

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Dates of Oral Hearing – March 9, 2001
Date of Final Written Submission - May 8, 2001
Date of Report and Recommendations – June 8, 2001

IN THE MATTER OF Sections 85, 86, 87, 91, 92 and 93 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 and Section 115 of the *Water Act*, S.A. 1996, c.W-3.5.

-and-

IN THE MATTER OF appeals filed by Mr. Chet Gilmore with respect to Enforcement Order 2000-WA-05 issued under the *Water Act* on November 16, 2000, and Mr. Gary and Ms. Cathy Fitzgerald with respect to Enforcement Order 2000-WA-04 issued under the *Water Act* on November 14, 2000 by the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment.

Cite as: *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment.*

HEARING BEFORE:

Dr. John P. Ogilvie, Vice-Chair
Dr. Curt Vos
Dr. Roy A. Crowther

PARTIES:

Appellants: Mr. Chet Gilmore; and Mr. Gary and Ms. Cathy Fitzgerald.

Director: Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment, represented by Ms. Heather Veale and Mr. David France, Alberta Justice.

WITNESSES:

Appellants: Mr. Chet and Ms. Kathleen Gilmore; Mr. Gary and Ms. Cathy Fitzgerald; and Mr. Robert Day.

Director: Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment; Mr. Bill Cruthers and Mr. Daryl Watters, Conservation Officers, Alberta Environment; Mr. Mike Melnyk, Public Lands, Alberta Environment; and Mr. Gerry Haekel, Alberta Agriculture, Food and Rural Development.

BOARD STAFF:

Mr. Gilbert Van Nes, General Counsel and Settlement Officer; and Ms. Denise Black, Hearing Officer.

EXECUTIVE SUMMARY

[1] The Gilmores and the Fitzgeralds filed appeals of Enforcement Orders issued to them. The Orders required them to remove the sand that they had deposited on walkways from their properties across the reserve lands to the edge of Island Lake. The placing of sand on the shore of a lake is an activity that requires an approval under the *Water Act*. The Gilmores and the Fitzgeralds did not have approvals.

[2] The Gilmores and the Fitzgeralds were doing what many other lakefront property owners on Island Lake have been doing for some fifty years and, in fact, they were trying to improve their walkways. Further, the Gilmores and the Fitzgeralds had received permission from the Council of the Summer Village of Island Lake, which administers the reserve lands, to deposit the sand on their walkways and did not know that a approval from Alberta Environment was also required. Finally, the education program conducted by Alberta Environment regarding the protection of lakeshore was presented to the Council of the Summer Village of Island Lake at the same time as the Gilmores and the Fitzgeralds were improving their walkways.

[3] The Board concludes that the Gilmores and the Fitzgeralds have contravened the *Water Act*. However, the Board concludes that the removal of the sand placed by the Gilmores and the Fitzgeralds would be more damaging to the environment than leaving it in place and maintaining it. Instead, the Board is of the view that the Gilmores and the Fitzgeralds should develop, in conjunction with the Director, an effective plan for the maintenance of their walkways to minimize any further environmental impacts. The Board, therefore, recommends that the Enforcement Orders be varied in accordance with these terms. Further, the Board recommends that Alberta Environment further develop its education program regarding the preservation of the ecology of lakes and the shorelines and that this program be widely presented throughout Alberta to lakefront residents and governing municipal bodies.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	ISSUE BEFORE THE BOARD	6
III.	SUMMARY OF THE HEARING	7
A.	Summary of the Evidence	7
1.	The Appellants	7
2.	The Director	8
3.	Final Arguments	9
4.	Reopening the Hearing	10
IV.	ANALYSIS.....	11
V.	CONCLUSION AND RECOMMENDATIONS	14
VI.	EXHIBITS	17
VII.	DRAFT ORDERS.....	21

I. BACKGROUND

[1] These appeals concern the decisions by Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment, (the “Director”), to issue Enforcement Order No. 2000-WA-05 to Mr. Chet Gilmore on November 16, 2000 and to issue Enforcement Order No. 2000-WA-04 to Mr. Gary and Ms. Cathy Fitzgerald on November 14, 2000.¹ The Orders were issued under the *Water Act*, S.A. 1996, c. W-3.5. The Orders state that the Appellants placed sand on the bed and shore of Island Lake, on walkways² leading to the lakefront, in the Summer Village of Island Lake, Alberta. This is said to be a violation of section 36(1) of the *Water Act*.³ The Orders require that the Appellants submit plans to the Director outlining the remedial action (removal of the walkways) to be taken to remove the sand from the bed and shore of the Island Lake. The Orders further require that the Appellants carry out these plans once they have been reviewed by the Director.

[2] On November 23, 2000, the Environmental Appeal Board (the “Board”) received a Notice of Appeal (EAB Appeal No. 00-071) from Mr. Gilmore and on November 24, 2000, the Board received a Notice of Appeal (EAB Appeal No. 00-072) from Mr. and Ms. Fitzgerald. Mr. Gilmore stated in his Notice of Appeal that statements contained within the Order issued to him were “...[g]rossly inaccurate and do not provide all factual accounts of the environmentally sound improvements I made to the existing walkway.” Mr. Gilmore indicated that he wanted a stay until the appeal process had concluded. The Fitzgeralds stated in their Notice of Appeal that a “... number of statements in the enforcement order are incorrect and do not provide the actual events that have happened over the past couple of years. We were improving an existing

¹ Enforcement Order No. 2000-WA-05 and Enforcement Order No. 2000-WA-04 are collectively referred to as the “Orders”. Mr. Gilmore and Mr. and Ms. Fitzgerald are collectively referred to as the “Appellants.”

