

ENVIRONMENTAL APPEAL BOARD FOR BRITISH COLUMBIA

In the matter of an appeal under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483

FORM 1

NOTICE OF APPEAL

Person Filing the Appeal

Name of Appellant:

City of Nanaimo
455 Wallace Street
Nanaimo, BC
V9R 5J6

Name of Appellant's Legal Counsel and Address for Service:

Reece Harding and Michael Moll
Young Anderson
Barristers & Solicitors
1616-808 Nelson Street
Vancouver, BC V6Z 2H2
Phone: 604 689 7400
Fax: 604 689 7444
Email: harding@younganderson.ca
Email: moll@younganderson.ca

Address for service: Young Anderson, Barristers & Solicitors Attn: Reece Harding, 1616-808 Nelson Street, Vancouver, BC V6Z 2H2; email: harding@younganderson.ca

Details of Decision to be Appealed:

Order of Glen Davidson, P. Eng., Comptroller of Water Rights, Water Management Branch, Dam Safety Section, Ministry of Forests, Lands and Natural Resource Operations issued on April 29, 2015.

Reasons for Appeal and Particulars

The City of Nanaimo (the “City”) is a municipality under the *Community Charter* and the *Local Government Act*. The City’s decision-making authority is exercised by or delegated by the City’s elected Council.

Under its authority to provide municipal services to residents and visitors, the City owns and operates 631 hectares of parks, including a park known as Colliery Dam Park. Colliery Dam Park contains two dams known as the Colliery Dams. Those two dams are specifically known as the Middle Chase River Dam (the “Middle Dam”) and the Lower Chase River Dam (the “Lower Dam”). The City operates the Colliery Dams pursuant to Conditional Water Licences C061424 and C061423 issued under the *Water Act*.

The Colliery Dams are a rare link with the City’s industrial heritage as they were built in 1910-11 by the Western Fuel Company to supply water for coal washing and for use by miners. The reservoirs are now used as park ponds and a popular fresh water swimming spot.

On April 29, 2015, Glen Davidson, P. Eng., Comptroller of Water Rights, Water Management Branch, Dam Safety Section, Ministry of Forests, Lands and Natural Resource Operations (the “Comptroller”) issued an order under the *Water Act* (the “April 29 Order”). Concurrent with his issuance of the April 29 Order, the Comptroller revoked an earlier order made by him on April 9, 2015 (the “April 9 Order”). Both orders were issued in response to an alleged contravention of section 7.1 of the British Columbia Dam Safety Regulation with regard to the Colliery Dams.

The April 9 Order and April 29 Order come after less than two years of Council seeking to respond to Dam Safety Branch’s concerns regarding the Colliery Dams. The requirements imposed on the City by the April 29 Order are not ones that affect the interests of a private dam owner, but rather affect the City’s interest in dam safety, good governance, public park provision and the stewardship of the public assets of its community. The Colliery Dams are a matter of significant public interest and Council is expected to manage the Colliery Dams in a manner that reflects the will of its residents.

An early decision by Council to remove the Colliery Dams in 2012 was met by public outcry and protest. Council has subsequently sought to respond to the Dam Safety Branch’s concerns regarding the Colliery by commissioning engineers to advise the City of potential remedial options. Council has also sought to respond to community concerns regarding the necessity of expensive and disruptive remedial options and has adopted resolutions that seek to clarify and confirm the degree of hazard the Colliery Dams pose. The complex and highly political nature of choosing a remedial option means that such a decision cannot be quickly and easily made.

The April 29 Order requires that the City perform remedial work on the Lower and Middle Dams, by requiring the City to make two choices that are essential terms of that order:

- (a) the City is required to choose one of three remediation options involving either a new auxiliary spillway, a replacement 'labyrinth' spillway or an overtopping protection approach for the Lower Dam as specified in the April 29 Order by June 1, 2015 (s. 1(a)); and
- (b) the City must choose a remedial option supported by a conceptual plan for addressing potential safety hazard of the Middle Dam by the end of 2015 (s. 2(a)).

Section 1(a) of the April 29 Order contains one more choice of remedial option than the April 9 Order. As stated in the preamble, the Comptroller added the option of an overtopping protection approach (the "Third Option") in response to a meeting with City officials. Unlike the other two options presented by s. 1(a) of the April 29 Order, selection of the Third Option requires the City to provide a satisfactory independent report to the Dam Safety Branch that confirms certain technical requirements.

