

# Manitoba Ombudsman

**REPORT UNDER**

**THE OMBUDSMAN ACT**

**CASE 2014-0478**

**SUSTAINABLE DEVELOPMENT AND THE MANITOBA WATER SERVICES BOARD**

**REPORT ISSUED ON APRIL 5, 2017**

## **CASE SUMMARY**

**In 2014 Manitoba Ombudsman received complaints from ten individuals and the chief administrative officer of the Rural Municipality of Argyle. The complainants alleged they were not provided with adequate notification about a proposed water project by the Town of Pilot Mound and therefore were unable to formally register their concerns with the Environmental Approvals Branch.**

**Manitoba Ombudsman determined that the public bodies involved with the implementation of the water project met legislative and regulatory requirements regarding public notification of the project. However, we are of the view that improvements can be made to ensure a more comprehensive notification process so individuals such as the complainants are able to fully participate in the review process.**

**In addition, we suggest improvements to the communication and administrative coordination between the branches of Sustainable Development<sup>1</sup> and the Manitoba Water Services Board with respect to providing information about projects.**

## **OMBUDSMAN JURISDICTION AND ROLE**

Under the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation. On other occasions

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<sup>1</sup> Formerly known as Manitoba Conservation and Water Stewardship prior to May 2016.

it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits we also examine the fairness of the action or decision.

## **KEY ISSUES**

- 1. Did the complainants including the chief administrative officer of the Rural Municipality of Argyle receive notification about the Town of Pilot Mound water project in accordance with requirements set out in legislation, by-law and policy?**
- 2. Was the chief administrative officer of the Rural Municipality of Argyle provided with accurate and sufficient information about the project when she contacted the Manitoba Water Services Board and the Water Use Licensing Section?**

## **SCOPE OF THE INVESTIGATION**

Our investigation of these complaints included the following:

- A review of legislation: the Environment Act; the Manitoba Water Services Board Act; the Drinking Water Safety Act; the Water Rights Act; the Municipal Act; and the Groundwater and Water Wells Act.
- A review of the Drinking Water Safety Regulation MR 40/2007; the Manitoba Municipal Act Procedures Manual.
- Interviews with government representatives from Sustainable Development's Environmental Approvals Branch; Sustainable Development's Water Use Licensing Section; Manitoba Water Services Board; the Town of Pilot Mound<sup>2</sup>; the Rural Municipality of Argyle.
- Interviews with and information provided by the complainants.
- Review of licensing flowcharts, processes and documentation.

## **BACKGROUND INFORMATION**

The Town of Pilot Mound (the town) is located within the Pembina watershed in the Municipality of Louise. Prior to the completion of the water treatment project at issue, the town provided a public water system that drew water from the Goudney Reservoir. Due to aging equipment and stricter regulations, the plant – constructed in 1964 – was failing to produce treated water that complied with Drinking Water Safety Act regulatory requirements. As a result, the provincial government identified the upgrade to the town's water supply as a project eligible for assistance in February 2012.

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<sup>2</sup> The Town of Pilot Mound was amalgamated with the Municipality of Louise and the Village of Crystal City on January 1, 2015, and the new entity is the Municipality of Louise.

### Development of a Rural Municipal Water Project

The development of a municipal water project in rural Manitoba is a complex and layered process. It involves many public bodies, including the municipality involved in the water project, the Manitoba Water Services Board (MWSB) and the department of Sustainable Development, in particular the Water Use Licensing Section (WULS) and the Environmental Approvals Branch (EAB). Each public body involved in the water project is bound by requirements set out in legislation, policy, and by-law and is responsible for various facets of the process.

Manitoba Water Services Board is tasked with assisting rural residents in developing safe and sustainable water facilities. The MWSB procures all services including engineering services and the detailed design, tendering, and awarding of contracts for installation of infrastructure works. The MWSB also obtains permits and environmental assessments, licenses and provides construction supervision.

