

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – January 24, 2022

**IN THE MATTER OF** sections 91, 92, 93, 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** appeals filed by Robin Tudor, Robert Killeleagh, Neil Konner, Ronald Boghean, Faith Boghean, Roberta Jensen, Doug Smith, John Jensen, and Marlow Currie, with respect to the decision of the Director, Regional Approvals, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue Approval No. 00405709-00-00 under the *Water Act* to Mark Crouch Backhoe Service Ltd.

Cite as: *Tudor et al. v. Director, Regional Approvals, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, re: Mark Crouch Backhoe Service Ltd.* (24 January 2022), Appeal Nos. 19-033-040 and 042-D (A.E.A.B.), 2022 ABEAB 1.

**BEFORE:**

Mr. Alex MacWilliam, Board Chair (ret.).

**SUBMISSIONS BY:**

**Appellants:** Mr. Robin Tudor, Mr. Robert Killeleagh, Mr. Mr. Neil Konner, Mr. Ronald Boghean, Ms. Faith Boghean, Ms. Roberta Jensen, Mr. Doug Smith, Mr. John Jensen, and Mr. Marlow Currie.

**Approval Holder:** Mark Crouch Backhoe Service Ltd.

**Director:** Mr. Todd Aasen, Director, Regional Approvals, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Environmental Law Section, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

On August 7, 2019, Alberta Environment and Parks (AEP) issued an approval to Mark Crouch Backhoe Service Ltd. (the Approval Holder) to extract sand and gravel and construct an end pit lake (the Activity) on private lands located near the Town of Sundre, in Mountain View County. AEP found the Activity would result in minimal or no adverse effect on the aquatic environment, and waived the Notice of Application requirement under section 108(6)(b) of the *Water Act*. When the approval was issued, notice of the decision was posted on the AEP website, at AEP's Red Deer office, and at the Mountain View County office. The postings advised the decision to issue the approval could be appealed to the Environmental Appeals Board (the Board) within seven days of the posting.

From September 18, 2019 to September 21, 2019, the Board received nine Notices of Appeal from members of the public living near the sand and gravel pit (the Appellants). AEP filed a motion to dismiss the Notices of Appeal for being filed past the seven-day time limit prescribed by the *Water Act*.

After reviewing the written submissions from the participants, the applicable legislation, and the AEP record, the Board found the Appellants filed their Notices of Appeal past the seven-day deadline, and they did not demonstrate extenuating or special circumstances existed that would allow the Board to extend the filing period.

The Board dismissed the Appellants' Notices of Appeal for being filed past the legislated time limit.

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## I. INTRODUCTION

[1] This is the Environmental Appeals Board's (the "Board") reasons for its decision to dismiss the appeals filed by Mr. Robin Tudor, Mr. Robert Killeleagh, Mr. Neil Konner, Mr. Ronald Boghean, Ms. Faith Boghean, Ms. Roberta Jensen, Mr. Doug Smith, Mr. John Jensen, and Mr. Marlow Currie (collectively, the "Appellants") of the decision of the Director, Regional Approvals, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director"), to issue Approval No. 00405709-00-00 (the "Approval") under the *Water Act*, R.S.A. 2000, c. W-3, to Mark Crouch Backhoe Service Ltd. (the "Approval Holder"). The Board issued its decision to dismiss the appeals on April 1, 2020, with reasons to follow. These are the Board's reasons.

## II. BACKGROUND

[2] In November 2017, GDK Future Home Enterprises Ltd. ("GDK"), submitted applications to Alberta Environment and Parks ("AEP") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"),<sup>1</sup> and the *Water Act* for approvals to extract sand and gravel from private lands located at NE 36-32-6-W5M (the "Site"), near the Town of Sundre, in Mountain View County (the "County").

[3] In June 2019, GDK advised the Director the Approval Holder had purchased the Site and would undertake any obligations under the applications and pay the security owing.

[4] On August 7, 2019, the Director issued the Approval to the Approval Holder allowing the Approval Holder to remove or disturb ground or other material in an unnamed aquifer, resulting in an end pit lake at the Site. The Director waived the requirement to provide a Notice of Application under section 108(6)(b) of the *Water Act*<sup>2</sup>.

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<sup>1</sup> The appeals currently before the Board are in relation to the Approval issued under the *Water Act* only.

<sup>2</sup> Section 108(6)(b) of the *Water Act* provides:

"Notwithstanding subsection (1), if the Director has received an application for an approval, a licence or an amendment of an approval, preliminary certificate or licence or the Director proposes to make an amendment on the Director's own initiative, the Director may waive the notice

[5] The Director posted a public notice to the AEP website where the Approval had been issued (the “Notice of Decision”). The Notice of Decision advised any party who wanted to appeal the decision had seven days to file a Notice of Appeal with the Board. The Notice of Decision was also forwarded to AEP’s Red Deer office, and a copy was sent to the County’s office with the request the Notice of Decision be displayed on the County’s bulletin board for seven days.

[6] Between September 18, 2019, and September 21, 2019, the Board received nine Notices of Appeal from the following individuals:

- Mr. Robin Tudor (EAB 19-033);
- Mr. Robert Killeleagh (EAB 19-034);
- Mr. Neil Konner (EAB 19-035);
- Mr. Ronald Boghean (EAB 19-036);
- Ms. Faith Boghean (EAB 19-037);
- Ms. Roberta Jensen (EAB 19-038);
- Mr. Doug Smith, (EAB 19-039);
- Mr. John Jensen (EAB 19-040); and
- Mr. Marlow Currie (EAB 19-042).

[7] On October 1, 2019, and October 8, 2019, the Board acknowledged receipt of the Notices of Appeal and requested the Director provide all documents and electronic media he reviewed and were available to him when making his decision, including policy documents (the “Record”).