² The Board notes that the appeals pertain to two separate existing walkways and two separate acts of placing sand on the bed and shore of Island Lake.

³ Section 36(1) of the *Water Act* states:

36(1) Subject to subsection (2), no person shall commence, or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.

walkway, trying to fix a mess and environmental hazard.” The relief sought by the Fitzgeralds includes a stay and the development of a lakeshore study.

[3] The Board acknowledged both Notices of Appeal on November 24, 2000 and requested that the Director provide the Board with all relevant documents concerning the appeals (the “Records”). According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board on November 24, 2000 asking whether these matters had been the subject of a hearing or review under their respective jurisdictions. Both Boards replied in the negative.

[4] On November 30, 2000, the Director wrote to the Board concerning the matters raised in both appeals. The Director agreed to the requests by Mr. Gilmore and Mr. Fitzgerald that any enforcement action related to the Orders would be postponed until the conclusion of the Board’s appeal process. In addition, the Director stated “...we trust that the EAB would not approve of the appeal process being used simply to delay the exercise of enforcement orders.”

[5] The Board received the Record on December 12, 2000 and subsequently forward copies to the Appellants. In separate letters sent to the Board, the Director questioned whether the appeals had been filed within the 7-day time limit prescribed in the *Water Act*. In addition, the Director requested clarification concerning the grounds for the appeals included in the Notices of Appeal filed with the Board.⁴ The Board reviewed the Director’s concern regarding the timing of the filing of the appeals and referred to section 22 of the *Interpretation Act*⁵ in

⁴ With regard to Mr. Gilmore’s Notice of Appeal, the Director stated in his December 12, 2000 letter:

“First, he refers to ‘grossly inaccurate’ statements contained in the Enforcement Order but is not specific. Second, how is the allegation of discrimination relevant to the appellant constructing a sand walkway prior to obtaining the required approval...”

With regard to the Fitzgeralds’ Notice of Appeal, the Director stated in his December 12, 2000 letter:

“They state that ‘many others on the lake have also breached the *Water Act*.’ It would appear that the appellants are admitting to constructing a sand walkway without the required approval under the *Water Act*. Secondly, they have not specified what ‘incorrect’ statements were made in the Enforcement Order.”

⁵ The relevant portions of section 22 of the *Interpretation Act*, R.S.A. 1980, c.I-7, considered by the Board were as follows:

“(1) If in an enactment the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday. ...”

calculating time. In the appeal filed by Mr. Gilmore, the Board stated that it is "... the Board's understanding that in calculating the seven-day time period, the day of service and the day the appeal must be filed are excluded.... [Therefore,] the appeal, dated November 22, 2000 and received by fax on November 23, 2000, may be interpreted as one day late." In the case of the appeal filed by Mr. Fitzgerald, the Board determined "... that the appeal was submitted within the specified time limit." The Board then requested that the Director clarify whether or not he wished to file a formal motion concerning the timeliness of the filing of either appeal. In addition, each of the Appellants was asked by the Board to respond to the issues raised by the Director regarding the grounds for each appeal.

[6] In letters dated January 3, 2001 and January 4, 2001, the Director confirmed that he did not intend to challenge the timing of the filing of either appeal.

[7] On January 2, 2001, the Board received a response from Mr. Fitzgerald, concerning the issues raised by the Director in his December 12, 2000 letter. In his letter, Mr. Fitzgerald stated that "...we took for granted that in the past people were going to the Summer Village of Island Lake for permission on these issues." He also indicates that he did not construct a new walkway as the Order stated, he upgraded an existing walkway. Mr. Fitzgerald states that he applied for

"... a permit to work on the walkway, but there was never any acknowledgement that they even received this application let alone that they rejected the application...At the very least we would appreciate a lake shore study to be carried out before Government officials hand out Enforcement Orders."

[8] On January 8, 2001, the Board received Mr. Gilmore's submission addressing the issues raised by the Director. His submission stated that he

"... acted in good faith after receiving permission from the local governing Municipality of the Summer Village of Island Lake to improve an existing walkway by removing rusty metal barrels that contained some sort of hydrocarbon toxins...I did not construct a new walkway; the walkway had been in place long before we owned the adjacent property...I did not hire a company to place 120 yards of screened sand to construct a walkway."

(3) If an enactment contains a reference to a number of days expressed to be clear days or to "at least" or "not less than" a number of days between 2 events, in calculating the number of days, the days on which the events happen shall be excluded."

[9] Mr. Gilmore also goes on to state how he alleges the Director's staff have engaged in discriminatory conduct by indicating that there "... is government documentation that there are many other incidents...but until myself, NO Enforcement Orders had been issued."

