions in the Approval adequate having regard to the potential environmental impacts of the approved activity.”⁶

The Town argued that as stated, this issue would include consideration of all of the environmental impacts alleged by the Appellants.

The Town further commented the four issues set out by the Appellants are not appropriately included in the statement of the issue for the hearing and concurred with the Director’s arguments. The Town noted the first issue proposed by the Appellants is evidential in nature and may be captured by the issue as proposed by the Board and the Director. The Town further noted the second and third issues proposed by the Appellants relate to policy decisions made by the Town with respect to its flood protection measures for its citizens, and such matters are outside the jurisdiction of the Board. The Town concluded by stating the last issue proposed by the Appellants is related to financial compensation, and is also outside the jurisdiction of the Board.

3. Director’s Comments

The Director commented the Approval itself does not create environmental impacts, but acknowledged that the approved activity may. The Director further noted that in reviewing the notices of appeal and previous correspondence, no party had raised a flood protection right. The Director stated it was unclear to the Director what this right was, or how this right related to either the Approval, or the Director’s decision to issue the Approval under the *Water Act* and the matters and factors under the *Approved Water Management Plan for the South Saskatchewan River Basin*.⁷ The Director submitted a flood protection right should not be an issue or form a part of the hearing.

The Director proposed the issue should be worded as follows:

“Are the terms and conditions of the Approval adequate having regard to the potential environmental impacts of the approved activity?”⁸

⁶ Town’s Letter, May 11, 2020, at page 1.

⁷ *Approved Water Management Plan for the South Saskatchewan River Basin*, Alberta Environment and Parks, January 1999 (“SSRB Plan”).

⁸ Director’s Letter, May 11, 2020, at page 1.

In response to the Appellants' first proposed issue, the Director commented the Director considers modelling as a part of making his decision and the Appellants' proposed issue regarding the modelling could be subsumed under a general issue for the hearing. The Director noted his decision is guided by section 38 of the *Water Act*⁹ and the matters and factors in Table 2 of the SSRB Plan. The Director submitted section 38 of the *Water Act* and Table 2 of the SSRB Plan should be used to determine whether the terms and conditions of the Approval are adequate.

The Director responded to the Appellants' proposed second issue by stating he reviews a project design as submitted. The Director stated a project redesign would require the approval of the Town, perhaps the involvement of the municipality where the Appellants reside, and notice to others who may be directly affected. The Director stated a redesign would return the Approval to the application stage.

In response to the Appellants' proposed third issue, the Director commented he must consider certain cumulative effects under the matters and factors contained in Table 2 of the SSRB Plan. He further commented in response to the Appellants' proposed fourth issue, he must consider downstream impacts of an activity on the aquatic environment, hydraulic, hydrological and hydrogeological effects, and effects on household users, licensees and traditional agricultural users.

The Director concluded by commenting he may consider public safety under section 38 of the *Water Act*, but has no statutory mandate to consider compensation. The Director submitted compensation issues were also out of scope for the hearing as they are similarly outside the jurisdiction of the Board and the Minister of Environment and Parks.

Analysis

Under section 95 of *Environmental Protection and Enhancement Act*,¹⁰ the Board has the authority to determine the issues that will be heard at the hearing.

⁹ Section 38 of the *Water Act* provides in part:

- “(2) In making a decision under this section, the Director
- (a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan,
 - (b) may consider any existing, potential or cumulative
 - (i) effects on the aquatic environment,
 - (ii) hydraulic, hydrological and hydrogeological effects, and
 - (iii) effects on household users, licensees and traditional agriculture usersthat result or may result from the activity, and
 - (c) may consider
 - (i) effects on public safety, and
 - (ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant.”

¹⁰ *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the “Act”).

Section 95 of the Act provides in part:

- “95(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in the notices of appeal properly before it will be included in the hearing of an appeal...
- (3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.
- (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

For a matter to be properly before the Board and set as an issue for the hearing, the matter must be included in the notice of appeal, relate to the decision being appealed and be within the Board’s jurisdiction.

The Appellants have argued that the issue proposed by the Board is overly narrow and does not encompass all of their concerns arising from the Approval and the Southwest Dike. The Appellants have suggested wording that in their view, would more clearly set out the issues for the hearing. The Appellants further asked the Board to reject the Director’s arguments to remove the reference to the Appellants’ flood protection right, as the removal would be inconsistent with the Director’s acceptance of their statements of concern. The Appellants argued their statements of concern were accepted because the Southwest Dike had the direct effect of causing flooding to their properties.