[8] On October 9, 2019, the Director filed a motion to dismiss the Notices of Appeal on the grounds the Appellants filed the Notices of Appeal more than seven days after the Notice of Decision was published as required under the *Water Act*.

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requirement under subsection (1) if the Director is of the opinion that...

- (b) the activity or diversion of water specified in the application for the approval or licence or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users....”

[9] The Board provided a schedule to receive written submissions from the Appellants, Approval Holder, and Director (collectively, the “Participants”) to address the Director’s motion to dismiss the appeals for being filed late. Between October 24, 2019 and November 12, 2019, the Board received written submissions from the Participants.

[10] On December 11, 2019, the Board requested the Director provide the Record given the concerns raised by the Appellants in their submissions pertaining to whether the Director exceeded his jurisdiction under section 108(6) of the *Water Act*. The Board received the Record on January 10, 2020, and provided copies to the Participants on January 17, 2020. From January 31, 2020, to March 9, 2020, the Board received further written submissions from the Participants.

[11] On April 1, 2020, the Board notified the Participants the Appellants’ appeals were filed late, and the Appellants did not demonstrate there were any exceptional circumstances that would allow the Board to exercise its statutory discretion to extend the appeal period. The Board dismissed the appeals and notified the Participants of its decision. These are the Board’s reasons.

### **III. Submissions**

#### **A. Appellants**

1. Mr. Robin Tudor

[12] Mr. Tudor provided submissions on behalf of Mr. Marlow Currie, Mr. Neil Konner,<sup>3</sup> Mr. Robert Killeleagh, and himself.

[13] Mr. Tudor said that, on September 8, 2019, he, along with several of his neighbours, witnessed equipment excavating at the Site. Mr. Tudor explained the underground aquifer that runs through the Site was the sole source of drinking water for his home and

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<sup>3</sup> Mr. Konner provided additional comments on November 11, 2019. See below.

business. Mr. Tudor stated he had not received a Notice of Application or a Notice of Decision for the proposed activity, and no notice was provided through the local newspapers.

[14] Mr. Tudor said he, and several of the other Appellants, searched online and found a copy of the Approval on the government website on September 9, 2019. He noted it was difficult for “average citizens to find notices of applications and approvals due to the multiple different descriptions used by the administrator of the website.”<sup>4</sup> Mr. Tudor observed the Approval had been issued August 7, 2019, but the website did not provide information regarding an appeal period for someone directly affected.

[15] Mr. Tudor said he contacted his County councillor, his MLA, and the Minister of Environment & Parks on September 9, 2019, to seek information on filing an appeal of the Director’s decision to issue the Approval. Mr. Tudor said he was not aware of the time limit for filing a Notice of Appeal and was finally able to obtain a copy of the Notice of Decision of the Approval. Mr. Tudor said AEP told him the Notice of Decision had been posted in the Provincial Building in Red Deer, which was over a one-hour drive from his home and the Site. He stated he would have no way of knowing the Notice of Decision had been posted in Red Deer, and no one from the County had informed him of the notice.

[16] Mr. Tudor advised he received an email from the Director on October 18, 2019, which provided another internet location where the Notice of Decision had been posted.<sup>5</sup> He noted the email was sent over a month after he had initially made inquiries with AEP.

[17] Mr. Tudor noted section 108(6) of the *Water Act* permitted the Director to proceed directly to a Notice of Decision only if the activity would result in minimal or no adverse effect on the aquatic environment, household users, licensees, or traditional agricultural users. Mr. Tudor submitted he had no way of knowing what information or scientific evidence the Director relied on when deciding there would be minimal or no adverse effect to the aquatic environment or Mr. Tudor’s water supply. He stated if the Director had required the Approval

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<sup>4</sup> Tudor’s Submission, October 24, 2019, at page 1.

<sup>5</sup> The website address provided by the Director was <https://avw.alberta.ca/PublicNoticesViewer.aspx>.

Holder to publish a Notice of Application in the local newspaper, he would have had the opportunity to submit a Statement of Concern outlining his concerns and evidence, he would have been notified if an approval had been issued, and he would have “been afforded due process under the law.”<sup>6</sup>

[18] Mr. Tudor argued the Director exceeded his jurisdiction by issuing a Notice of Decision without required due process. He stated the Director erred in assuming the aquatic environment and directly affected persons would not be adversely affected by the approved activity occurring in the aquifer.

[19] Mr. Tudor noted the purpose of notice under the *Water Act* is to ensure all persons directly affected by the decision would have an opportunity to provide their concerns to the Director and file Statements of Concern, and it would enable the filer to submit a Notice of Appeal if an approval was granted. Mr. Tudor stated he could not reasonably have known an application to dig in the groundwater aquifer that is the source of his drinking water had been made, or for him to file a Statement of Concern outlining his concerns and provide evidence of how his drinking water supply might be negatively impacted.

[20] Mr. Tudor stated he had not seen any evidence to support the Director’s decision to waive the notice requirements, and he noted the lack of dewatering activities at the Site did not mean the Approval did not impact the aquifer.

[21] Mr. Tudor explained that, once he learned of the activity at the Site, he took immediate steps to contact government officials to find out how to appeal the Director’s decision. Mr. Tudor said no one told him he was outside the appeal period, and he had no way to find out. Mr. Tudor stated he filed the Notice of Appeal as soon as he learned it was necessary, and he would have followed the instructions on the Notice of Decision, if it had been provided to him.

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<sup>6</sup> Tudor’s Submission, October 24, 2019, at page 3.

[22] Mr. Tudor noted section 116(1)(ii) of the *Water Act* required a notice of appeal to be submitted to the Board no later than seven days after the Notice of Decision was received.<sup>7</sup> Mr. Tudor submitted he had not received notice that an application had been made or the Director had approved the application.