[10] On January 23, 2001, the Director wrote to the Board in response to a telephone inquiry by Board staff regarding the consolidation of three separate appeals related to enforcement orders issued to residents on Island Lake.⁶ The Director indicated that he did not support combining the three appeals. He went on to clarify that

"... given that the factual differences between the Martin appeal and the other two, the Director would like the Martin appeal to be heard separately and as soon as possible. ...The Director is prepared to agree to consolidating the Gilmore and Fitzgerald appeals and to consider mediation after the Board has heard the Martin appeal. However, in light of the limited time available to complete remedial work and in the event that mediation is not pursued or unsuccessful, the Director requests that a hearing be presently scheduled..."

[11] The Board acknowledged the Director's letter concerning consolidation of the appeals filed by Mr. Fitzgerald and Mr. Gilmore and sent a letter on January 26, 2001 to the parties requesting available dates for a hearing. A hearing date of March 9, 2001 was set after consultation with the parties.⁷

[12] On February 13, 2001, the Board received a telephone call from the Director requesting that the date of the hearing be postponed pending the conclusion and issuance of the Minister's Order in the Martin Appeal. The Director wrote to the Board on February 15, 2001 stating that:

"Please be advised that the Director is not prepared to proceed with the Fitzgerald and Gilmore appeals until it has received a decision from the Board for the Martin appeal...Therefore the Director respectfully requests that the Board cancel the March 9, 2001 date for the Fitzgerald and Gilmore appeals and tentatively re-schedule the appeals for April, 2001."

⁶ Martin Enforcement Order No. 2000-WA-02 *Water Act* EAB File 00-065 (appeal filed October 31, 2000) (the "Martin Appeal"); Gilmore Enforcement Order No. 2000-WA-05 *Water Act* EAB File 00-071 (appeal filed November 23, 2000); and Fitzgerald Enforcement Order No. 2000-WA-04 *Water Act* EAB File 00-072 (appeal filed November 24, 2000).

⁷ An advertisement was placed in the Edmonton Journal and the Athabasca Advocate on February 15, 2001 providing the details of the hearing and establishing a deadline of February 23, 2001 for the receipt of intervenor requests.

The Board reviewed the request of the Director and in a letter dated February 21, 2001, decided to proceed with the March 9, 2001 hearing date.

[13] The Board received intervenor requests from Mr. Neil Martin on February 12, 2001 and from Mr. Robert Day and Mr. William Fitzgerald on February 22, 2001. In a letter dated February 23, 2001, the Appellants and the Director were asked by the Board to comment on the participation of these parties as intervenors.

[14] On February 28, 2001, Mr. Gary Fitzgerald wrote to the Board indicating that he did not object to the participation of intervenors during the hearing. On March 2, 2001, the Director wrote to the Board concerning the status of the intervenors. The Director stated that he did not object to the appearance of the intervenors but requested submissions concerning the evidence and facts they wished to present. The Board later received a letter dated March 6, 2001 from Mr. Fitzgerald indicating that

“... after a meeting between ourselves (Fitzgeralds and Gilmores), we do not wish any intervention with regards to the above noted appeal No. 00-072. We are hoping to call the following as witnesses only as necessary:

- Mr. William Fitzgerald
- Mr. Robert Day
- Mr. Harvey Robert
- Mr. Dave James”

[15] On March 6, 2001, the Board acknowledged the letters from Mr. Fitzgerald (February 28, 2001 and March 6, 2001) and the Director (March 2, 2001) concerning the participation of the intervenors by requesting that Mr. Martin, Mr. Day and Mr. William Fitzgerald provide a summary of their proposed presentation by noon March 8, 2001.⁸ The Board also noted that failure to provide a submission may “... prompt the Board to deny the intervenors an opportunity to present oral arguments...” but that the Appellants could call these parties as witnesses if necessary. Procedures concerning the appeal (time limits, order of presentation etc.) were also addressed in the Board’s March 6, 2001 letter.

[16] On March 7, 2001, the Board received a letter from Mr. Gilmore stating

⁸ By noon March 8, 2001, the Board had not received submissions from any of the proposed intervenors.

“... I need to inform you that the proposed order of presentations by the main people or parties involved is not acceptable...I insist that it is only fair that I am able to put forth my initial presentation ONLY after the employees of the Alberta Government and/or Government of Canada have presented their initial information...We need to know exactly what is being presented before we make our information available within the time constraints imposed.”

[17] Board staff spoke with Mr. Gilmore and explained that the structure of the hearing was to remain as it was in order to provide all parties with adequate opportunities to present direct evidence and cross examination. A phone call was made to the Director and a phone message was left indicating that while a request had been made to change the speaking order, the Board would be issuing a letter stating that the order would remain as stated in the letter sent to the parties March 6, 2001. On March 7, 2001, the Board sent a letter to Mr. Gilmore confirming that while he would be first in providing direct evidence, that he could use a portion of his 1-hour time allotment to extend his rebuttal. Mr. Gilmore was requested in the letter to “...make his request to the Chair prior to the commencement of the hearing when the Chair asks if there are any additional matters to be dealt with before the hearing begins.”

[18] On March 8, 2001, the Director wrote to the Board outlining a list of witnesses in addition to seeking clarification of the time limits. The Board responded to the Director on March 8, 2001 indicating that he would have up to one hour to for each appeal and that repetition of general information common to both appeals would be discouraged.

