

ALBERTA  
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision: December 14, 2005

**IN THE MATTER OF** sections 91, 92, 97, and 101 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 Elin Barlem, Linda Covey, and Ray Cerniuk with respect to Amending Approval No. 00193447-00-02 issued under the *Water Act* to Hal Willis by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Barlem et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (14 December 2005), Appeal Nos. 05-010-012-D (A.E.A.B.).

## EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval under the *Water Act*, amending an Approval issued to Mr. Hal Willis, allowing him to place clean fill on property adjoining Dodds Lake in Innisfail, Alberta. The Amending Approval changed the address of Mr. Willis and extended the expiry date of the Approval until October 31, 2005. The Environmental Appeals Board received three appeals of the Amending Approval. The appellants also requested a Stay of the Amending Approval and a reconsideration of the Board's Report and Recommendations issued in response to the appeals of the original Approval.

The Board dismissed the appeals of the Amending Approval, as the appellants did not provide sufficient reasons to demonstrate that section 115(2)(c)(iii) of the *Water Act* should not apply in this circumstance. Section 115(2)(c)(iii) clearly states there is no right of appeal when the Director amends an approval by extending the expiry date. As there was no valid appeal before the Board, the Stay request was denied.

The Board also denied the reconsideration request of its Report and Recommendations\* as the appellants did not demonstrate there were exceptional circumstances that would justify the Board reconsidering its recommendations and introducing unwarranted uncertainty into its decision-making process.

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\* (*Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.)).

**BEFORE:**

Dr. Steve E. Hrudehy, Chair.

**PARTICIPANTS:**

**Appellants:** Ms. Elin H. Barlem, Ms. Linda Covey, and Mr. Ray Cerniuk.

**Approval Holder:** Mr. Hal Willis.

**Director:** Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

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## I. INTRODUCTION

[1] Alberta Environment issued Approval No. 00193447-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c.W-3, to Mr. Hal Willis (the “Approval Holder”) to place clean fill on property adjoining Dodds Lake in Innisfail, Alberta. The Environmental Appeals Board (the “Board”) received 26 Notices of Appeal objecting to the Approval. For standing purposes, the Board accepted seven of the Notices of Appeal and dismissed the remaining 19 Notices of Appeal because the individuals were not directly affected.<sup>1</sup>

[2] A Hearing was held on April 13, 2004, in Red Deer, Alberta. On May 12, 2004, the Board provided the Minister with its Report and Recommendations, and on May 17, 2004, the Minister issued Ministerial Order 08/2004, accepting the Board’s recommendations.<sup>2</sup> The Ministerial Order confirmed the Approval with variations. Specifically, the Ministerial Order changed the expiry date from June 30, 2004 to June 30, 2005. The Ministerial Order also required the Approval Holder complete a survey to delineate the bed and shore of Dodds Lake and to consult with the Public Lands Division of Alberta Sustainable Resource Development when preparing the report. The Approval Holder was required to submit the survey and report to the Director for approval before starting work.

[3] On June 27, 2005, the Director issued Amending Approval 00193447-00-02 (the “Amending Approval”), extending the expiry date of the Approval to October 31, 2005, and updating the Approval Holder’s address.

[4] The Board received three appeals regarding the issuance of the Amending Approval.

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<sup>1</sup> See: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (20 January 2005), Appeal Nos. 03-014-019, 021-027, 029-038, and 03-082-ID1 (A.E.A.B.). The Board accepted the appeals of Ms. Margaret Baycroft, Ms. Margaret E. Medak, Ms. Laurie Ann Miller, Mr. Randy Miller, Ms. Leah Wile, Ms. Dixie and Mr. Kevin Ingram, and Ms. Doreen and Mr. William Thomsen. The Board dismissed the appeals of Ms. Linda Covey, Ms. Elin H. Barlem, Mr. J. Mark Barlem, Mr. Bill and Ms. Linda Biggart, Mr. Leo E. Carter, Ms. Judy Hudson, Mr. Robert R. Lewis, Mr. Ron Macdonald, Mr. Len Plummer, Ms. Karen Strong, Mr. Laurence Strong, Ms. Laurie Zaleschuk, Mr. Robert J. Miller, Mr. Larry and Ms. Eleanor Brown, Mr. Sydney Ms. Myrtle Quartly, Mr. William Froling, and Ms. Jean Veldkamp and Mr. Howard Milligan.