In September 2012, the Town of Pilot Mound passed a resolution formally requesting technical and financial assistance from the MWSB to upgrade the existing non-compliant water supply system.<sup>3</sup> The project originally involved the construction and operation of an upgraded water supply system for the town, which included:

- the installation of two wells in the Glenora Aquifer (one production well and one future standby well)
- a new raw water pipeline from the wells to the Town of Pilot Mound (including approximately 14.5 km of buried pipeline on road allowances in an agricultural area)
- an upgraded water treatment plant

The table in the attached Appendix A sets out in chronological order the various approvals, permits and licenses that the town's water project triggered from its inception in 2012 to 2015 and which are relevant to this investigation.

The complainants, all of whom resided in the Rural Municipality of Argyle (the RM), along with the RM's chief administrative officer and council, were concerned that the project could negatively impact the environmental health and the current and future capacity of the Glenora Aquifer.

### Regulatory Requirements

In October 2012 the MWSB applied to WULS for a water rights licence and was later issued a groundwater exploration permit on behalf of the Town of Pilot Mound to divert water from the Glenora Aquifer, which is located in the RM of Argyle.

WULS advised our office that its role is to ensure that sufficient water is available for such projects. In doing so, WULS will issue a project proponent with a groundwater exploration permit, which requires the proponent to hire a consulting hydrogeologist to assess the capacity of the wells and the aquifer.

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<sup>3</sup> The MWSB typically provides 1/3<sup>rd</sup> assistance and the remaining 2/3<sup>rd</sup> is generally shared between the local municipality and the federal government.

In this case, WULS issued the groundwater exploration permit in June 2013. WULS mailed the permit to the CAO of the Town of Pilot Mound, copying the RM of Argyle as the wells were located within the RM of Argyle's boundaries.

With the groundwater exploration permit secured, MWSB's hydrogeological testing proceeded. In October 2013, a hydrogeological report was issued indicating that there was sufficient groundwater available for the project.

The MWSB next applied on behalf of the town for an Environment Act licence, which was required given the volume of water proposed to be withdrawn. The Environmental Approvals Branch (EAB) issued an Environment Act licence on February 10, 2014.

Concurrent to the application for an Environment Act licence, the MWSB also applied to WULS for a water rights licence under the Water Rights Act, which is a permit to draw water. While the actual license is not issued until the water is flowing, WULS provided the applicant with a response stating that their application has been accepted in principle and subsequently issued the licence in June 2015.

### Project Expansion

The MWSB was aware of other water quality issues with neighbouring municipalities of Pilot Mound and therefore expanded the project to include Manitou and eventually Pembina. Because the expansion of the project increased the amount of water needed from the aquifer, a revised application was made to the EAB.

Considered a "minor alteration" under the act, the revised application requested an alteration to the licence to include the formation of a regional water system and increase the proposed raw water withdrawal. The alteration was accepted by the EAB in July 2014 and a revised licence was issued.

The expanded water needs also triggered a need for a revised joint water rights licence to allow for the increase in water allocation for the regional water system. Therefore the MWSB applied in June 2014, and later in December 2014 when the RM of Argyle joined the regional water system to secure some water allocation for future needs. WULS accepted the applications in principle and issued an official licence after the project was complete in June 2015.

## Map of the RM of Argyle and the Municipality of Louise



Source: Google Maps

### ANALYSIS OF ISSUES AND EVIDENCE

**1. Did the complainants including the chief administrative officer of the Rural Municipality of Argyle receive notification about the Town of Pilot Mound water project in accordance with requirements set out in legislation, by-law and policy?**

The Environment Act outlines the environmental assessment and licensing process for developments in the province that may have potential for significant environmental and or human health effects. It requires that public notice be provided to Manitobans when projects such as the one at issue are proposed.

According to the Environmental Approvals Branch “Information Bulletin – Environmental Assessment and Licensing under the Environment Act,” the process exists to ensure environmental

and human health protection, encourage early consultation, allow for full public participation, and ensure economic development occurs in an environmentally responsible way.