[23] Mr. Tudor argued the Notice of Decision was not placed in a logical or reasonable place where adjacent and nearby landowners would look to find notices of applications or approvals under the *Water Act*.<sup>8</sup> Mr. Tudor said the websites he was directed to were not easy to use for the average citizen, and he could not look for a public notice until after the approval had been issued.

[24] Mr. Tudor requested the Board extend the time for filing a Notice of Appeal and accept his Notice of Appeal, even though he had not submitted a Statement of Concern.

[25] Mr. Tudor provided an additional submission on behalf of Ms. Currie, Mr. Konnor, Mr. Killeleagh, Mr. Smith, and himself.

[26] Mr. Tudor stated the area where the Site is located is known as McDougal Flats, and approximately 3,000 people live in the area, including in the Town of Sundre and surrounding communities. He explained industrial activity in the area included six active gravel pits, two sawmills, one wood processing operation, supporting businesses, oilfield chemical and fluid storage, transportation, agriculture, and at least six seasonal campgrounds.

[27] Mr. Tudor stated the area contains a clean alluvial gravel deposit, with thin overburden consisting mostly of silt deposits, and the alluvial gravel deposit consists of 18 percent sand and 80 percent gravel with a low percentage of fines, such as silt and clay, which makes the aquifer more permeable than average. He stated the alluvial aquifer was as shallow as

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<sup>7</sup> Section 116(1)(ii) of the *Water Act* provides:

“(1) A notice of appeal must be submitted to the Environmental Appeals Board

(a) not later than 7 days after...

(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....”

<sup>8</sup> Tudor’s Submission, October 24, 2019, at page 3.

four metres below ground level and less than 30 metres thick, and there were a number of water wells within this depth range or in bedrock just below the interface with the alluvial deposits. Mr. Tudor stated the alluvial aquifer within the McDougal Flats area and surrounding lands was hydraulically connected, and water levels in the aquifer rise and fall by one metre or more seasonally and with changing climatic conditions.

[28] Mr. Tudor noted the Red Deer River Watershed Alliance document, *Blueprint: An Integrated Watershed Management Plan for the Red Deer River Watershed (Phase One: Water Quality)* (the “RDRWA Report”),<sup>9</sup> identified the McDougal Flats area as having a “High Surface Water Sensitivity” and a “Very High Groundwater Vulnerability.”

[29] Mr. Tudor stated images from Google Earth from September 2004 and September 2011, showed an increase in surface disturbances, which caused the Appellants serious concerns regarding cumulative effects on the local groundwater system. He said people living within the McDougal Flats area depend on the aquifer and were concerned about possible contamination from intensive industrial and residential activities. Mr. Tudor said there was insufficient information on water level fluctuation, floodwater effects, and surface land use contamination in McDougal Flats to understand and estimate the risks identified in the RDRWA Report, and the lack of information created confusion and fear within the community. Mr. Tudor noted McDougal Flats already contained considerable industrial development risks, and more development was proposed for the area. He stated the cumulative effects in the Red Deer River watershed were insufficiently addressed in environmental assessment studies of recent aggregate developments.

[30] Mr. Tudor submitted the Director’s decision to proceed directly to a Notice of Decision deprived the Appellants of the opportunity to provide a Statement of Concern. Mr. Tudor stated the Appellants had no way of knowing what information or scientific evidence the Director relied on when deciding there would be minimal or no adverse effect to the aquatic environment or the Appellants’ water supplies. Mr. Tudor said the Director’s file did not contain sufficient scientific information from the Approval Holder to support the Director’s decision that

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<sup>9</sup> <[https://rdrwa.ca/wp-content/uploads/2020/09/Blueprint\\_Phase1\\_WaterQuality\\_Online\\_Final.pdf](https://rdrwa.ca/wp-content/uploads/2020/09/Blueprint_Phase1_WaterQuality_Online_Final.pdf)>

the approved activity would have no adverse effect on the groundwater or the aquifer. He stated the Approval Holder's application did not have adequate evidence to support the conclusion of no adverse impact.

[31] Mr. Tudor submitted that, if the Director had required the Approval Holder to publish a Notice of Application in the local newspaper, the Appellants would have provided the Director evidence in a Statement of Concern, would have known if an approval was issued, and would have been able to pursue their concerns through the appeal process.

[32] Mr. Tudor submitted the Director erred in assuming there would be no adverse effect on the people who rely on the aquifer. Mr. Tudor stated the Director exceeded his jurisdiction by issuing a Notice of Approval without the required due process. Mr. Tudor requested the Appellants be given the opportunity to present expert evidence to the Board to support their concerns.

[33] After receiving the Director's Record, Mr. Tudor provided a submission on behalf of Mr. Currie, Mr. Konner, Mr. Killeleagh, Mr. Smith, and himself. Mr. Tudor reiterated the earlier submissions and provided further arguments in support of the Notices of Appeal.

[34] Mr. Tudor submitted the catchment calculations for the Site were incorrect given the calculations did not consider another gravel pit had already resulted in excavation of the catchment area, which the Appellants estimated reduced the proposed catchment area by approximately 25 percent. Mr. Tudor stated that, although there would still be a net positive water balance, periods of extreme drought would lower the catchment yield. Mr. Tudor noted West Fraser Timber, which operates east of the Site, stopped dust abatement work as the dugout used for the water supply was too low. Mr. Tudor said the dugout and aquifer were hydraulically connected.

[35] Mr. Tudor referred to an AEP internal email, dated June 26, 2018, from Mr. Bing Han, Hydrogeologist, to Ms. Terrina Perley, Senior Land and Water Specialist. Mr. Tudor noted the email stated the approved activity would not encounter any contaminated groundwater as there would not be any dewatering. Mr. Tudor noted other pits in the area have historically

removed large amounts of water for fracturing. Mr. Tudor submitted it would be a mistake to assume no impact has occurred to the aquifer.

