



**Ombudsman
Saskatchewan**

Promoting Fairness

Office of the Ombudsman for the Province of Saskatchewan

Report of Findings and Recommendations

Process for reviewing drainage complaints by the Water
Security Agency

March 2016

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Introduction

Saskatchewan's water is a valuable resource that needs to be managed properly. Under *The Water Security Agency Act*, the Water Security Agency (formerly the Saskatchewan Watershed Authority) is to manage, administer, develop, control and protect water, watershed and related land resources of Saskatchewan. It is also responsible for helping to resolve disputes between landowners over water drainage.

From 2011 to 2014, the Water Security Agency (WSA) has received 720 Requests for Assistance, 41 of which went on to become formal complaints from people claiming to have suffered damage to their property because of the construction, extension, alteration, or operation of drainage works on neighbouring lands.

This is not the first time that Saskatchewan residents have contacted Ombudsman Saskatchewan to complain about the WSA's process for handling complaints about drainage works. Since January 1, 2014, Ombudsman Saskatchewan has received 24 concerns about the WSA's complaint-handling processes, including this complaint.

The Complaint

A couple whose farm is in south central Saskatchewan contacted Ombudsman Saskatchewan with a complaint about the WSA. In 2010, they filed a complaint with the Saskatchewan Watershed Authority, because their neighbour constructed a drainage ditch that they believed was causing flooding on their home quarter.

The Water Security Agency Act sets out the process that a person must follow to have concerns about drainage works addressed by the WSA. The complainants feel that the entire process takes too long, is unresponsive and unfair to complainants. As well, when the complainants eventually got an order, which required the neighbour to fix the ditches, it was too difficult to get that order enforced.

The Water Security Agency's Complaint Process

The Water Security Agency Act provides a two-stage process to follow if a person believes he or she has suffered loss, damage or injury because someone has constructed drainage works.

First, a person must submit a written request for "assistance in resolving the complaint." Then the WSA conducts a preliminary investigation. After the preliminary investigation, the WSA will either issue written recommendations for resolving the complaint or dismiss the complaint with written reasons. At this stage, the parties may accept or reject the recommendations. There is no limit to how long this process can take, or any deadlines by which the WSA must make recommendations.

Second, if a complainant is not satisfied with the recommendation made by the WSA, or the party considered responsible for the damage does not implement the recommendation, the complainant has the right to file a formal complaint. The current fee for filing a formal complaint is \$200. A complainant cannot file a formal complaint unless he or she has first used the “assistance in resolving the complaint” process.

The Water Security Agency Act requires the WSA to investigate and render a written decision within 18 months after receiving the formal complaint. However, the WSA may extend the time by another six months, if it considers it appropriate.

If the decision requires corrective action, the WSA will issue an order that requires specific actions to be undertaken and completed within a given period. If the order is not complied with, the WSA has the authority to carry out the work itself and recover the costs from the party who failed to comply with the order. The WSA may also register an interest against the title to the land (like a lien) based on the order against the land on which the offending drainage works are located. It also has the right to extend the period under which an order has to be complied with or can amend the terms and conditions of any order it makes. Decisions can be registered in the court and enforced like a court order.

Anyone who is unhappy with the WSA’s decision or order may appeal to the Water Appeal Board within 30 days of the decision or order. The Board may hear the matter, and render a decision. A Water Appeal Board decision may be appealed to the Court of Queen’s Bench.

Ombudsman’s Mandate

The Ombudsman is an independent officer of the Legislative Assembly of Saskatchewan. Under *The Ombudsman Act, 2012*, our role is to investigate complaints about administrative actions and decisions of provincial ministries, agencies of the government, publicly-funded health entities, municipal entities, and their council members, board members, officers and employees. After an investigation, we make recommendations to a government entity when the Ombudsman is of the opinion that the government entity:

- Has made a decision, omission or recommendation to a minister, or has acted in a way that appears to be contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, or was made or done in accordance with a law or a practice that is unreasonable, unjust, oppressive or improperly discriminatory, based on a mistake of law or fact, or wrong.
- Has exercised a power or right for an improper purpose, on irrelevant grounds, or by taking into account irrelevant considerations.
- Should have given reasons for a decision, action, omission or recommendation that was the subject-matter of the investigation.