Section 2(1) of the act states:

***Department***

***2(1)*** *The aims and objectives of the department are to protect the quality of the environment and environmental health of present and future generations of Manitobans and to provide the opportunities for all citizens to exercise influence over the quality of their living environment.*

***Functions of the department***

***(2)2*** *Without limiting the generality of subsection (1), departmental functions include*

...

*(d) the establishment and maintenance of an effective method of public involvement in environmental decision making.*

The MWSB submitted an Environment Act proposal form on behalf of the Town of Pilot Mound in pursuit of the license on November 12, 2013. The EAB replied to the MWSB advising that the proposal would be advertised as set out in section 11(8) of the act below:

***Action by director in Class 2 developments***

**11(8)** *Upon receipt of a proposal for a Class 2 development under this section, the director shall within such time as may be specified by the regulation*

*(a) subject to section 47, file a summary of the proposal in the public registry and notify the public through advertisements in the local newspaper or radio that a proposal has been received, providing opportunity for comments and objections;*

*(b) file a copy of the proposal with the Interdepartmental Planning Board and other departments as may be affected by the development, for their review and comment;*

*(c) on the advice of the Interdepartmental Planning Board and other departments so consulted, determine the form of assessment required for the proposal, which may include forwarding the proposal to the minister for consideration as a Class 3 development pursuant to section 12 or consideration as a Class 1 proposal under section 10;*

*(d) notify the proponent of the assessment options and tentative schedule for the options; and*

*(e) provide the proponent with the name of a contact person to coordinate the process.*

As a result, the EAB prepared an advertisement of the Environment Act proposal as per the act and placed it in the *Pilot Mound Sentinel Courier* on Tuesday, December 10, 2013, providing the public with a 31-day window of opportunity to submit comments and objections until January 10, 2014.

The notice was posted electronically in the Environmental Approvals online public registry and two hardcopies were placed at the public registries located in the Legislative Library and the Millennium Library in Winnipeg. In addition, the notice was provided to other departments (Technical Advisory Committee members or TAC)<sup>4</sup> on December 6, 2013, with a closing date for comments of January 10, 2014.

The EAB explained to our office that by practice the branch advertises proposals for public comment in the nearest local paper, or in the *Winnipeg Free Press* if there is no convenient local paper. In this case, EAB advertised the proposal in the *Pilot Mound Sentinel Courier* as the primary components of the project (i.e. the water treatment plant and reservoir for reject water) were in and around the Town of Pilot Mound.

The EAB received no public comments by the deadline of January 10, 2013. The complainants advised our office that they would have submitted objections but were unaware of the comment period as they did not live within the distribution area of the *Pilot Mound Sentinel Courier*.

Ultimately, the EAB issued an Environment Act licence to the Town of Pilot Mound on February 10, 2014. As noted earlier in this report, the licence was later altered to include the expansion of the capacity of the water treatment plant. The EAB approved the proposal and issued a revised Environment Act licence in July 2014. Pursuant to Section 7 of the Environment Act, the approval of the proposed alteration opened another 30-day window of appeal.

However, none of the public bodies involved in the water project informed the CAO of the RM of Argyle that a revised Environment Act licence triggers a 30-day window for appeals. The EAB's practice is to send notification letters to anyone who had provided comments during the initial Environment Act licence public comment period; in this case the EAB explained it had received no comments and therefore was not required to mail notification letters.

In regards to its notification practices, the EAB explained in a letter to our office dated January 4, 2016, that

*a combination of local ads and notification on our website provides affected residents with ample opportunity to obtain more information about a project, and to provide comments. For almost all projects, the comment deadline is one month after the date of the advertisement. In our experience, where there is genuine public concern about a project, our advertisements and subsequent word of mouth discussion among neighbours generates most of the public comments....*

*In many cases involving municipal infrastructure, the infrastructure is to be located within the proponent's boundaries. In cases of private projects or municipal projects located in another municipality, it is very rare for the "host" municipality to be unaware of the project by the time an Environmental Act Proposal is advertised.*

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<sup>4</sup> The Technical Advisory Committee is made of representatives of different government departments including Sustainable Development's Wildlife Branch, Water Quality Management Section, Groundwater Management Section, Fisheries Branch; Manitoba Infrastructure's Highway Planning and Design Branch; and others.