[19] On March 9, 2001, the Board convened the hearing into the appeals filed by Mr. Gilmore and the Fitzgeralds, at the Board’s offices in Edmonton. Following initial deliberations, the Board reopened the hearing to receive written submissions from the parties on the question: “What other potential decision could the Director have made with respect to this enforcement issue?” The Board wrote to the parties on April 9, 2001 asking for their submissions on this question, with the last of these written submissions due on May 8, 2001.

II. ISSUE BEFORE THE BOARD

[20] The issues before the Board are whether the Appellants each engaged in an activity, the placing of sand on the bed and shore of Island Lake, without an approval where an

approval was required, and whether or not the Director acted reasonably, within his jurisdiction, and properly exercised his discretion to issue the Orders.

III. SUMMARY OF THE HEARING

A. Summary of the Evidence

1. The Appellants

Mr. and Ms. Gilmore

[21] Mr. and Ms. Gilmore testified that they purchased the property at 243 Lakeshore Drive North in the Summer Village of Island Lake, legally described as Plan 763TR, Block 1, Lot 17, during the summer of 1997. They were influenced in their decision by the fact that there was an existing sand walkway to the lake providing access across the reserve lands⁹ that separates their property from the lakeshore. They assumed that this walkway would provide access to a place to park their boat.

[22] During the next year they discovered that the sand walkway partially covered some thirty metal barrels containing what Mr. Gilmore described as "some sort of toxin". When questioned, Mr. Gilmore said that he had not had the material analysed, but that it was leaking from the barrels and, in his opinion, was damaging the environment. Therefore, he decided that the barrels should be removed.

[23] After talking to neighbours and Councillors of the Summer Village of Island Lake, Mr. Gilmore determined that the best way to remove the barrels and repair the walkway would be to hire a local contractor, who was familiar with the area. The contractor would remove the barrels and replace them with clean sand. Accordingly, on March 3, 1999, Mr. Gilmore wrote to the Council of the Summer Village of Island Lake requesting permission to hire Dave James Trucking, a local contractor, to apply sand and to level the existing trail so as to improve it. Mr. Gilmore said that he received verbal permission from the Summer Village of Island Lake to proceed with the project and he did so.

⁹ Reserve lands are lands set aside during the subdivision process, and are owned by the local municipality – here the Summer Village of Island Lake.

[24] Mr. Gilmore testified that at no time did he have any intention of damaging the lakeshore or affecting the fish habitat. He was merely repairing an existing walkway that was similar to walkways that many of his neighbours already had and had used for many years.

Mr. and Ms. Fitzgerald

[25] Mr. Fitzgerald testified that he and his wife are the owners of 275 Lakeshore Drive North in the Summer Village of Island Lake, legally described as Plan 763TR, Block 1, Lot 32. He said that his parents had purchased a property on the lake some 25 years ago and, as a result, he had observed much of the development on the west shore of the lake. He had observed people making beaches and walkways to the water's edge. When he purchased his property he expected to have the same rights as others, that is, the right to safe access to the shoreline.

[26] Mr. Fitzgerald said that in January, 1999 he sent a letter to the Summer Village of Island Lake requesting permission for Dave James Trucking to construct a pathway through the reserve lands to the shoreline. The Summer Village of Island Lake granted permission and the pathway was constructed in February, 1999.

[27] Mr. Fitzgerald feels that he and Mr. Gilmore have been discriminated against by the Director's staff. He points out that there are many developed boat paths and beaches in the Summer Village of Island Lake and that these property owners have not been charged. Mr. Fitzgerald entered a book of 31 pictures¹⁰ to illustrate the development of the lakeshore in the Summer Village of Island Lake.

2. The Director

[28] The Director, Mr. Slatnik, explained how the new *Water Act* differed from the *Water Resources Act*, R.S.A. 1980, c.W-5, which it replaced. Prior to the *Water Act* it was effectively permissible to modify the lakeshore with out an approval without the likelihood of enforcement. He and Mr. Haekel described the public education process that Alberta Environment had developed since the *Water Act* was assented to in the Legislature on September 3, 1996 and expanded further since the *Water Act's* proclamation on January 1, 1999. Meetings have been held at various lakes and specifically at Island Lake on April 9 and July 17, 1999. At

¹⁰ Exhibit 8.

these meetings Dave James of Dave James Trucking was advised of restrictions on the placement of sand along a lakeshore.

[29] Conservation Officer Watters described the impact of shoreline alterations on the aquatic environment and, particularly on the fish habitat. He noted that the *Fisheries Act*, R.S.C. 1985, c. F-14 defines fish habitat as "...[s]pawning grounds and nursery, rearing, food supply, and migration areas on which the fish depend directly or indirectly in order to carry out their life processes." He said that placement of sand on the shoreline results in a number of effects. A major effect is on the aquatic plants that grow along the shoreline. These plants will be stunted or actually killed by the sand.

