

ALBERTA ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – May 10, 2002

IN THE MATTER OF Sections 91, 92 and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Mr. Grant McNabb with respect to Approval No. 00151445-00-00 issued under the *Water Act* to Mr. Axel Steinmann by the Director, Bow Region, Natural Resources Service, Alberta Environment for the purpose of a channel realignment at NE 25-026-07 W5M and NW 30-026-06 W5M near Cochrane, Alberta.

Cite as: *McNabb v. Director, Bow Region, Natural Resources Service, Alberta Environment re: Axel Steinmann.*

**PRELIMINARY MEETING
BY WRITTEN SUBMISSION
ONLY BEFORE:**

William A. Tilleman, Q.C., Chair.

PARTIES:

Appellant: Mr. Grant McNabb.

Director: Mr. David Ardell, Director, Bow Region,
Regional Services, Alberta Environment,
represented by Ms. Charlene Graham, Alberta
Justice.

Approval Holder: Mr. Axel Steinmann.

EXECUTIVE SUMMARY

Mr. Axel Steinmann was issued a *Water Act* Approval by Alberta Environment, for a channel realignment of a portion of Baymar Creek near Cochrane, Alberta. Mr. Grant McNabb filed a Notice of Appeal stating his principal concern was the steep walled trench and the potential for erosion, and the proximity of the trench to his fence.

Alberta Environment advised the Board that the project was completed in accordance with the Approval granted to Mr. Steinmann, and a certificate of completion was submitted. It was Alberta Environment's position that there was nothing further to be done in relation to this Approval.

The Board requested that parties to the appeal provide written submissions to the Board in response to Alberta Environment's motion to dismiss the appeal.

The Board concludes that the appeal is moot, and there is no remedy that could be given to Mr. McNabb. Installing a culvert the length of the diversion or altering the slopes along the trench could create more of a disturbance to the environment. There are no reasonable or logical alternatives available for a remedy.

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I. BACKGROUND

[1] On September 18, 2001, the Director, Bow Region, Natural Resources Services, Alberta Environment (the “Director”) issued Approval No. 00151445-00-00 (the “Approval”) to Mr. Axel Steinmann (the “Approval Holder”) with respect to a realignment of a portion of Baymar Creek near Cochrane, Alberta.

[2] On July 10, 2001, Mr. Grant McNabb filed a Statement of Concern with the Director.

[3] On September 27 2001, the Environmental Appeal Board (the “Board”) acknowledged receipt of a Notice of Appeal from Mr. Grant McNabb (the “Appellant”) and in the same letter requested that the Appellant provide a written response to the following three questions;

1. What are the details of the Approval that you object to? (What sections of the Approval do you not like?);
2. What are the grounds for this appeal? (Why do you not like the Approval? How does the Approval affect you?); and
3. What is the relief that you request? (What do you want the Board to do?)

On the same date, the Board requested the Director provide the documents related to this appeal (the “Record”), and the Board also notified the Approval Holder of the appeal.

[4] According to standard practice, on September 27, 2001, 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 the Boards responded in the negative.

[5] On October 9, 2001, the Board acknowledged receipt of the Appellant’s response to its questions as well as a copy of the Certificate of Completion provided by the Approval Holder. At this time, the Board requested available dates for a mediation meeting/settlement conference from all parties to the appeal.

[6] On October 16, 2001, the Director confirmed that work had been completed in accordance with the Approval. It was his position that “...this matter is no longer properly

before the Board, and that the matter should be dismissed". The Director also advised that an inspection was undertaken by the Director and was satisfied that the project was completed in accordance with the Approval granted.

[7] On October 24, 2001, the Board established a submissions process regarding the application by the Director to dismiss the appeal, and on November 1, 2001, the Appellant provided the Board with an initial submission.

[8] On November 2, 2001, the Board acknowledged the receipt of the Appellant's initial submission. The Appellant asked that the Board refuse the Director's request to dismiss the appeal as he felt that since the Director had signed off the certificate of completion, they were no longer a party to the appeal.

[9] On November 9, 2001, the Board received the Director's response submission and on the same day, the Board acknowledged the Director's submission and extended the deadlines for a response submission from the Approval Holder and a rebuttal submission from the Appellant.

[10] On November 14, 2001, the Board received and acknowledged the response submission from the Approval Holder and a copy of a letter that the Appellant sent to the Municipal District of Bighorn stating his concerns.