The EAB, however, acknowledges that it can be difficult to alert people in rural areas of Environment Act proposals and comment periods. It indicated that regulations and policy could provide more detail regarding various approaches to take to ensure a more robust notification process.

Our office is of the view that current legislation, regulation, policy and practice may in some instances result in limited public notification. Two hardcopy registries both located in downtown Winnipeg; an on-line registry that is a passive location for information and does not actively send alerts to the general public; and one advertisement in a local newspaper with very limited distribution may satisfy the legislative requirements of the act but may not alert all individuals who may be affected by the proposal.

**2. Was the chief administrative officer of the Rural Municipality of Argyle provided with accurate and sufficient information about the project when she contacted the Manitoba Water Services Board and the Water Use Licensing Section?**

The CAO of the RM of Argyle advises that she contacted MWSB and WULS in June and July of 2013 respectively after being copied on a June 5, 2013, letter from WULS to the Town of Pilot Mound containing a groundwater exploration permit. The letter from WULS stated:

*The Groundwater Exploration Permit authorizes the Town of Pilot Mound to carry out exploration test drilling, construct production well(s), and conduct aquifer pump testing. The purpose of the pump testing is to determine if sufficient water is available from the well(s) and from the aquifer to support the project and to determine water level impacts on existing local wells and/or registered projects with earlier precedence dates than the proposed project.*

Concerned that a neighboring municipality would be testing the Glenora Aquifer – an aquifer within the RM of Argyle’s boundaries – the CAO advised our office that she contacted MWSB on June 17, 2013. The CAO indicated to our office that the MWSB told her it was conducting drill tests to determine if there was sufficient water available to supply the public water system in the Town of Pilot Mound.

The CAO said she was advised that the Town of Pilot Mound would only be allowed to use the aquifer as a new water source if it was determined that doing so would not negatively affect or impact any of the surrounding wells or users already on the aquifer. The CAO said that the MWSB assured her a representative from the Town of Pilot Mound would contact the RM to further discuss Pilot Mound’s water project. MWSB advised our office that it does not keep records of calls and that officials do not recall discussing this matter with the CAO.

The CAO indicated that she also contacted WULS on July 11, 2013, as council remained concerned about the test drilling being performed on the aquifer. She states that she was assured that at this point the Town of Pilot Mound was only permitted to conduct pump tests. She also states that WULS advised it would copy the RM of Argyle on all correspondence to the Town of Pilot Mound about the project going forward.

WULS confirms that it was contacted by the CAO on July 11, 2013, regarding her concerns about the groundwater exploration permit for the Glenora Aquifer. In a letter to our office, WULS advised that:

*We do not have any information on file that would indicate that the WULS informed the CAO that the MWSB had submitted an Environment Act Proposal (in December 2013). Furthermore, there is no information on file to indicate that WULS staff had informed either the Town of Pilot Mound or the EAB that the RM of Argyle had contacted WULS about the project. However, the absence of such information in the file does not preclude the possibility that such discussions took place. And as was pointed out above, WULS staff were aware that the CAO of the RM of Argyle had been in contact with ...MWSB in June, 2013.*

WULS further explained that it was aware when it issued the groundwater exploration permit that the project would trigger an environmental licensing process. WULS, however, did not copy the Environmental Approvals Branch on the groundwater exploration permit cover letter dated June 5, 2013, to the Town of Pilot Mound, as per its usual practice with private-sector applicants, nor did WULS inform the EAB of the RM of Argyle's concerns.

WULS explained to our office that their practice of copying the EAB on groundwater exploration permit approval letters with private-sector applicants is done to ensure applicants are aware that an Environment Act licence will be required. In this case the MWSB applied for the water use licence on behalf of a municipality; WULS, therefore, did not feel it necessary to alert the MWSB that an Environment Act licence would be required.