<sup>2</sup> See: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.).

## II. BACKGROUND

[5] On June 27, 2005, the Director, Central Region, Regional Services, Alberta Environment (the “Director”) issued Amending Approval No. 00193447-00-02 under the *Water Act*, the Approval Holder, amending the expiry date of Approval No. 00193447-00-00 to October 31, 2005, and updating the Approval Holder’s address. The Approval authorized the placement of clean fill on property adjoining Dodds Lake at SW 28-35-28-W4M in Innisfail, Alberta.

[6] On August 2, 2005, the Board received Notices of Appeal from Ms. Elin Barlem (05-010), Ms. Linda Covey (05-011), and Mr. Ray Cerniuk (05-012), (collectively the “Appellants”) appealing the Amending Approval. The Appellants also requested a Stay, and Mr. Cerniuk requested a reconsideration of the Board’s Report and Recommendations<sup>3</sup> and Ministerial Order 08/2004.<sup>4</sup>

[7] On August 2, 2005, the Board acknowledged the Notices of Appeal and notified the Director and the Approval Holder of the appeals. In this same letter, the Board asked the Participants<sup>5</sup> to provide comments on the whether Notices of Appeal can be filed considering section 115(2)(c)(iii) of the *Water Act* states: “Notwithstanding subsection (1), a notice of appeal may not be submitted with respect to an amendment to extend the expiry date of an approval, preliminary certificate or licence.”

[8] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

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<sup>3</sup> See: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.).

<sup>4</sup> Ms. Linda Covey and Ms. Elin Barlem requested the Board reconsider its decision regarding *Water Act* Approval 00076694-00-00 (the “Innisfail Approval”) issued to the Town of Innisfail on March 3, 2000, authorizing the installation of a culvert in the bed and shore of Dodds Lake. The Innisfail Approval is separate and distinct from the Approval discussed in this decision, and therefore, their reconsideration of the Innisfail Approval decision will not be discussed in this decision but will be addressed under Appeal Nos. 05-022 and 05-023. See: *Biggart v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.); *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal No. 03-040-058 and 03-060-081-D (A.E.A.B.); and Reconsideration Decision: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-RD (A.E.A.B.).

<sup>5</sup> The “Participants” in this decision include, collectively, the Appellants, Approval Holder, and Director.

[9] On August 22 and 23, 2005, the Board received comments from the Participants.

[10] On September 20, 2005, the Board notified the Participants that there is no right of appeal of the Director's decision to extend the expiry date of the Approval, and the appeals are dismissed. The Board denied the reconsideration request of its previous report and recommendations regarding the Approval. As there was no valid appeal before the Board, the Stay requests could not be considered. The following are the Board's reasons.

### III. SUBMISSIONS

#### A. Appellants

[11] Ms. Elin Barlem and Ms. Linda Covey reviewed the history of the site where the project is to take place. They explained the surveyor of the bed and shore submitted a survey from the archives, showing the bed as of 1918, and stated the natural bank is under water because human interference made the current water level artificially high.

[12] Ms. Barlem and Ms. Covey stated the documents they received from Public Lands Division undermine the rationale of the surveyor's reasoning. These Appellants referred to a 1985 document issued by the Documentation Section, Public Lands Division, in which it indicated the lake level had been deemed to be natural and at the time, the lake was full. They explained the 1985 document "...shows that ownership of any titled lots lying within the bed and shore lie within the department, pursuant to Section 3..."<sup>6</sup> of the *Public Lands Act*, R.S.A. 2000, c. P-40.<sup>7</sup>

[13] Ms. Barlem and Ms. Covey argued 1992 documents they obtained from the Public Lands Water Boundaries Division specifically refer to Block F, Plan P, and the area in question

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<sup>6</sup> Ms. Elin Barlem and Ms. Linda Covey's submission, dated August 18, 2005.

<sup>7</sup> Section 3 of the *Public Lands Act* provides:

"(1) Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of

(a) all permanent and naturally occurring bodies of water, and

(b) all naturally occurring rivers, streams, watercourses and lakes,

is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before, on or after May 31, 1984 does not convey title to those beds or shores. ...