[36] Mr. Tudor stated the following matters were not addressed before the Approval was issued:

- (a) the risk of contamination to water wells;
- (b) turbidity and potential problems for down gradient wells;
- (c) potential chemical reactions due to the agitation of water below the water table during wet pit gravel extraction; and
- (d) the impact of cumulative effects with four gravel pits and three wood processing operations in the area.

[37] Mr. Tudor submitted the Director did not have sufficient and up-to-date technical information to decide the approved activity would have minimal or no adverse effect on the aquatic environment, household users, licensees, or traditional agricultural users. Mr. Tudor requested the Board extend the time to file a Notice of Appeal so the Appellants could present additional evidence that would enable a decision be made based on facts and cumulative risk assessment.

2. Ms. Faith and Mr. Ron Boghean

[38] Ms. Faith and Mr. Ron Boghean (the “Bogheans”) stated they did not receive the Notice of Application or Notice of Decision. The Bogheans noted there was no notice in the local newspapers or from the County regarding the notices, even though they were required under the *Water Act*.

[39] The Bogheans commented on the approval granting process in general, and stated that, although their Notices of Appeal were filed late, it was not a breach of the legislated process based on the “principle of the reasonable man.” They believed the Director’s role is to serve the public interest, which in this case included the responsibility to inform the public of developments in the Province. The Bogheans stated they were not advised of the process nor the

rights they have.<sup>10</sup>

[40] The Bogheans noted they were not provided with an opportunity to file a Statement of Concern. The Bogheans said that, to their knowledge, the Director did not publish a Notice of Application in the local newspaper as required by the *Water Act*. The Bogheans objected to the Director's assumption the Approval would not have an adverse effect on the aquatic environment or directly affected persons such as themselves.

[41] The Bogheans noted the purpose of providing notice under the *Water Act* was to ensure directly affected persons could provide their concerns to the Director by having the opportunity to file a Statement of Concern and to file a Notice of Appeal, if an approval was granted.

[42] The Bogheans said they contacted government officials to obtain direction on how to appeal the Director's decision and filed a Notice of Appeal as soon as they knew it was required. The Bogheans noted they were not told the appeal period had expired.

[43] The Bogheans submitted there was no notice an application had been made by the Approval Holder, and they did not receive any notice the Director had issued the Approval. They stated the Notice of Decision was not placed in any location they attended nor where they lived, which would have been reasonable and in accordance with the *Water Act*.<sup>11</sup>

[44] The Bogheans submitted they took all reasonable steps to determine how to appeal the Director's decision, only to discover the period to file an appeal was seven days. The Bogheans requested their interest be protected by hearing their objections to the matters that affect their lives, health, and property. The Bogheans said the issues in these appeals were significant to all residents in the Sundre region.

[45] The Bogheans submitted the development of open pits in the area would cause significant health risk from fine air-borne dust, migration of arsenic into the aquifer from which

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<sup>10</sup> Bogheans' Submission, October 24, 2019, at page 1.

<sup>11</sup> Bogheans' Submission, October 24, 2019, at page 3.

they draw their water, loss of property value as people move out due to the health risks, and closure of businesses.

[46] The Bogheans argued the development of the project, and any others that come in the future where there has not been representative participation of those affected, should be disallowed. The Bogheans stated virtually no one from the area responded to the Notice of Decision because of an ineffective communications system.<sup>12</sup>

3. Mr. Neil Konner

[47] Mr. Konner stated he had corresponded with AEP since 2016 and the County since 2013 regarding the environmental preservation of McDougal Flats and concerns for the Red Deer River watershed. Mr. Konner submitted the Code of Practice for Pits was not followed, and the Code of Practice for Asphalt Paving Plants had not been recognized in the area.

[48] Mr. Konner said there were seven properties within McDougal Flats designated as aggregate extraction sites within an area four miles long and a mile wide west of Sundre. Mr. Konner stated there were approximately 600 acres of active pits with topsoil removed.

[49] Mr. Konner noted the RDRWA Report designated the area as having “High Surface Water Sensitivity” and “Very High Groundwater Vulnerability.” He stated the RDRWA Report found increasing amounts of contaminants in the Red Deer River, with some contamination resulting from human activities in the watershed.

[50] Mr. Konner said area residents created the South McDougal Flats Area Protection Society (the “Society”) in September 2016. The Society’s purpose was to engage the County and other governments and inform them of the situation and cumulative effects within McDougal Flats. Mr. Konner argued that, on previous development applications, only the facts presented by a project proponent were considered by the Director while cumulative effects in the area were ignored.

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<sup>12</sup> Bogheans’ Submission, October 24, 2019, at page 3.

[51] Mr. Konner stated the Society met with AEP in January 2017 to inform AEP of their concerns for the area and the potential impacts on the aquifer. AEP directed them on how to find approvals and were told to watch the newspapers to find applications, but they were never informed of the AEP website.

[52] Mr. Konner stated the Approval allows for the creation of a 10.4 hectare by 8 metre deep water body, which was only an approximation as the aquifer rises and falls depending on environmental conditions. He noted the aquifer rises and falls approximately one metre annually and has dropped two metres in the past four years. Mr. Konner stated that, given the size and dynamic properties of the approved waterbody in a High Ground Vulnerability area, it was hard to believe the Approval would have minimal or no adverse effect on the aquatic environment.

[53] Mr. Konner submitted it was unreasonable for the Director to permit the creation of an end pit lake by digging in the aquifer that was relied on for household and other needs. Mr. Konner said the Director did not consider cumulative effects as required by the *Alberta Land Stewardship Act*.<sup>13</sup> Mr. Konner stated the Appellants were not outside the zone of impact as alleged by the Director, even though he had no evidence to support his allegation.