[11] The Board received a copy of the Record on November 14, 2001, and forwarded copies of the documents to the Appellant and the Approval Holder.

[12] As there was a delay in the delivery of the Approval Holder's submission to the Appellant, the Board granted an extension to the Appellant to file its rebuttal submission. On November 30, 2001, the Board received the rebuttal submission from the Appellant.

II. DECISION

[13] Given that the work is complete, the issue before the Board is whether the matter is moot or if there is a remedy that can be given to the Appellant. Again, the realignment of the creek has been completed and a certificate of completeness filed with the Director.¹

¹ Letter from the Director dated October 16, 2001.

[14] The Board has considered when a decision is moot in previous cases. In the *Butte Action Committee*,² the Board stated that:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”³

[15] The moot issue was also discussed in *Kadutski*,⁴ where the Board stated:

“An appeal is moot when an appellant requests a remedy that the Board can not possibly grant because it is impossible, not practical, or would have no real effect.”⁵

[16] In this case, since the work is essentially completed, there are no remedies that the Board can give the Appellant that will satisfy his concerns. The Board cannot make the recommendation to reverse or vary the decision appealed⁶ in this circumstance as the work has been completed in accordance with the Approval,⁷ and this type of work cannot be reversed without causing further damage to the environment. If the Board directed the Approval Holder to restore the creek to its original state, this would inevitably cause a further disturbance and potential damage to the creek. In a similar case, *Martin*,⁸ the Board discussed the effect of requiring the removal of an illegal deposition of sand. After evaluating the effect of the project, plus the potential effect the project could have on the environment, and the effect of removing the project, the Board stated:

“In light of the fact that Mr. Martin placed a small amount of sand on the site, an amount that would be difficult to accurately determine, the nutrient loading damage would already be done, and that removal of this amount of sand would

² *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment*, re: *Crestar Energy*, E.A.B. Appeal No. 00-060-D.

³ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment*, re: *Crestar Energy*, E.A.B. Appeal No. 00-060-D at paragraph 28.

⁴ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re: *Ranger Oil Limited*, E.A.B. Appeal No. 00-055-D.

⁵ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re: *Ranger Oil Limited*, E.A.B. Appeal No. 00-055-D at paragraph 36.

⁶ Section 100(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c E.12, provides: “On receiving the report of the Board, the Minister may, by order, (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make....”

⁷ See Letter from Alberta Justice dated October 16, 2001.

⁸ *Martin v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, E.A.B. No. 00-065-R.

create as much or environmental damage through siltation than leaving it in place, it is environmentally unreasonable to require Mr. Martin to remove it.”⁹

[17] In another similar case, *Gilmore*¹⁰ the Board discussed the reasonableness of an enforcement order that required removal of sand; the same principle is applicable to the decision that this Board must now make. In *Gilmore*, the Board stated:

“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.”¹¹

It is the Board’s obligation to ultimately determine if the environment will be protected more by removing or leaving the project in place.

[18] In this case, the Approval Holder did obtain the required approvals or permission from the Director, as well as from the Department of Fisheries and Oceans and the Municipal District of Bighorn. In the approval from the Municipality, proof had to be provided that there would be no effect on the fish habitat. The Approval Holder received notification from the Department of Fisheries and Oceans that the proposed realignment would not affect the fish or fish habitat, providing the following mitigation measures were followed:

- “1. Any disturbance of any streambeds, streambanks, and approaches to any water course, related to the work project, should be kept to a minimum. Any disturbances should be stabilized, revegetated and reclaimed to the natural conditions that existed, as soon as possible following construction.
2. No instream work should occur between May 16 and August 15, or September 1 and April 30 in any year for the watercourse, unless it is dry to the bottom.
3. Suitable erosion and silt suppression measures should be implemented on disturbed areas during construction and until vegetation is established in order to minimize sedimentation into any watercourse.

⁹ *Martin v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, E.A.B. No. 00-065-R at paragraph 34.

¹⁰ *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, E.A.B. Appeal No. 00-071-072-R.

¹¹ *Gilmore and Fitzgerald v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, E.A.B. Appeal No. 00-071-072-R at paragraph 48.

4. DFO should be notified of all changes in plans, specifications, or operating conditions which have the potential to adversely affect fish and fish habitat.”¹²

These mitigation measures were intended to reduce the impact this project will have on the creek and surrounding area.