(3) For the purposes of subsection (1), a river, stream or water course does not cease to be naturally occurring by reason only that its water is diverted by human act."

was located totally within the bed and shore of the lake. They argued the Approval allows fill to be added in Block F, Plan P, only because the Town of Innisfail was allowed to install a culvert to drain water from the lake.

[14] Ms. Barlem and Ms. Covey stated the lake level is artificially low and the proposed clean fill is in the bed and shore contrary to the conditions of the Approval.

[15] Ms. Barlem and Ms. Covey submitted the information regarding the location of the bank as presented by the Director at the Hearing held on April 13, 2004, was incorrect, and the survey submitted by the Approval Holder contravenes the Ministerial Order.

[16] Ms. Barlem and Ms. Covey requested a Stay of the Amending Approval.

[17] Mr. Cerniuk argued the appeals should be heard, as section 115(2)(c)(iii) of the *Water Act* contradicts section 69(2)(a) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).<sup>8</sup> He argued this is a second application for an extension, and therefore, the Director’s “...opinion regarding the necessity of an effective public review of the approval is implicit in that decision.”<sup>9</sup>

[18] Mr. Cerniuk argued new information regarding the validity of some of the assumptions used in the original decision has become available to the Appellants. He argued the errors of fact involve the conflicting positions of officials regarding the location of the bed and shore of the lake, the historical significance of documents, and the effects of storm sewers and the culvert on the lake. Mr. Cerniuk stated that in 1985, Public Lands Division considered everything under water at that time to be bed and shore, and even now, Public Lands Division officials insist the natural level of the lake is that which existed before the alleged artificial

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<sup>8</sup> Section 69 of EPEA provides:

- “(1) The Director may extend the expiry date, if any, of an approval or registration for one or more periods of not more than one year each.
- (2) the 2<sup>nd</sup> extension and any subsequent extensions of an approval under subsection (1)
  - (a) may be made only where the Director is of the opinion that the extension is necessary to allow for the effective public review of the renewal of the approval, and
  - (b) are, for the purposes of the provisions of this Division that require the giving of notice and for the purposes of Part 4, to be treated as if they were amendments of a term or condition of the approval made under the authority of section 70(3)(a).”

<sup>9</sup> Mr. Ray Cerniuk’s submission, dated August 22, 2005.



influences. Mr. Cerniuk stated he agreed with that reasoning, and the lake has been artificially lowered by 60 cm due to the placement of the culvert.

[19] Mr. Cerniuk argued the surveyor who identified the bed and shore did not consider the *Land Surveyors Act*, R.S.A. 2000, c. L-3, and the surveyor relied "...on a theoretical line that was traversed in 1918 and the obvious confusion at Public Lands about the so-called 'artificial influences.'"<sup>10</sup> The Appellant argued the surveyor did not acknowledge the significant body of archived information that contradicts him.

[20] Mr. Cerniuk stated there is no proof that the lake level has ever been artificially raised by any means. He stated the top of the culvert was placed at the same elevation as the water in 1999, and the only effect was to drain 60 cm of water from the lake.

[21] Mr. Cerniuk requested the Approval be revoked or a Stay be put in place until the public can be made aware of the issues at stake.

**B. Approval Holder**

[22] The Approval Holder stated the Director had told him that requesting an extension of the Approval could not be appealed. He agreed that section 115(2)(c)(iii) of the *Water Act* does not allow appeals of extensions.

[23] The Approval Holder stated he has no further comments regarding the bed and shore, as those issues were resolved in the Hearing.

[24] In response to Ms. Covey's claim that someone has been trying to develop this land since 1985 but was turned down by Public Lands Division, the Approval Holder explained that his family has never made an application to develop the lands in question until the current application. He also explained Block F, Plan P encompasses more than the portion of land belonging to his family.

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<sup>10</sup> Mr. Ray Cerniuk's submission, dated August 22, 2005.

[25] The Approval Holder stated the documents attached to the Appellants' submissions indicate the "...great efforts made by the government departments to ensure every base was covered before making their decisions."<sup>11</sup>

### **C. Director**

[26] The Director submitted the appeals should not be allowed to proceed. He stated the amendment changed the expiry date of the Approval from June 30, 2004<sup>12</sup> to October 31, 2005. He argued this amendment falls squarely within section 115(2)(c)(iii) of the *Water Act*, which states that a Notice of Appeal may not be submitted with respect to an amendment to extend the expiry date of an approval.