Ombudsman Saskatchewan does not advocate for the citizens who complain to us or for the government entities we investigate. We are neutral, impartial and independent from the

government entities we oversee. Our mission is to promote and protect fairness and integrity in the design and delivery of provincial and municipal government services.

Making a complaint to an Ombudsman is usually considered an avenue of last resort, meaning that, in most circumstances, a person must use existing processes to deal with his or her complaint before we will get involved.

In this case, the complainants contacted us at various times throughout the WSA process concerned about the time it was taking to have their issues addressed. We contacted the WSA on two occasions during the process to help the complainants get answers about what was happening with their complaint. However, we did not conduct our formal investigation until after the WSA reviewed and made a final decision about the complainants' matters.

Events Leading to the Complaint

In August or September 2010, the complainants' neighbour constructed 11 surface water drainage works (ditches) on his land on the NE 3. The complainants' contend that soon after these ditches were constructed, their adjacent home quarter situated on NW 3 started to flood. They allege that the ditches were draining surface water from their neighbour's land onto their land causing flooding.

On September 11, 2010, the complainants told their neighbour that the ditches were draining water onto their property. According to the complainants, the neighbour attempted to fill in one ditch, but left several others untouched.

On September 13, 2010, the complainants contacted the Saskatchewan Watershed Authority (now the Water Security Agency) to complain about the ditches. The following date, a WSA senior technologist wrote them to provide them with information about the WSA's process for complaints about drainage works.

Request for Assistance (Step 1 of the WSA process)

On September 17, 2010, the complainants contacted the neighbour again to advise that the ditches were still draining water onto their land. The complainants told us that the neighbour refused to do anything. As a result, they filed a *Request for Assistance in Resolving a Complaint*.

On September 23, 2010, a WSA supervisor advised the complainants that the WSA was backlogged because of the number of requests for assistance it received due to above-normal precipitation.

On October 5, 2010, a WSA senior technologist did a site inspection and confirmed the complainants' allegations that the ditches had not been approved by the WSA, which meant they were, therefore, illegal.

No further steps appear to have been taken by the WSA until one year later, when on October 7, 2011, the WSA senior technologist wrote to the complainants and their neighbour outlining the findings of his preliminary investigation, including:

...the flooding occurring on the NW 3 is mainly the result of the extreme events of 2010 & 2011, the drainage works on the [the neighbour's] NE 3 remain a contributing factor. The flooding damage occurring on the NW 3 impacts the ability for the [complainants] to access pasture and feed for their cattle, their corrals, and the lagoon system for their house.

The WSA made the following written recommendations to the neighbour to resolve the complaint:

- Install ditch blocks (#2 thru #11 inclusive) at locations marked on Plan [*plan number withheld*] (copy of plan enclosed) until such time as an Approval to Construct and Operate Drainage Works can be obtained.
- Maintain ditch block #1 as indicated on Plan [*plan number withheld*] in the future.

The written recommendations included no timelines by which the neighbour had to complete the work. The WSA's October 7, 2011 letter explained that if the complainants were unsatisfied with the recommendations or if the neighbour did not follow the recommendations, they could use the formal complaint process.

This informal process took almost 13 months.

Formal Complaint Process (Step 2 of the WSA process)

The neighbour did not take any steps to follow the WSA's recommendations. Therefore, on October 28, 2011, the complainants submitted a formal complaint along with the \$200 fee. The WSA wrote the complainants on November 16, 2011, to advise them that their formal complaint had been received and that a Notice of Filing of Drainage Complaint had been served on the neighbour.

Because the complainants were frustrated that it took the WSA over a year to complete the informal request for assistance process and the illegal ditches still were not fixed, the complainants contacted Ombudsman Saskatchewan. Since the Ombudsman is an avenue of last resort, it was too early for us to conduct an investigation, because the complainants still had the WSA's formal complaint process available to them. We referred them back to the WSA.