[54] Mr. Konner stated if the Director had required the Approval Holder to publish a Notice of Application in the local newspaper, Mr. Konner would have had an opportunity to provide a Statement of Concern outlining his evidence, and he would have been able to learn whether or not an approval had been issued. Mr. Konner submitted the Director erred in assuming Mr. Konner and the aquatic environment would not be directly affected by the approved activity. Mr. Konner stated the Director exceeded his jurisdiction by issuing the Approval without the required due process for those directly affected.

[55] Mr. Konner noted the Board had previously determined the purpose of notice under the *Water Act* was to ensure all directly affected persons had an opportunity to provide their concerns to the Director, to file a Statement of Concern, and to later being able to file a

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<sup>13</sup> *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8.

Notice of Appeal if an approval was granted.

[56] Mr. Konner submitted there was no way he could have logically or reasonably known an application to dig in the groundwater aquifer that was his drinking water source had been made, or to file a statement of concern to the Director outlining his concerns and providing evidence of how his drinking water supply may be negatively impacted.<sup>14</sup>

[57] Mr. Konner stated he had not seen any evidence to support the Director's decision that the approved activity would not impact the aquifer. Mr. Konner said as soon as he discovered the Approval was issued, he took immediate steps to contact government officials to obtain direction on how to appeal the Director's decision, and no one told him he was outside the appeal period. Mr. Konner noted the Board encourages reasonable notice, but the Director did not make any effort to notify an interested group of directly affected people. Mr. Konner said the Notice of Decision was not placed where landowners would look to find notices of *Water Act* applications or approvals.

[58] Mr. Konner requested the Board extend the period for filing a Notice of Appeal of the Director's decision to "...7 days after a person such as myself could logically and reasonably discover that an approval of the proposed activity had been granted."<sup>15</sup> Mr. Konner also requested the Board accept his Notice of Appeal as he was not provided an opportunity to submit his concerns to the Director before the decision was made.

## **B. Approval Holder**

[59] The Approval Holder explained public notice of the Director's decision to issue the Approval was published on AEP's website from August 9, 2019, to August 16, 2019, at the local AEP office, and at the County's office for seven days.

[60] The Approval Holder noted sections 116(1)(a)(ii) and 116(1)(b) of the *Water Act*<sup>16</sup> set out the requirements for submitting a Notice of Appeal to the Board. The Approval

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<sup>14</sup> Konner's Submission, November 11, 2019, at page 3.

<sup>15</sup> Konner's Submission, November 11, 2019, at page 4.

<sup>16</sup> Sections 116(1)(a)(ii) and 116(1)(b) of the *Water Act* state:

Holder stated section 116(1)(a)(ii) required a Notice of Appeal to be submitted to the Board no later than seven days after receipt of notice of the decision, or the last provision of notice of the decision.

[61] The Approval Holder submitted the appeals should be dismissed as they were not submitted within the timelines specified by the *Water Act*.

[62] The Approval Holder submitted the Appellants were not directly affected by the Director's decision as they live beyond the one-kilometre impact radius, and the groundwater travels in an east to northeast direction, away from the Appellants' residences.

[63] The Approval Holder explained it extracts gravel through bailing by excavator while minimizing erosion. The Approval Holder said there would be no dewatering or diversion of water from the gravel pit and no chemicals used. The Approval Holder said the approved activity, which is located outside the flood hazard area, would result in a net positive water balance.

### **C. Director**

[64] The Director submitted he had the discretion and authority under section 108(6)(b) of the *Water Act* to waive the requirement to provide notice of an application and subsequently provide the Notice of Decision. The Director stated the ability to waive the notice requirement was "not intended to be an unjust or unfair process, but rather an acknowledgement

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- "(1) A notice of appeal must be submitted to the Environmental Appeals Board
- (a) not later than 7 days after...
    - (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.
- (2) The Environmental Appeals Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so."

that in certain limited circumstances, it may be appropriate to waive such notice.”<sup>17</sup>

[65] The Director noted the gravel pit had operated in the area since 2008. The Director submitted the approved activity would not have an adverse effect on the aquatic environment or household users, licensees, or traditional agriculture users. The Director explained the approved activity:

- did not involve diverting water or dewatering;
- the sand and gravel aquifer was shallow;
- the flow of water moved from east to the northeast, not towards anyone; and
- no chemicals would be used.

[66] The Director argued the Appellants were not unreasonably denied an opportunity to participate in the approval process. The Director stated the Appellants were not affected by the Approval as there would be minimal or no adverse effects, and the Appellants reside at least 1.5 kilometres from the Site and were not within any potential impact zone.

[67] The Director noted section 13(1) of the *Water (Ministerial) Regulation*<sup>18</sup> sets out

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<sup>17</sup> Director’s Submission, November 5, 2019, at page 1.

<sup>18</sup> Section 13(1) of the *Water (Ministerial) Regulation*, Alta. Reg. 205/1998 provides:

“For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:

- (a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (b) provide notice of the application, decision or order through a registry established by the Government for that purpose;
- (c) provide notice of the application, decision or order through a telecommunication system or electronic medium;
- (d) publish notice of the application, decision or order in The Alberta Gazette;
- (e) make available a copy of the application, decision or order in one or more branch offices of the Department in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (f) provide notice of the application, decision or order, in the form and manner and within the time period specified by the Director, to
  - (i) any persons determined by the Director, and

the notice requirements for section 108 of the *Water Act*. The Director stated that, under section 13(1) of the *Water (Ministerial) Regulation*, the Director may provide notice by posting notice on the AEP website, providing a copy of the decision in AEP's branch office, or providing the Notice of Decision to the local authority or municipality in which the activity is located. The Director said he exceeded the legislated requirements by posting the Notice of Decision on the AEP website and on the AEP branch office's bulletin board, and providing it to the County to post. The Director stated his decision to not require additional notice was not appealable to the Board.