[27] The Director stated the amendment dealing with the change of the current address of the Approval Holder is an administrative amendment that does not change any of the terms and conditions of the Approval. Therefore, according to the Director, none of the terms and conditions of the Approval is open to review through the appeal.

[28] The Director submitted it is not within the Board's power to open up the entire Approval given the nature of the amendments.

### **IV. SECTION 115(2)(c)(iii)**

[29] The Board notes the Appellants are, or have been, property owners who live near Dodds Lake. They are concerned about the health of Dodds Lake, which they have observed declining in the last number of years. They are generally concerned about the water quality in the lake, but their main concern in this regard is the low water level, which they attribute to the operation of a control structure owned by the Town of Innisfail.

[30] When an amending approval is issued and is appealed, the Board can only hear issues related to the clauses that are amended.<sup>13</sup> In this case, the only clauses that were amended

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<sup>11</sup> Approval Holder's submission, dated August 22, 2005.

<sup>12</sup> The Approval had an expiry date of June 30, 2004. However, Ministerial Order 08/2004 extended the expiry date to June 30, 2005.

<sup>13</sup> See: Preliminary Motions: *Kievit et al. v. Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.* (16 April 2002), Appeal Nos. 01-097, 098 and 101-D (A.E.A.B.). See also: *Kievit et al. v. Director, Approvals, Southern Region, Regional Services, Alberta Environment re: Lafarge*

relate to the Approval Holder's change of address and the expiry date of the Approval. These are the only issues that could be considered by the Board in an appeal of the Amending Approval. It is evident the change of address is not something that can be of concern to the Appellants. It is an administrative change that does not affect any of the terms or conditions of the Approval. It is also reasonable for the Director be given the ability to amend an approval to keep information, such as an approval holder's address, up to date without the appeal process being triggered. In the Board's view, an appeal of a change of address is frivolous.<sup>14</sup>

[31] Therefore, there is no basis to hear an appeal based on the amendment of changing the Approval Holder's address.

[32] The other amendment included in the Amending Approval extends the expiry date of the Approval from June 30, 2005, to October 31, 2005. Section 115(2)(c)(iii) of the *Water Act* clearly states extending an expiry date of an approval cannot be appealed. This section provides: "Notwithstanding subsection (1), a notice of appeal may not be submitted with respect to an amendment to extend the expiry date of an approval, preliminary certificate or licence."

[33] The Board must adhere to the intent of the legislators as provided for through the *Water Act* and EPEA. An essential part of administrative law and natural justice is the need to be fair to all participants that appear before the Board. Part of this fairness requires the Board to follow the legislation as written. It allows all participants to know what the law is and what is expected of them to ensure the law is followed. The Board does not have the jurisdiction to interpret legislation in a way other than the way it is written, particularly when it is clearly stated and no other interpretation could apply. The legislators did not want expiry date amendments to be appealed. There is no other way in which to interpret section 115(2)(c)(iii) of the *Water Act*.

[34] The Appellants did not provide any documents to warrant the Board proceeding with the appeals in light of section 115(2)(c)(iii). The documents they provided related to water levels in Dodds Lake and the delineation of the bed and shore, and the Board previously determined the issue of water quality generally was not an issue before the Board, only the water

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*Canada Inc.* (27 May 2002), Appeal Nos. 01-097, 098, and 101-R (A.E.A.B.).

<sup>14</sup> Section 95(a)(i) of EPEA states: "The Board may dismiss a notice of appeal if it considers the notice of appeal to be frivolous or vexatious or without merit."

quality as it relates to the placement of fill.<sup>15</sup> No evidence was provided that related to the specific amendments in the Amending Approval. It is only the amendments that can be considered by the Board, not the Approval itself. As the Appellants did not submit any substantial arguments regarding the Amending Approval itself, and considering the clear limits to filing an appeal as set out in section 115(2)(c)(iii), the Board cannot consider the appeals as valid. Therefore, the appeals are dismissed.