[30] Conservation Officer Watters testified that northern pike spawn in shallow water in the spring by broadcasting their eggs on aquatic plants present on the bottom of the lake. Yellow perch also spawn in the spring and lay their eggs on the vertical stems of emergent plants. If the bottom plants and the emergent plants are adversely affected because they are covered with sand the spawning habitat for the fish is removed. In addition, the rooted plants take up nutrients from the lake and if the plants are removed, the nutrient levels increase. Nutrients in the sand are also leached into the lake water. These nutrients contain nitrogen and phosphorus. An increase in the presence of these elements in the water column will enhance the growth of blue green algae, which can cause health problems to human and family pets.

[31] The Board is unclear as to just how much sand had been deposited on the shore and bed of the lake by the Gilmores and the Fitzgeralds. When the Director's witnesses were questioned regarding how much sand was required to produce the effects they described, they were unable to provide any quantitative answer. However, when the Board asked the Director's witnesses whether someone who threw a cup of sand into the lake could be charged under the *Water Act*, the answer was that technically under the *Water Act* such an act would be illegal.

3. Final Arguments

The Gilmores and the Fitzgeralds

[32] Both Appellants submitted basically the same final argument. They said that they had not realized that they were actually breaking the law in that they had permission from the

Summer Village of Island Lake to place the sand and repair their walkways. They felt that education and information regarding the effects of the new *Water Act*, which only came into effect on January 1 of the year in which they placed the sand, came too late. Mr. Gilmore said that he was trying to improve the environment by removing the barrels and here he is being charged with an offense.

The Director

[33] The Director argued that the issue before the Board is "Was a valid order issued under the *Water Act*?" If the order is valid, then the appeals must be dismissed. The Director further noted that the *Water Act* does not require that a specific effect on the environment occur. The Act requires an effect which "may" cause an environmental effect.

4. Reopening the Hearing

[34] As stated above, after the initial deliberations of the Board, the Board decided to reopen the hearing to obtain further written submissions from the parties.

The Appellants' Submissions

[35] The Appellants both suggest that the Director and his staff should be willing to work with the lakefront property owners so that the lake accesses can be improved and made more environmentally friendly. They recognize that they have broken the law, but emphasize that there are extenuating circumstances. First, they did obtain permission to do the work from the Summer Village of Island Lake. They assumed that this was sufficient and did not know that an approval from the Director was also required. Second, they believed that they were repairing existing walkways, removing leaking barrels, and improving the safety of the walkways. They point out that the so-called education program Alberta Environment developed was started either just after or at the same time as the work was done on their walkways. They both suggest that a lakeshore study of Island Lake should be done.

[36] They do not believe that an administrative penalty or prosecution should be used and express doubt that a warning letter would be effective in carrying the message to other lakefront property owners that the placing of sand and cutting weeds are not allowed without an approval.

The Director's Submission

[37] The Director argues that he made the correct decision, as it was really the only decision available to him. He notes that the enforcement order is the only tool to remedy non-compliance under the *Water Act*. He argues that it would be inappropriate for the Board to recommend to the Minister enforcement options other than that proposed by the Director.

IV. Analysis

[38] The enforcement orders issued to the Gilmores and the Fitzgeralds were issued as a result of alleged contraventions of section 36(1) of the *Water Act*.¹¹ A literal reading of these sections indicates that any deposition of sand on the bed or shore of a lake is a contravention, unless you have an approval. This includes deposition on the shore of the lake when the water levels are low, as these areas will undoubtedly be covered again when the lake level rises. The purpose of this prohibition is, among other things, to protect our lakes from the potential negative environmental impacts that can be caused by the addition of sand. How much sand is required to produce a significant effect is unclear. The evidence given by the Director's witnesses does not provide a clear answer to the question. After all, sand has been deposited along the shore of Island Lake for some forty years since the shore development began around 1960.

¹¹ Sections 36(1) and 1(1) of the *Water Act* provides:

36(1) Subject to subsection (2), no person shall commence, or continue an activity except pursuant to an approval unless it is otherwise authorized under this Act.

1(1) In this Act ...

(b) "activity" means

(i) 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 ...

(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

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

[39] Whether the Gilmores and Fitzgeralds were aware of the fact that they needed to obtain an approval from the Director to carry out the work on their walkways is also not clear. The point in time when they undertook the work is almost coincidental with the time Alberta Environment commenced an education program regarding the protection of lakeshore areas. What is clear is that the Gilmores and Fitzgeralds did obtain permission from the Summer Village of Island Lake to carry out the work and were apparently not informed by the Summer Village that an approval from the Director was also required.

[40] The Board must examine the severity of the penalty imposed versus the gravity of the effects of the activity on the environment. In other words, did the Director use proper discretion in imposing the penalty he did, based on the environmental damage that was done? The evidence given by Conservation Officer Watters showed that the placement of sand on a lakebed has several effects. First, the sand covers bottom-rooted plants causing them to be unavailable for fish spawning. Northern pike and golden perch use these plants for spawning and hence, the fish habitat is affected. Second, any nutrient in the sand is leached out into the waters of the lake. This may cause increased growth of blue algae which can be poisonous to animals and humans if present in large enough amounts.

[41] The Board must, therefore, consider if the amount of sand placed in the walkways will have a serious deleterious effect on the ecology of Island Lake. First, the Board has a number of unanswered questions about whether the sand placed by the Appellants can be distinguished from the sand that was already there. Second, the Appellants testified that only some 15 percent of the shoreline of Island Lake had residential development on it. If a lot is 50 feet wide and contains a 15-foot wide walkway, only 30 percent of the lot consists of walkway. Putting this in terms of the total lakeshore means that some 5 percent of the lakeshore is affected by sand. It appears to the Board that there will still be ample fish habitat remaining unaffected.