[19] The Municipal District of Bighorn also has a process in place in which individuals who are affected by an application can submit their concerns to their Council. The concerns are taken into consideration when Council makes its decision as to whether the application should be accepted or not.¹³ The landowners and lessees were notified by the Municipal District of Bighorn of the application, and any concerns submitted were brought before Council before the decision was made. The Municipal District of Bighorn required approvals from Alberta Environment, the Federal Department of Fisheries and Oceans, and proof of the approvals would have to be provided before any work could start.¹⁴

[20] For his part, the Director instructed the Approval Holder to reduce the slope of the channel banks as part of proper erosion control techniques.¹⁵ In this same letter, the Approval Holder was told that approval would also be required under the *Public Lands Act* and the Director had informed the Approval Holder that he would be required to comply with the *Fisheries Act* and the *Navigable Waters Protection Act*.¹⁶ As a result, the Approval Holder did obtain the specified approvals prior to work commencing.

[21] Having said this, the Board does have concerns as to when the work was completed relative to the appeal notice. According to the documents provided, the realignment was completed two days *before* the end of the appeal period. The Board strongly suggests that the Director look at ways to notify possible appellants before the work is completed, or have some mechanism to ensure the project is held in abeyance, until the appeal period has passed. Even though the Appellants followed the timelines as stated in the *Water Act*, R.S.A. 2000, c. W-

¹² Letter from Fisheries and Oceans Canada to Axel Steinmann, dated September 17, 2001.

¹³ Letter from the Municipal District of Bighorn to Landowners/Lessee, dated January 2, 2001.

¹⁴ Letter from Municipal District of Bighorn to Axel Steinmann, dated February 25, 2001.

¹⁵ Letter from Alberta Environment to Axel Steinmann, dated July 10, 2001.

¹⁶ Letter from Alberta Environment to Axel Steinmann, dated May 14, 2001.

3,¹⁷ their appeal was moot before the appeal period was over. It was *not* the intention of the legislation to have the issue determined in such a manner, and *nor* is it the way the appeal process works. While the Board acknowledges that an approval holder is within his rights to commence work once the approval has been issued, an approval holder should not be allowed to effectively eliminate the right of appeal by completing the project before the appeal period ends and then later claim the issue is moot knowing there would have been no chance to appeal. The Board hopes never to see this situation arise in an appeal in the future.

[22] In another matter, that is not dispositive of the appeal, the Act also should not be used to settle disputes between landowners. Based on the submissions presented by the parties, it appears there is an issue with respect to access to the parties' lands. This is not an issue that is within the Board's, nor the Director's, jurisdiction. The Board notes from the file that much of the damage that has occurred along the creek is the result of unrestricted access to the water by grazing cattle.¹⁸ This, again, is not within the Board's jurisdiction – at least not on facts like these.

¹⁷ Section 116 of the Water Act, R.S.A. 2000, c. W-3 states:
“116(1) A notice of appeal must be submitted to the Environmental Appeal Board

- (a) not later than 7 days after
 - (i) receipt of a copy of a water management order or enforcement order, or
 - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from,

or

- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

The *Water Act*, R.S.A. 2000, c. W-3 replaced the *Water Act*, S.A. 1996, c.W-3.5 on January 1, 2002.

¹⁸ See Submission of Approval Holder including photograph number 20. In its submission, the Approval Holder states:

“One hundred percent of the erosion of the creek banks is caused by cattle and horses which are allowed to approach the creek unmanaged. At this time, it is not regulated by Alberta Environment.”

In its rebuttal submission, the Appellant does not argue with this statement and only refers to the future impact on the trench. In paragraph 8, it states:

“As soon as Mr. Steinmann constructs the fence on the east side of the road allowance as required as a condition of the MD of Bighorn approval, the horses will not affect his trail or the diversion.”

[23] Section 95(5)(a) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12,¹⁹ states:

95(5) The Board

- (a) may dismiss a notice of appeal if
 - (i) it considers the notice of appeal to be frivolous or vexatious or without merit, ...
 - (iii) for any other reason the Board considers that the notice of appeal is not properly before it...

[24] For the reasons discussed above, the Board dismisses the Notice of Appeal filed by Mr. Grant McNabb, as his appeal is either moot, not properly before the Board, or without merit.

Dated on May 10, 2002, at Edmonton, Alberta.

“original signed by” _____
William A. Tilleman, Q.C.
Chair

¹⁹ The *Environmental Protection and Enhancement Act*, R.S.A 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1993, c. E-13.3 on January 1, 2002.