In response to the April 29 Order, the City promptly retained GeoStabilization International and other engineers to provide the report necessary to consider the Third Option using a technical approach suggested by GeoStabilization International. On May 18, 2015, the City was advised by GeoStabilization International that it would not provide the Council with the report necessary for it to pursue the Third Option because GeoStabilization International concluded that the tight timelines and the City's previous reliance on a different approach advanced by Golder & Associates meant that the City should instead work with Golder & Associates. As a consequence Council is unable to consider the Third Option using GeoStabilization International's approach at this time. Council has declined to consider choosing between the two options involving a new spillway design as required by either the April 9 Order or the April 29 Order.

Given that Council's consideration of the Third Option is not presently viable, City wishes to consider and pursue appropriate dam safety measures without being constrained by the parameters and tight deadlines imposed by the April 29 Order. Council's primary concern with the April 29 Order is that the Comptroller has overestimated the risk posed by the Colliery Dams and is consequently requiring excessive remedial measures in response.

If the City must perform a remedial action, Council seeks the time and opportunity to consider preferred alternatives to a new spillway design as it has been doing so since Council reversed its decision to remove the Colliery Dams in 2012.

The City appeals the April 29 Order because the City says the Comptroller has overestimated the risk posed by the Colliery Dams and that the urgency and scope of the remedial actions specified in the April 29 Order is unjustified. Even if the risk has been accurately assessed, the City says that the Comptroller has made erroneous and inappropriate conclusions and directives with regard to facts, law, and jurisdiction that do not consider new and relevant facts related to the scope and timing of the April 29 Order.

The City says that the Environmental Appeal Board should reverse the April 29 Order, or in the alternative, issue a new order that is more appropriate to the circumstances.

The Grounds of Appeal

The City advances the following grounds of appeal against the issuance of the April 9 Order:

1. The April 29 Order should be reversed because the Comptroller erred in estimating the potential safety hazard posed by the Colliery Dams and erred in assessing the scope and urgency of remedial action that is presently required.
2. In the alternative, the April 29 Order should be modified to grant the City more time and greater discretion to identify and consider other remedial option or options that the Council might consider to be in the interests of the City.
3. Additionally and in the further alternative:
 - (a) the Comptroller lacked the jurisdiction to require that the City's Council make a choice regarding a remediation option and to fetter that discretion with timelines and parameters set by the Comptroller; or
 - (b) if the Comptroller did have such jurisdiction, the Comptroller erred in ordering the City to make a choice regarding the Lower Dam in a manner that does not accommodate the plenary nature of the City's Council, including the possibility the City will not comply with the April 29 Order if the Council vote on which particular remedial option is preferred results in a stalemate; and

the order should be modified so as to respect City Council's statutory authority over decisions regarding the fulfillment of municipal purposes.

What result are you seeking from an appeal:

The Appellant seeks an order from the Board that provides for the following:

1. A reversal of the April 29 Order.
2. In the alternative, an order that provides for the following:
 - (a) that the City may submit a design report and construction plans for approval under section 4 of the B.C. Dam Safety Regulation of any of following remediation plans for the Lower Dam:
 - (i) the Labyrinth Spillway Design (Report on Dam Remediation Options, Golder, August 29, 2014);

- (ii) the Auxiliary Spillway Design (Auxiliary Spillway – Conceptual Design, Golder, January 16, 2015); or
- (iii) an alternative option identified by the City and subject to the approval of the Dam Safety Branch;

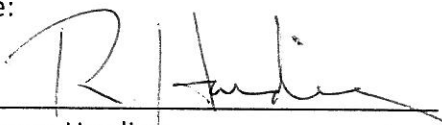
by a date to specified by the Board;


- (a) if the City does not submit a design report and construction plan in accordance with section 2(a) above, the City must submit a design report and construction plan for approval under section 4 of the B.C. Dam Safety Regulation utilizing a design ordered by the Board by a date specified by the Board;
- (b) the City must substantially complete the approved construction plan for the Lower Dam by a date specified by the Board;
- (c) the City must prepare and submit for approval a design report and conceptual plan that identifies any actions required to correct the potential safety hazard with the Middle Dam by December 31, 2015; and
- (d) the City must, upon receipt of approval under section 4 of the B.C. Dam Safety Regulation, complete construction of the plan submitted under section 2(d) above by a date specified by the Board.

Type of Hearing

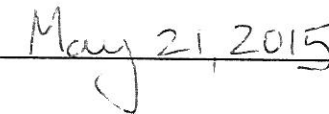
The City requests that the appeal be heard as a full oral hearing (*de novo*) in Nanaimo, BC to allow for cross-examination of witnesses and community members and interested parties from the Nanaimo area to attend and participate.

Signature:


 Reece Harding
 Counsel for the City of Nanaimo


 Michael Moll
 Counsel for the City of Nanaimo

Date:


 May 21, 2015