[42] However, as more cottages are built around the lake, the number of potential walkways increases. In this regard, the Board is concerned about the potential cumulative effects. From a cumulative effects perspective, 15 people doing an activity may cause no harm, but 16 or 17 together might. The question is what is the appropriate way to address this cumulative effects problem, taking into account that the construction of walkways has been a historic activity at Island Lake for some time.

[43] In this case, in that the amount of sand placed by the Appellants will have a minor effect on the ecology of the lakeshore and in that they were only repeating what other residents had done over the last fifty years and as a result, the remedial action requested by the Director is not appropriate. However, the *Water Act* clearly states activities "...that cause, may cause or may become capable of causing...", an effect needs to be considered. Although the Director did not provide any specific evidence to prove that the activities engaged in caused an effect in Island Lake, he did indicate that the scientific literature concludes an effect may be caused. Thus, the activity can be considered one that may cause an adverse effect. And as a result, since the Gilmores and Fitzgeralds broken the law, the Director must respond in some way.

[44] Further, the Board agrees with the Director that lakefront property owners can not continue to add sand and cut weeds if it is scientifically proven to damage fish habitat and thus lake quality. In this regard it would have been far more helpful to the Board if the Director had focused on the scientific evidence against sanding and weeding rather than on their general educational efforts for the lakefront property owners. As a result, the Board agrees with the Director that cumulative effects are an important consideration in determining if such historical practices should continue. All of the parties realize that something needs to be done.

[45] It is clear to the Board that the Director must continue to work to minimize the environmental effects of this increased use of the lake. An education program to make lake shore property owners aware of the necessary protection of the lake shore has been started. However, it is apparent to the Board that the education program the Director discussed is not working. Perhaps the Director could explore such simple additions to this program as posting signs at lakes, summer village offices, and boat launches that approvals are required to undertake lakeshore development. The Board believes this program should be extended to all the occupied lakes in the province. The participants should be the landowners, the local municipality, and all areas of government

[46] Further, the Board agrees with the Director that to ignore the contraventions of the *Water Act* would have a negative impact on his authority to dealing with further contraventions by other lakefront property owners. The considered and effective enforcement of the *Water Act* is essential to protect the lakeshore environment. However, the Board does not believe it is appropriate to use an enforcement order to deal with a historical problem. The Board has to

consider how this cycle must end. The Board believes that the situation could have been avoided had the Director more clearly outlined to the lakefront property owners what the issues were and more importantly, how they would be addressed. The lakefront property owners of Island Lake clearly asked for a study of their lake and the opportunity to get involved in developing an appropriate development plan. Surely this would be a more expedient and efficient way of making people familiar with the new *Water Act* and giving them some input into the lake's management. Such a plan should include an interpretation of what activities are not permitted by the *Water Act* (e.g. what constitutes landscaping), what activities require approval, and from whom that approval should be sought. Such a plan should also clearly indicate what the repercussions are for not following the plan.

V. Conclusion and Recommendations

[47] The Board believes that, the *Water Act* was contravened, but for the reasons noted above, including the fact that the removal of the sand which they placed will do far more environmental damage than allowing it to remain in place, the Appellants should not be so heavily penalized under the tool of an enforcement order.

[48] It is clear that the Director needs to send a message to lakefront property owners that appropriate enforcement action will be taken against them under the *Water Act* if they continued historical practices. An enforcement order to stop an activity which was already done is appropriate, as is an enforcement order to undertake remedial action that is logical, reasonable, and environmentally sound. However, an enforcement order that includes a direction to undertake remedial action when it is not logical or reasonable to do so is not appropriate.

[49] The Board, therefore, concludes that the Director acted within his jurisdiction to issue the Order. However, the Board believes that the Director did not act reasonably, nor properly exercise his discretion in electing the remedial steps within the order.

[50] As a result, the Board will recommend that the Enforcement Order be varied due to the circumstances discussed, and that the Director work with the Appellants to develop a plan to maintain the access pathway in proper condition for safety and to minimize the environmental effects. As the Appellants suggested, this could involve berming the sides of the walkways and

providing culverts beneath it. The details of the plan should be worked out between the Appellants and the Director to reach a mutually agreeable solution.

[51] The Board also recommends that the lakefront property owners, the Director, and the Summer Village of Island Lake participate in a lakeshore planning exercise to ensure that any development by the lakefront property owners occurs within the constraints of ensuring environmental protection. The Board supports the Director's efforts to make it clear to lakefront property residents that any activities on the shore and bed of the lake should cease until the lakeshore plan is developed and implemented, and even then activities can only be carried out with an approval. Further efforts should be made to clearly communicate the Director's concerns to the lakefront property owners even during this planning process. Once the plan is implemented, it should be made widely known to all residents and property owners.

[52] Further, the Board recommends that Alberta Environment further develop its education program regarding the preservation of the ecology of lakes and the shorelines and that this program be widely presented throughout Alberta to lakefront residents and governing municipal bodies.