[35] One of the Appellants, Mr. Cerniuk, submitted that section 69(2)(a) of EPEA applies in this circumstance. Section 69 applies to approvals issued under EPEA, not the *Water Act*. Therefore, it does not apply in this case. In addition, the original Approval was extended as a result of the appeals filed, and it was amended by the Minister following the Board's Report and Recommendations. By the time the Board heard the matter and the Minister issued his decision, the Approval had almost expired. It would not have been fair to the Approval Holder to have the Approval expire before he could proceed even though the Minister essentially upheld the Approval. It is not the intent of the appeal process to use it as a method to have the approval become moot; therefore, it was necessary in this case, to extend the expiry date of the Approval. It could not have been the intention of the legislators to include amendments under such circumstances to be considered under section 69(2). Also, the Minister ordered the amendment; the Director did not extend the expiry date to June 30, 2005. Therefore, the extension to October 31, 2005, was the first extension of the expiry date granted by the Director.

## **V. RECONSIDERATION REQUEST**

[36] One of the Appellants, Mr. Cerniuk, requested the Board revoke the Approval until the public could be made aware of the issues at stake. Although not clearly stated, the Board interprets this statement as a request for the Board to reconsider its Report and Recommendations and the Ministerial Order regarding the Approval. When determining whether the Board should grant a reconsideration request, the Board looks at, among other things, section 101 of EPEA.

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<sup>15</sup> See: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.), at paragraph 10, where the Board stated the only issue to be heard at the Hearing was: "Has the Director properly considered the issue of water quality impacts in issuing the Approval to place fill in the specified location?"

[37] Under section 101 of EPEA, the Board can reconsider a decision made by it. Section 101 states: “Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.”

[38] The Board has stated in previous decisions that its power to reconsider “...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.”<sup>16</sup> The Board uses its discretion to reconsider a decision with caution, as the power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for parties to reargue the same issues a second time, or as in this case, a third time.

[39] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.<sup>17</sup> The factors the Board will consider in deciding a reconsideration request include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.<sup>18</sup>

[40] Essentially, what the party requesting reconsideration must demonstrate is that there was an error in the Board’s interpretation of the law, the process was flawed, or there was an error in fact sufficient to undermine the basis of the Board’s Report and Recommendations and the Minister’s Order.

[41] The Appellants in this case argued they had received new evidence from Public Lands Division that was not available to them at the time of the initial or the reconsideration decision.<sup>19</sup> The evidence does not have to, on the grounds of probability, result in a change of

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<sup>16</sup> *Whitefish Lake First Nation Request for Reconsideration re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD.

<sup>17</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

<sup>18</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

<sup>19</sup> See: Reconsideration Decision: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (20 January 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-RD (A.E.A.B.).

the original decision, but there must be a reasonable possibility that the decision could be altered.<sup>20</sup>

[42] The applicant must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made but was available at the time of the hearing is not relevant for purposes of reconsideration. However, information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.<sup>21</sup>

[43] In these appeals, the Appellants once again raised the issue of the determination of the bed and shore of Dodds Lake by Public Lands Division. The Board dealt with this matter by amending the Approval to include a requirement to have the bed and shore established by requiring the Approval Holder to complete a survey and prepare a report delineating the bed and shore of Dodds Lake. The Approval Holder was to consult with the Public Lands Division of Alberta Sustainable Resource Development, and the survey and report had to be provided to, and accepted by, the Director prior to any work proceeding under the Approval. The Minister accepted these recommendations.<sup>22</sup>

[44] According to the information provided by the Appellants, the Approval Holder complied with the conditions of the Approval, but the Appellants now dispute the accuracy of the required survey. The reasons for disputing this survey ultimately relate to the Appellants' views

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<sup>20</sup> *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (7 April 1998), Appeal No. 96-059.

<sup>21</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

<sup>22</sup> See: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.) and Ministerial Order 08/2004, which states:

“The Approval is varied by adding immediately after clause 11 the following:

- ‘12. The approval holder shall ensure that no fill material is placed on the bed or shore of the water body.
13. Prior to any fill material being placed on the site, the approval holder shall complete a survey, prepare a report delineating the bed and shore of the water body adjacent to SW 28-35-28-W4M, and mark the area in which fill will be added. The approval holder should consult the Public Lands Division of Alberta Sustainable Resource Development in preparing the report.
14. The approval holder shall provide the survey and report to the Director for approval. No fill is to be added to the site until the Director accepts the survey and report.’”

of what they regard to be the “natural” water level of Dodds Lake. Although the Board disagrees with the Appellants’ selective view of the natural water levels, particularly considering the evidence contained in the aerial photos originally provided by the Approval Holder at the Hearing, the Board’s recommendation placed the responsibility for determining the shoreline in the hands of a surveyor. The Appellants do not agree with the surveyor’s delineation of the bed and shore and are using the Amending Approval as the basis for an appeal. Disagreeing with the surveyor’s conclusion is not an adequate reason for a reconsideration of the Board’s Report and Recommendations and the Ministerial Order. The Board is not the proper judge of whether any professional land survey is accurate.