It appears the RM of Argyle was provided with accurate information when it contacted WULS and the MWSB in the summer of 2013, but we are of the view that it was not provided with sufficient information about the water project including the upcoming environmental approvals licence process which provides an opportunity for concerned citizens to submit comments and objections.

The RM of Argyle's CAO advises that the RM was not contacted about the water project by any public body – MWSB, the Town of Pilot Mound, WULS, or the EAB – until April 15, 2014, when the MWSB project manager informed the RM that the Pilot Mound project was going ahead and surveying for the pipeline was to start immediately. By this time the period for public comments and objections to the project under the Environment Act had long passed.

While neither WULS nor MWSB is required by law to provide said information to the public, we are of the opinion that both public bodies should make it standard practice to provide such information when they receive inquiries about a project.

Further, neither WULS nor MWSB informed the Environmental Approvals Branch of the RM of Argyle's concerns about the project. While WULS is not mandated to provide any information to the EAB, nor is WULS involved in the Environmental Approvals process, WULS stated that it is standard practice to copy the EAB on private-sector projects that WULS believes will require an Environment Act licence to proceed. We suggest that WULS make it standard practice to copy the EAB on all projects that it believes will require an Environment Act licence to proceed.

In a letter to our office, the EAB notes that: “Typically, some form of public participation occurs during the project planning stage, involving municipal officials and/or the general public. This input is generally incorporated in the design of a project, and reflected in the content of the Environment Act Proposal.” Regarding the proposals, the EAB notes “usually it’s pretty clear from the project description to anyone who reads the proposal whether or not others would have an interest in it. Often it’s addressed in the proposal, but there isn’t a requirement in the guidelines for them to do that.”

In the course of our investigation, we asked the EAB if implementation of a recommendation made in 2015 in the Manitoba Law Reform Commission’s *Final Report on Manitoba’s Environmental Assessment and Licensing Regime under the Environment Act*, would be beneficial:

**4.3** *Section 1.1. of the Licensing Procedures Regulation should be amended to require that an EAP includes an expanded list of requirements such as, but not limited to:*

- *A list of the licences, certificates, permits, approvals and other forms of authorization that will be required for the proposed undertaking;*
- *Sustainability;*
- *Information about the development’s potential effects on Aboriginal communities;*  
*and*
- *A list of the concerns received from the public and Aboriginal communities about the potential effects of the development and the way these concerns will be addressed by the proponent. (emphasis ours)*

In a letter to our office dated January 4, 2016, the EAB states that “Consideration is being given to providing more direction in guidelines to proponents on public involvement reporting in Environment Act proposals.”

## **FINDINGS AND RECOMMENDATIONS**

Based on our investigation, Manitoba Ombudsman determined that the Town of Pilot Mound, the Manitoba Water Services Board, the Environmental Approvals Branch and the Water Use Licensing Section of the department of Sustainable Development followed applicable legislation and regulations regarding public notification of the water project, therefore we have made no formal recommendations.

However, these public bodies did not effectively intersect to provide fair notification to the RM of Argyle nor to the complainants in the vicinity of the Glenora Aquifer. As a result, the complainants were not provided an opportunity to register their concerns with the Environmental Approvals Branch. As such, Manitoba Ombudsman suggests the following administrative improvements:

- That the Environmental Approvals Branch increase the scope and effectiveness of its notification process of Environment Act licence proposals to include a wider variety of channels to ensure broader distribution.
- That the Environmental Approvals Branch better meet the intent of the Environment Act by ongoing promotion of its online public registry website and the optional RSS feed to ensure public involvement in environmental decision making.
- That Manitoba Sustainable Development's Water Use Licensing Section and the Environmental Approvals Branch develop a protocol with the Manitoba Water Services Board to ensure that any public interest in projects that may require an Environment Act license is communicated in writing to the Environmental Approvals Branch in a timely and effective manner.
- That Manitoba Sustainable Development's Water Use Licensing Section make it standard practice to copy the Environmental Approvals Branch on all projects that WULS believes will require an Environment Act licence to proceed.
- That given the recommendation of the Law Reform Commission, the Environmental Approvals Branch update the Environment Act proposal guidelines to instruct proponents to include a list of the names of individuals, organizations, or public bodies who express concerns so that the Environmental Approvals Branch can ensure that their public notification process includes these individuals.