[53] In accordance with section 91 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3, the Board recommends to the Minister of Environment that the decisions of the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment to issue (1) Enforcement Order No. 2000-WA-05, issued to Mr. Chet Gilmore, on November 16, 2001 and the September 20, 2001 and (2) Enforcement Order No. 2000-WA-04 to Mr. Gary and Ms. Cathy Fitzgerald on November 14, 2001, both be varied to:

1. replace the requirement to remove the sand placed on the bed and shore with a requirement for Mr. Gilmore and the Fitzgeralds to work with the Director to develop a maintenance program for the lakefront of their properties that will minimize environmental impacts; and
2. these plan should be developed within six months of the date of the Minister's Orders respecting these Appeal and implemented as soon as possible thereafter.

[54] Attached for the Minister's consideration are two draft Ministerial Orders implementing these recommendations.

[55] Finally, with respect to section 92(2) and 93 of the Act, the Board recommends that copies of this Report and Recommendations and any decision of the Minister be sent to the following parties:

1. Mr. Chet and Ms. Kathleen Gilmore;
2. Mr. Gary and Ms. Cathy Fitzgerald;
3. Mr. Doug Slatnik, Director, Northeast Boreal Regions, Natural Resources Services, Alberta Environment, represented by Ms. Heather Veale and Mr. David France, Alberta Justice;
4. Mr. Neil Martin;
5. Mr. Robert Day;
6. Mr. William Fitzgerald; and
7. the Summer Village of Island Lake, represented by Ms. Lorraine Robertson, the Administrator for the Summer Village.

Dated on June 8, 2001, at Edmonton, Alberta.

Dr. John P. Ogilvie

Dr. Curt Vos

Dr. Roy A. Crowther

VI. EXHIBITS

March 9, 2001, Edmonton, Alberta

Mr. Chet Gilmore
Enforcement Order No. 2000-WA-05/*Water Act*
Appeal EAB 00-071

Mr. Gary and Ms. Cathy Fitzgerald
Enforcement Order No. 2000-WA-04/*Water Act*
Appeal EAB 00-072

EXHIBIT LIST

Exhibit No.	Description
1	A Notice of Public Hearing Ad placed in the <i>Edmonton Journal</i> on February 15, 2001 and the <i>Athabasca Advocate</i> on February 20, 2001, advising of a hearing to be held on March 9, 2001, in Edmonton. A news release was forwarded to the Public Affairs Bureau regarding the hearing and placed on the Government Alberta's website on February 14, 2001. It was also distributed on the same day to 95 daily newspaper, radio stations and television stations within Alberta.
2	Notice of Appeal filed by Mr. Chet Gilmore on November 23, 2001. Notice of Appeal filed by Mr. Gary and Ms. Cathy Fitzgerald on November 24, 2001.
3	Air photo showing part of Tranquil Bay – Summer 1997.
4(A-G)	Examples of Existing Trail and Dock Materials, 7 photographs submitted by Mr. Chet Gilmore.
5	Air photo – Island Lake shore line demonstration.
6(A-U)	21 photographs of Tranquil Bay Walkway submitted by Mr. Chet Gilmore.

7	Letter of January 25, 1999 to the Council of Island Lake c/o Mr. Harvey Robert from Mr. Gary and Ms. Cathy Fitzgerald re: Permit for walkway on lake front property.
8	31 photographs submitted by the Fitzgeralds. Pictures include Island Lake, Old Bay, Tranquil Bay and Deadman's Bay.
9	Letter of October 26, 2000 to the Honourable Halvar Jonson, Minister of Environment from Mr. Gary and Ms. Cathy Fitzgerald and petition. Letter of November 28, 2000 from the Honourable Halvar Johnson, Minister of Environment, to the Fitzgeralds.
10	Video of Island Lake submitted by the Fitzgeralds.
11	Permit 46729-1 and 46729-2, <i>Water Resources Act</i> , March 19, 1990.
12	Written Submission of the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment, relating to Enforcement Order 2000-WA-05 (EAB 00-071).
13	Written Submission of the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment, relating to Enforcement Order 2000-WA-04 (EAB 00-072).
14	Director's Record relating to Enforcement Order 2000-WA-05 (EAB 00-071).
15	Director's Record relating to Enforcement Order 2000-WA-04 (EAB 00-072).
16	Alberta Environment diagram of properties that exist around lakes in Alberta.
17	Alberta Environment diagram of the registered subdivision at Island Lake, Lot 17 – Gilmore, Lot 32 – Fitzgerald.
18	Land Title (Fax) Search dated July 31, 2000 for Plan 763TR, Block 1, Lot 17 in the Municipal District of Island Lake, Registration Number 972 205 879, Owner Kathleen Gilmore.
19	Land Title (Fax) Search dated September 1, 2000 for Plan 763TR, Block 1, Lot 32 in the Municipal District of Island Lake, Registration Number 982 230 664, Owners Gary William and Cathryn Fitzgerald.
20	Diagram of boundary of lake.