[68] The Director said he had previously provided information to some of the Appellants regarding sand and gravel operations in the region, and he responded to at least one inquiry that had been derived directly from the AEP's Authorization Viewer. The Director did not believe posting of the Notice of Decision on the AEP's website was an obscure location as suggested by the Appellants.

[69] The Director acknowledged that, under section 116 (2) of the *Water Act*, the Board has the authority to extend the appeal period. The Director submitted there were no extenuating circumstances to warrant an extension, as the appeals were filed outside the seven-day appeal period, and the approved activity would have a minimal adverse effect, if any.

[70] The Director submitted the question before the Board was whether or not the Director correctly determined the Approval would have minimal or no adverse effect on the aquatic environment, household users, licensees, and traditional agricultural users based on the facts before the Director. The Director stated the following facts were before him when making the decision:

- (a) the Site was close to existing industrial developments;
  - (b) the Site's maximum size was 12.2 hectares;
  - (c) the Site was approximately 1.5 kilometres outside the flood hazard area;
- 
- (ii) the local authority of the municipality in which the land on which the activity, diversion of water or operation of a works is located;
  - (g) provide notice in any other form and manner considered appropriate by the Director."

- (d) the shallow groundwater flows to the northwest, where Sundre Wood Products was located;
- (e) the majority of water wells within the 1.6-kilometre range were completed in bedrock or below the maximum depth of excavation or were not within probable travel time for activities at the pit to cause an adverse impact;
- (f) the gravel would be extracted through bailing, with no chemicals or dewatering used;
- (g) the Approval Holder had plans to clean any potential spills; and
- (h) the probability of a potential spill introducing hydrocarbons into the groundwater was no greater than any other industrial or agricultural operation.

[71] The Director said even if the catchment area were reduced by 25 percent, there would still be a net positive water balance value.

[72] The Director stated he considered the possibility of flooding and soil erosion when deciding to issue the Approval, as evidenced by Conditions 4.0 and 4.1 of the Approval.<sup>19</sup> The Director noted the approved activity was outside the flood hazard area and would only flood in extreme events.

[73] The Director said he considered the following factors when determining the approved activity would not be a risk to the water wells mentioned by the Appellants in their submissions:

- “(a) while within the 1000 m of the proposed activity, the wells ranged in 567-824 m in distance from the proposed activity;
- (b) no water was to be diverted;
- (c) there was no down draw of the water table;

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<sup>19</sup> Condition 4.0 of the Approval states:

“The Approval Holder shall minimize:

- (a) siltation; and
- (b) erosion.”

Condition 4.1 of the Approval states:

“The Approval Holder shall monitor for, mitigate and repair any siltation and erosion of the waterbody(s) and the end pit lake(s) that occurs due to the operation until such time that the operator is released from responsibility for the construction, operation or reclamation of the pit.”

- (d) the end pit lake would be created by the excavation into the shallow groundwater;
- (e) the flow of water was minimal and the direction of flow was towards other industrial users; and
- (f) no chemical would be used in the excavation process.”<sup>20</sup>

[74] The Director stated he relied on the comments of AEP’s hydrogeologist in deciding to grant the Approval.

[75] The Director submitted the Appellants had not provided any evidence the approved activity would cause an increase in turbidity or create adverse chemical reactions that would impact the wells or nearby river.

[76] The Director stated it was generally preferable to have industrial activities located in the same area to minimize the overall impacts to the environment. The Director said the Approval did not increase the overall industrial footprint in the area beyond what already existed and did not increase the cumulative effects.

[77] The Director noted section 108 of the *Water Act* provided him with the discretion to waive the requirement to provide notice of an application if he determined the proposed activity would result in minimal or no adverse effect on the aquatic environment, household users, licensees, and traditional agricultural users. The Director submitted that, before he made the decision, he determined the approved activity would have minimal or no adverse effect and, therefore, he did not exceed his jurisdiction or authority in waiving the notice of an application.

**D. Appellants’ Rebuttal**

[78] The rebuttal was provided by Mr. Tudor on behalf of Mr. Currie, Mr. Konner, Mr. Killeleagh, Mr. Smith, and himself.

[79] The Appellants retained a hydrogeologist, Dr. Jon Fennell, who explained that:

“When an aquifer is exposed to the atmosphere, like what will happen when the Crouch Pit is excavated down to, and below, the water table, the accumulating groundwater in the pit will degas some of the CO<sub>2</sub> entrained by infiltration waters, which will cause the pH to increase.”<sup>21</sup>

[80] Mr. Tudor submitted the types of information provided by Dr. Fennell were not assessed by the Approval Holder or the Director before making the decision. Mr. Tudor stated that, without assessing the groundwater chemistry, possible changes from open pit bailing operations, and the presence of an end pit lake, there could be unintended consequences for downgradient groundwater users that could have been avoided. He stated the application was deficient since no baseline assessment of the groundwater was conducted to determine if there was a real risk, and the Approval did include the requirement for a groundwater monitoring program to determine if changes in groundwater quality downgradient of the pit could occur.

[81] Mr. Tudor submitted the Director failed to demonstrate that, prior to making his decision, the Director had all the correct information to determine there would be no adverse effect on the aquatic environment, household users, traditional agricultural users, licensees, or other approval holders.

[82] Mr. Tudor stated the Director relied on information provided by the Approval Holder’s consultant, who did not provide an assessment of the physical or chemical implications of the approved activity. Mr. Tudor noted the June 26, 2018 letter from Mr. Han to Ms. Perley “strongly” recommended a field verified water well survey, which the Director ignored. Mr. Tudor submitted a field survey would have found the water level in the aquifer was lower than expected.