## **MANITOBA OMBUDSMAN**

## APPENDIX A

The table below sets out in chronological order the various approvals, permits and licenses, which are relevant to this investigation<sup>5</sup> that the Pilot Mound water project triggered from its inception in 2012 to 2014.

DATE	ISSUING DEPT	LICENSE / PERMIT / POLICY	LEGISLATION	PURPOSE	LICENSE GRANTED
Sept 2012	Town of Pilot Mound	<i>Local Improvement By-Law 2013-03</i>	Manitoba Municipal Act	To finance project	By-law enacted January 13, 2014
Oct 2012	Water Use Licensing Section of the Department of Sustainable Development	<i>Water Rights Licence - Groundwater Exploration Permit</i>	The Water Rights Act	To construct a well and divert groundwater for groundwater testing	Issued June 5, 2013
Nov 2013	Environmental Approvals Branch of the Department of Sustainable Development	<i>Environment Act Licence</i>	The Environment Act	To ensure environmental and human health protection, encourage early consultation, allow for full public participation, & ensure economic development occurs in an environmentally responsible manner	Feb 2014 Licence No. 3093 issued to The Town of Pilot Mound
Jan 2014	Water Use Licensing Section of the Department of Sustainable Development	<i>Water Rights Licence</i>	The Water Rights Act <sup>6</sup>	To pump water from the aquifer and put it "to beneficial use"	Water Rights Licenses are issued after water is put to beneficial use - May 2015 Licence No: 2015-052
April 2014	Office of Drinking Water, Department of Sustainable Development	<i>Permit to Construct or Alter a Public Water System</i>	Drinking Water Safety Act & supporting regulations	For the well and pipeline installation	July 2014 – Issued Permit #PWS-14-P39
April 2014	Environmental Approvals Branch of the Department of Sustainable Development	<i>Environment Act Licence - Alteration to the license to include the formation of a regional water system; proposed water withdrawal</i>	The Environment Act	To ensure environmental and human health protection, encourage early consultation, allow for full public participation, & ensure	July 2014 – Revised Environment Act Licence No. 3093R issued

<sup>5</sup>Our investigation pertains only to some of the licenses, permits and policies involved in this water project. Other applicable federal, provincial and municipal legislation, regulations and by-laws are not being reviewed here.

<sup>6</sup> Water Rights Licences are issued upon the completion of the project, as per MWSB, October 2014 "Town of Pilot Mound Pipeline Project" report, provided to the Manitoba Ombudsman office October 22, 2014.

		rate increased to 342.15 dam <sup>3</sup> /year		economic development occurs in an environmentally responsible manner	
June 2014	Water Use Licensing Section of the Department of Sustainable Development	Joint <i>Water Rights License</i> for regional water system	The Water Rights Act	To pump water from the aquifer for municipal purposes	Water Rights Licenses are issued after water is put to beneficial use - May 2015 Licence No: 2015-052
Dec 2014	Water Use Licensing Section of the Department of Sustainable Development	Joint <i>Water Rights License</i> for regional water system and RM of Argyle	The Water Rights Act	To pump water from the aquifer and put it "to beneficial use"	Water Rights Licenses are issued after water is put to beneficial use - May 2015 Licence No: 2015-052
April 2015	Water Use Licensing Section of the Department of Sustainable Development	<i>South Central District Water Co-op Inc. Groundwater Interference Policy</i>	The Water Rights Act	To ensure an interference response plan for mitigation of drawdown effects	Adopted by Resolution April 22, 2015
June 2015	Office of Drinking Water	<i>Permit to Construct or Alter a Public Water System</i>	Drinking Water Safety Act & supporting regulations	For the pipeline installation to Manitou	June 2015 – Issued Permit #PWS-15-P18