21	Graph comparing elevation with years regarding lake levels of Island Lake, Station D07BE904. Illustrating water levels from 1968-2000. Table showing range and number of readings from July 17, 1968-July 26, 2000.
22	Photo of the Gilmore walkway taken on March 26, 1999. Photo taken from lake, looking towards Gilmore residence.
23 (A & B)	Two photographs taken on March 31, 1999. Photo "A" – Looking slightly northwest toward the residence in Lot 17, #243 Lakeshore Drive Island Lake (Gilmore property). Photo "B" – Looking slightly southeast (115 degrees) from the edge where the sand starts southeast for 195 feet in length and 12 feet wide.
24	Photograph taken March 30, 1999 of the Fitzgerald walkway. Photo taken from the lake, looking toward the reserve.
25	Photograph taken on March 31, 1999. Photo looking west toward the reserve and Lot 31 #275 Lakeshore Drive (Fitzgerald property). Illustrates sand dumped for 180 feet in length and 18 feet width.
26	Chronology of regulatory information communicated to specified individuals, the Summer Village of Island Lake and the community from May 29, 1993 to present. Albert Environment, Natural Resources Service, Public Educational Initiatives from March 9, 1993 to July 17, 1999 also attached.

27	<ol style="list-style-type: none"> 1. Form letter from Mr. Gerry Haekel, Shoreland Management Coordinator, Public Land Management Branch to Summer Villages and “Guidelines for Lakeshore Use” (revised 1994). 2. Meeting agenda for the S.V. Island Lake Council on April 9, 1999. 3. Meeting agenda for the Summer Village of Island Lake on July 17, 1999. 4. Letters dated April 29, 1999 to Mr. Jim Sandmaier, Mayor, Summer Village of Island Lake South and Ms. Lorraine Robertson, Administrator, Summer Village of Island Lake from Mr. Mike Melynk, Agricultural Conservation & Reclamation Officer, AFRD, re: News letter to the property owners of the Summer Village of Island Lake. 5. Summer Village of Island Lake Newsletter, June 1999. 6. Government of Alberta News Releases: <ol style="list-style-type: none"> a) Altering a water body may get you in over your head (July 1, 2000); b) Protecting Alberta’s Aquatic Resources (June 25, 1999); c) A Lesson on Lakeshores – Leave Them Alone. (May 4, 1999); d) New Water Act proclaimed to manage, conserve and protect Alberta’s water resources (November 5, 1998); and e) Life in a wet world is focus of Alberta Government report (March 11, 1998).
28	<i>A Fish Conservation Strategy for Alberta 2000 – 2005</i> (March 1998).
29	Alberta’s Northern Pike Management and Recovery Plan (<i>June 1999</i>)
30	<i>Northern Pike in Alberta – Public Review of Future Fishery Management. Advisory Committee Summary Report and Recommendations – November 1998.</i>
31	<i>Atlas of Alberta Lakes, Athabasca River Basin, Island Lake, The University of Alberta Press</i>
32	<i>Caring for Shoreline Properties Changing the Way We Look at Owning Lakefront Property in Alberta</i> by the Alberta Conservation Association, 1999.
33	<i>Island Lake Management Study</i> - Prepared for the County of Athabasca, Summer Village of Island Lake – Prepared by Alberta Municipal Affairs, Regional Planning Section, Planning Services Division (July 1980).
34	<i>The Vital Edge</i> Video from Alberta Environment.

VII. DRAFT ORDERS

Ministerial Order
/2000

Environmental Protection and Enhancement Act,
S.A. 1992, c.E-13.3

Order Respecting Environmental Appeal Board
Appeal No. 00-071

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeal Board Appeal No. 00-071.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2001.

Honourable Lorne Taylor
Minister of Environment

Draft Appendix

Order Respecting Environmental Appeal Board Appeal No. 00-071

With respect to the decision of Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment to issue Enforcement Order No. 2000-WA-05, (the “Order”) issued to Mr. Chet Gilmore, on November 16, 2001, I, Dr. Lorne Taylor, Minister of Environment order that the Order be varied by:

1. deleting the requirement to remove the sand placed by Mr. Gilmore and replacing it with a requirement for Mr. Gilmore to work with the Director to develop a maintenance program for the lakefront of his property that will minimize environmental impacts; and
2. requiring that this plan should be developed within six months of the date of this Ministerial Order and implemented as soon as possible thereafter.

DRAFT ORDERs cont.

Ministerial Order
/2000

Environmental Protection and Enhancement Act,
S.A. 1992, c.E-13.3

Order Respecting Environmental Appeal Board
Appeal No. 00-072

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeal Board Appeal No. 00-072.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2001.

Honourable Lorne Taylor
Minister of Environment

Draft Appendix

Order Respecting Environmental Appeal Board Appeal No. 00-072

With respect to the decision of Mr. Doug Slatnik, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment to issue Enforcement Order No. 2000-WA-04, (the "Order") issued to Mr. Gary and Ms. Cathy Fitzgerald, on November 14, 2001, I, Dr. Lorne Taylor, Minister of Environment order that the Order be varied by:

1. deleting the requirement to remove the sand placed by Mr. and Ms. Fitzgerald and replacing it with a requirement for Mr. and Ms. Fitzgerald to work with the Director to develop a maintenance program for the lakefront of his property that will minimize environmental impacts; and
2. requiring that this plan should be developed within six months of the date of this Ministerial Order and implemented as soon as possible thereafter.