[83] Mr. Tudor argued the Director’s submissions contained several inconsistencies. Mr. Tudor noted the Director said the groundwater flowed to the northwest, and later said the groundwater flowed east to northeast. Mr. Tudor noted Dr. Fennell assessed the local

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<sup>20</sup> Director’s Submission, February 14, 2020, at paragraph 27.

<sup>21</sup> Tudor’s Submission, March 9, 2020, at paragraph 12.

groundwater flow direction and velocity and found turbidity and any other constituents associated with the groundwater disturbed by the gravel extraction process (such as mobilized trace elements, trace elements associated with turbidity, hydrocarbons from spills, etc.) would take about 7 months to reach the nearest downgradient well located roughly 600 metres away from the Site.

[84] Mr. Tudor stated the documents relied on by the Director to make his decision did not contain any assessment or mitigation of turbidity impacts on water wells, and the only statements found referred to the expectation that turbidity would be filtered out in a short distance and groundwater flow was assumed to be slow. Mr. Tudor submitted Dr. Fennell's evidence indicated the groundwater flow velocity was considered quite high. Mr. Tudor said the Director did not consider the physical impacts to the groundwater flow around the Site and the risk to water wells in the area.

[85] Mr. Tudor stated the issue of whether there was a positive water balance should be determined by a professional, and there was no examination of impacts from an extended drought and warmer temperatures in the future.

[86] Mr. Tudor submitted the Director could not reasonably predict the Site would not flood in the future and the pit would not be impacted. Mr. Tudor noted localized flooding was an almost yearly occurrence in the area.

[87] Mr. Tudor argued the Approval Holder's application was incomplete, because it did not provide the Director with sufficient information about the groundwater wells and who relied on those wells for their water needs. Mr. Tudor stated the issues of turbidity, chemical reactions, and cumulative effects were not properly addressed by the Approval Holder or the Director.

[88] Mr. Tudor submitted the Director erred in determining there would be minimal or no adverse effects on the Appellants or any other water user in the area. Mr. Tudor noted the inconsistencies in statements of fact and the lack of assessments of the direction of flow and cumulative effects in the Director's submission. Mr. Tudor stated there was no assessment of the

physical, chemical, or biological implications of the pit development or any consideration by the Director of the adverse effects on the aquatic ecosystem.

#### **IV. ANALYSIS**

##### **A. Legislation**

[89] Section 108(1)(a) the *Water Act* requires notice to be given of an application for an approval:

“An applicant

(a) for an approval...

shall provide notice of the application in accordance with the regulations.”

[90] Section 108(6)(b) of the *Water Act* sets out the circumstances where a waiver of the notice requirement is permitted:

“Notwithstanding subsection (1), if the Director has received an application for an approval, a licence or an amendment of an approval, preliminary certificate or licence or the Director proposes to make an amendment on the Director’s own initiative, the Director may waive the notice requirement under subsection (1) if the Director is of the opinion that ...

(b) the activity or diversion of water specified in the application for the approval or licence or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users....”

[91] Sections 111(1)(a) and (2)(a) of the *Water Act* detail when the Director must give notice of an approval being issued if the requirement for notice of an application is waived under section 108:

“(1) If the Director

(a) issues an approval...

the Director must comply with the notice requirements referred to in subsection (2).

(2) If subsection (1) applies, the Director must

(a) if notice of the application or proposed changes was waived by the Director under section 108(6), ensure that notice of the decision is

provided, in accordance with the regulations, to any directly affected person....”

[92] Section 13(1) of the *Water (Ministerial) Regulation* provides:

“For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:

- (a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (b) provide notice of the application, decision or order through a registry established by the Government for that purpose;
- (c) provide notice of the application, decision or order through a telecommunication system or electronic medium;
- (d) publish notice of the application, decision or order in The Alberta Gazette;
- (e) make available a copy of the application, decision or order in one or more branch offices of the Department in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
- (f) provide notice of the application, decision or order, in the form and manner and within the time period specified by the Director, to
  - (i) any persons determined by the Director, and
  - (ii) the local authority of the municipality in which the land on which the activity, diversion of water or operation of a works is located;
- (g) provide notice in any other form and manner considered appropriate by the Director.”

[93] Section 116(1) of the *Water Act* sets the time limits for filing a Notice of Appeal as follows:

“A notice of appeal must be submitted to the Environmental Appeals Board

- (a) not later than 7 days after...

- (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.”

[94] Under section 116(2) of the *Water Act*, the Board has the discretion to extend the time to file a Notice of Appeal if there are sufficient grounds. Section 116(2) provides:

“The Environmental Appeal Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

## **B. Discussion**

[95] After reviewing the submissions from the Participants and the Record, the Board determined the appeals must be dismissed since the Appellants:

- (a) did not meet the legislated timelines for filing their Notices of Appeal; and
- (b) failed to provide sufficient grounds for the Board to grant an extension of time to file their Notices of Appeal.

### 1. Legislated Timelines

[96] One of the purposes of having deadlines in the legislation is to provide an element of certainty to the regulatory process. The time limit to file an appeal is specified in the legislation so all parties – the applicant for the approval, the persons who are directly affected, and the Director – know when the process is complete. If there were no time limits on the appeal period, the approval holder would not know when it could proceed with its approved activity, as an appeal could be filed at any time that could result in the approval being quashed or changed. The timelines included in the *Water Act* and the certainty they create are intended to balance the interests of all parties involved. Once the appeal period has expired, the approval holder can proceed with the activity under the approval’s terms and conditions without the risk of an appeal being filed.

[97] A party seeking an approval under the *Water Act* is required to go through an application process. Under section 108(1) of the *Water Act*, providing public notice of the application is part of the application process. However, section 108(6) of the *Water Act* allows the Director to waive the notice requirement if the Director is of the opinion the activity specified in the approval application “will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agricultural users...”