[45] An Alberta Land Surveyor who is regulated to practice under the *Land Surveyors Act*, R.S.A. 2000, c. L- 3, completed the survey. Alberta Land Surveyors are a self-regulated profession under this Act. If, as the Appellants contend, the surveyor in question erred, that error should be raised with the Alberta Land Surveyors Association, the body that is responsible for maintaining regulatory and disciplinary powers over professional surveyors. The Board has no jurisdiction over the professional practice of surveying nor would the Board be qualified to judge the professional competence of the surveyor in question. Without a determination by a competent body that this survey is wrong, the Appellants’ allegation that the survey is wrong does not provide grounds in law or in fact to justify a reconsideration of the Report and Recommendations and Ministerial Order.

[46] In its Report and Recommendations, the Board recommended and the Minister ordered that a qualified surveyor was to delineate the bed and shore in order to allay the concerns of the Appellants that the shoreline was properly assessed. This was to provide the parties with an unbiased method of determining the bed and shore. The Appellants continue to argue the survey was done inaccurately since the result is not what they wanted.

[47] Regarding the process, the only issue considered at the Hearing was, “Has the Director properly considered the issue of water quality impacts in issuing the approval to place fill in the specified location?” The Appellants have continued to raise many concerns about the impacts of water levels in Dodds Lake on water quality, but the Approval in question had no bearing whatsoever on water levels. The limited potential for water quality impacts arising from

the activities authorized by the Approval has and continues to be adequately covered by the conditions contained in the Approval established by the Ministerial Order.

[48] The Appellants' continuing concern with water levels in Dodds Lake was determined to be not properly before the Board in the Hearing. Those concerns can clearly not now be used to justify a reconsideration of the Report and Recommendations and Ministerial Order when the Appellants have provided no evidence to change the fact that the Approval had no bearing whatsoever on water levels in Dodds Lake.

[49] The Appellants continue to raise the issue of the delineation of the bed and shore of Dodds Lake. The documents provided relate to water levels generally, and do not relate to water quality effects due to fill being added to the site, which is the only issue that was considered and could be considered by the Board. The documents provided would not change the result of the Board's previous recommendations, as the documents do not apply to the issue identified, discussed, and determined by the Board. Also, the documents were in existence for 13 to 20 years, and therefore were available at the time of the Hearing.

[50] As the Appellants have not shown any exceptional circumstances or compelling reasons that would warrant reconsideration, the Board denies the reconsideration request.

## **VI. STAY REQUEST**

[51] The Board is empowered to grant a Stay pursuant to section 97 of EPEA. This section provides, in part:

- “(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
- (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted.”

[52] It is important to note that only a party to an appeal can make an application for a Stay. As stated above, the Appellants have been unable to demonstrate the appeals should be heard considering section 115(2)(c)(iii) of the *Water Act*. Therefore, there are no valid appeals before the Board, and the Board cannot consider the Stay applications.



**VII. DECISION**

[53] The Appellants did not provide sufficient reasons to demonstrate section 115(2)(c)(iii) of the *Water Act* should not apply in this circumstance. Therefore, pursuant to section 95(5) of EPEA and the above, the Board dismisses the appeals. As there are no valid appeals before the Board, the Stay request cannot be considered.

[54] The Appellants did not provide sufficient evidence of the extraordinary circumstances required to reconsider its previous decision of *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment re: Hal Willis* (12 May 2004), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-R (A.E.A.B.). Therefore, the reconsideration request is denied.

Dated on December 14, 2005, at Edmonton, Alberta.

“original signed by”  
Steve E. Hruday, D.Sc. (Eng.), P.Eng.  
Chair