Both Town and the Director argued against the inclusion of the flood protection right. The Director argued that it was unclear what this right was, and that it was not included in the Appellants’ notices of appeal. The Director also commented while a flood protection right does not appear in the legislation and policies, he was obligated to consider the environmental impacts of the proposed activity. The Director proposed wording based on this obligation. Given this information, the Board considers it appropriate not to reference the flood protection right and to more closely follow the considerations the Director must make when issuing the Approval.

With regard to issues related to compensation, both the Town and the Director argued against any reference to monetary compensation as this is also outside the jurisdiction of the Board. The Board agrees with the Town and the Director that monetary compensation is outside of the jurisdiction of the Board and therefore, cannot form an issue for the hearing.

The Director argued the Appellants' first proposed issue could be subsumed under the general issue proposed by the Board, as the Director is required to consider modelling when making his decision. The Town similarly argued the Appellants' concerns could be encompassed in one broad issue. The Board notes the Edeys raised specific concerns regarding the modelling in their notice of appeal.

The Town argued the second and third issues proposed by the Appellants related to policy issues made by the Town which are outside of the jurisdiction of the Board. In regards to the second and third issue proposed by the Appellants, the Director argued he reviews projects as designed, and is required to consider cumulative effects. The Director further argued any changes to the design of the Southwest Dike would require notice to those who are directly affected and return the Approval to the application stage. The Board notes the Macklins raised a concern regarding the construction of the Southwest Dike in the floodplain. All of the Appellants raised concerns to varying degrees regarding the impacts arising from the Southwest Dike to their properties, safety and infrastructure.

The Board finds the Appellants raised issues related to the scientific and technical studies, appropriateness of constructing the Southwest Dike in the Highwood River's floodplain, and the appropriateness of the Approval's terms and conditions in their notices of appeal.

Given the wide breadth of concerns raised by the Appellants, the Board finds that it would be appropriate to set out three broad issues, with detailed references below those issues to scope and provide guidance for those issues.

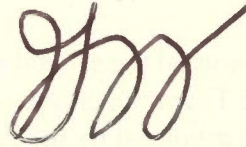
Conclusion

As stated in its decision letter dated November 9, 2020, the Board determined that the issues for the hearing were:

1. Are the terms and conditions of the Approval appropriate having regard to the potential environmental impact of the approved activity? This includes but is not limited to the potential environmental impact of the Approval on each of the Appellants (i.e. property, business, safety).
2. The accuracy and reliability of the technical and scientific studies that informed the Director's decision to issue the Approval. This includes but is not limited to any modelling that was undertaken.
3. The appropriateness of constructing a dike in a floodway or floodplain as authorized by the Approval under appeal before the Board.

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

Yours truly,

A handwritten signature in black ink, appearing to read 'G. Van Nes', with a long, sweeping flourish extending to the right.

Gilbert Van Nes
General Counsel
and Settlement Officer

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

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**Distribution List
Town of High River
(EAB 19-089-091, 093-094)**

Appellants

Mr. Delbert and Ms. Helen Edey (19-089)

[Redacted]

Mr. James Howie (19-093)

[Redacted] S9

Mr. Rod and Ms. Nicole Macklin (19-094)

[Redacted]

Mr. Gavin Fitch
McLennan Ross LLP
#1900 Eau Claire Tower
600 – 3 Avenue SW
Calgary, AB T2P 0G5
(gfitch@mross.com)
*(Representing Appellants 19-089, 093 & 094 and
Intervenor)*

Intervenor

Mr. Peter and Ms. Sheila Macklin

[Redacted]

(Appeal EAB 19-091 dismissed, on Nov 9, 2020
permitted to intervene)

Director, Alberta Environment and Parks

Ms. Jodie Hierlmeier
Ms. Jade Vo
Alberta Justice and Solicitor General
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6
(jodie.hierlmeier@gov.ab.ca, jade.vo@gov.ab.ca and
aep.environmental.law@gov.ab.ca)
(Representing the Director, AEP)

Approval Holder

Mr. Chris Prosser
Chief Administrative Officer
Town of High River
309B Macleod Trail SW
High River, AB T1V 1Z5
(cprosser@hrmdf.net, lalbert@hrmdf.net and
tgilliss@hrmdf.net)

Ms. Meaghan Conroy
MLT Aikins LLP
#2200, 10235 – 101 Street
Edmonton, AB T5J 3G1
(mconroy@mltaikins.com)
(Representing the Town of High River)