[98] The Director will often waive notice of the application where potential impacts, if any, are known and would be minimal. The approved activity is for an existing disturbed Site, and impacts are known for the proposed activity. Based on the knowledge of the Site, the existing operation, and the known impacts of sand and gravel operations, the Director relied on section 108(6)(b) of the *Water Act* to waive the notice requirement for the application. The Director provided a Notice of Decision as required under sections 111(1)(a) and 111(2)(a) of the *Water Act*.

[99] Under section 116(1) of the *Water Act*, anyone seeking to appeal a decision to issue an approval must file a Notice of Appeal with the Board within seven days of receipt of the Notice of Decision or the last provision of the Notice of Decision. In these appeals, the Director posted the Notice of Decision on the AEP website on August 14, 2019, and it was provided to AEP’s Red Deer office and the County office to post on their bulletin boards.

[100] Based on this, August 15, 2019, was the first full day the notice was available to the public. Therefore, the seven-day appeal period would end on August 22, 2019. When the Appellants became aware of the Director’s decision to issue the Approval, they filed Notices of Appeal. The Board notes the Appellants filed their Notices of Appeal between September 18 and 21, 2019. The first Notice of Appeal, received on September 18, 2020, was 28 days after the expiry of the seven-day period to file. The Appellants acknowledged their Notices of Appeal were filed late.

[101] The Board recognizes the challenges for an appellant to know when an approval is issued when there was no notification an application had been made, or to continually check AEP's websites in case an application was made or an approval issued. However, the legislation has given the Director the discretion to waive notice of an application and exclude the statement of concern process. Having reviewed the Record and the submissions of the Participants, the Board is of the view the Director did not exceed his jurisdiction by exercising his discretion under section 108(6) of the *Water Act* to waive notice of the application.

[102] The Notices of Appeal were filed more than 28 days past the legislated time limit and, therefore, the Board finds the appeals were filed late.

## 2. Extension of Filing Time

[103] The Appellants submitted that, had the Director not waived the requirement for notice of the application, they would have learned of the application, filed Statements of Concern, and the Director would have known to advise them when the Approval was issued. If this had occurred, the Appellants believe they would have filed their Notices of Appeal on time.

[104] The Appellants requested the Board extend the time to file their Notices of Appeal for the following reasons:

- (a) the Director waived the notice requirements, preventing the Appellants from learning of the application;
- (b) the Director erred in assuming the aquatic environment and directly affected persons would not be adversely affected by the approved activity and, therefore, he exceeded his jurisdiction by issuing a Notice of Decision without required due process;
- (c) the Appellants filed Notices of Appeal as soon as they learned it was necessary; and
- (d) the Appellants were directly affected by the approved activity.

[105] The need for certainty is an essential element of the regulatory process. The *Water Act* recognizes the importance of conserving and managing water and the need for balancing various interests.<sup>22</sup> As the importance of certainty in the regulatory process is significant, the Board generally does not extend the appeal period unless it is clear an extension would be required to maintain natural justice and fairness principles. The Board has the responsibility to ensure the appeal process is fair for all parties to an appeal. For the Board to grant an extension of time to file a Notice of Appeal, the appellant must show that extenuating or special circumstances existed that prevented the filing within the legislated time frame.

[106] The *Water Act* has specific time limits governing the filing of appeals. In this case, the appeal period is seven days. The legislators determined this was a reasonable amount of time to file an appeal of an approval under the *Water Act*. Even though the legislation allows the Board to extend the time to file, the Board is only willing to consider an extension when compelling reasons are provided by the appellant. In this situation, the Appellants' reasons for why the Board should grant an extension are not sufficiently compelling for the Board to extend the time to file the Notices of Appeal.

[107] The Board recognizes the legislation contemplates situations where the Director could waive the notice requirement. Although such a waiver makes it more difficult for interested persons to become aware of and be involved in the application process, the Director acted within the discretion granted to him by the *Water Act* to waive notice of the application.

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<sup>22</sup> Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.”

[108] The Appellants provided submissions disputing the Director's finding the approved activity would not cause a significant adverse impact. Although the submissions might be relevant at a merits hearing, the matter before the Board is whether the Appellants' Notices of Appeal should be dismissed for being filed late and whether there were sufficient circumstances to warrant an extension of time to file the Notices of Appeal.

[109] Although the Appellants filed their Notices of Appeal as soon as they learned it was necessary to appeal the Director's decision, the Notices of Appeal were filed after the seven-day time limit specified in the *Water Act* had expired. The Notice of Decision was posted as required under the *Water Act* and in a manner specified in the *Water (Ministerial) Regulation*. The Appellants lack of awareness of the appeal process is not a sufficient reason for the Board to extend the time to file a Notice of Appeal set by the legislation.

[110] The Appellants stated they were directly affected by the Director's decision to grant the Approval, and the Board should extend the time limits to allow their concerns to be heard. The Director and Approval Holder argued the Appellants were not directly affected. The Board is not making a finding on the Appellants' directly affected status. At this stage of the appeal process, the directly affected status of the Appellants is not relevant to determining whether the appeals were filed in time and if the Board should extend the appeal period.

[111] When the Board considers extending the period to file a Notice of Appeal, it looks for extenuating or special circumstances that prevented an appellant from filing within the legislated time frame. The Board did not find such circumstances existed in respect to the Appellants.

[112] Therefore, the Board will not extend the time limit for the Appellants to file their Notices of Appeal.

## **V. DECISION**

[113] The Board finds the Appellants did not file their Notices of Appeal within the applicable time period required in the *Water Act*, and the Appellants did not provide sufficient

evidence of extenuating or special circumstances that prevented them from filing within the legislated time period. Therefore, the Board dismisses the Appellants' appeals for failing to submit their Notices of Appeal on time.

Dated on January 24, 2022, at Edmonton, Alberta.

"original signed by"

Alex MacWilliam

Board Chair (ret.)