Six months later, on May 4, 2012, a WSA supervisor began the formal investigation by interviewing both the complainants and the neighbour. He told us that he could not inspect the drainage works that day because of heavy rains. However, according to the information provided to us, nothing further occurred on the investigation until September 26, 2012, when he returned to inspect the drainage works. Frustrated that the formal complaint process was taking so long, the complainants wrote the Premier on September 27, 2012, who forwarded the letter to the Minister responsible for the WSA.

The WSA completed the formal investigation on November 27, 2012, 13 months after the formal complaint was filed (nearly 26 months after the initial request for assistance.) It involved the initial interviews of the parties, the site inspection, a review of the 2011 site inspection notes (from the request for assistance process), and a review of aerial photographs of the area to determine the historical pattern of surface water accumulation and drainage. The investigation report recommended that the WSA render a decision, finding that:

[T]he extensive flooding experienced in the northeast corner of NW 3 has been a natural occurrence caused by the above normal precipitation events, occurring since the fall of 2010.

...
[D]amages to NW 3 from the drainage works on NE 3 could occur by extending the duration of extensive flooding events, and cause increased flooding in the north east corner of NW 3 to occur during normal weather patterns.

The [neighbours] are operating illegal drainage works[.]

The investigation report also recommended that the WSA issue an order directing the neighbour to install the ditch blocks. The terms of the recommended order were very similar to the recommendations the WSA made in October 2011 at the end of the request for assistance process.

On December 10, 2012, the WSA issued a decision and an order detailing the corrective measures the neighbour was to do so that he could demonstrate full compliance. The order stated that the work was to begin “immediately” and was to be completed no later than June 15, 2013.

On June 19, 2013, the WSA conducted a site inspection. It concluded that, in general, the neighbour had met the spirit of the order, but two of the nine ditches still needed some work. The site inspection also revealed that two new soil berms had been constructed.

On June 26, 2013, the WSA issued an extension giving the neighbour another two and half months to get the work done, and it ordered that the two new soil berms should be removed by the same date. We were told that the WSA extended the order deadline to September 3, 2013, because the neighbour was cooperative and the work was underway.

On September 20, 2013, the complainants contacted us again because they were not satisfied that the neighbour had complied with the order. Given how long the process was taking, we contacted the WSA on the complainants’ behalf. The WSA told us that the neighbour was 90% in compliance with the order by the fall of 2013 and that although the neighbour’s ditches were not the significant cause of the flooding, they were illegal and were ordered closed. The WSA also told us that it intended to do an aerial inspection in the spring of 2014 to try to determine if the changes had been completed according to the order. We relayed this information to the complainants.

By July 2014, the WSA had not contacted the complainants about the results of any aerial inspection. The complainants told us floodwaters were getting very close to their well, so we

contacted the WSA again. The WSA told us that the aerial inspection had been completed and showed that the run off had been restored to historical levels.

A WSA supervisor did a final site inspection on August 7, 2014. During the inspection, the complainants noted that the neighbour had constructed new ditching just east of their fence. The complainants wanted to know whether these new ditches were causing additional flooding. The supervisor told the complainants that in order to address the new drainage works they would have to start the complaint process over again.

In an October 1, 2014 letter entitled *Compliance Inspection of Ditch Blocks Ordered on NE 3*, the WSA formally indicated that in its opinion, after the site inspection, the neighbour had fully complied with the order.

The complainants filed a new request for assistance on October 22, 2014, in an effort to get the WSA to look at the neighbour's most recent ditching activity and to stop him from exacerbating their flooding problems by continuing to drain surface water from his land onto theirs. Despite the WSA supervisor's assessment that the run off was at historical levels, in the spring of 2015, the complainants advised that they experienced significant flooding again.

Issues Raised by this Complaint

1. Is the Water Security Agency administering claims of damage, loss or injury caused by drainage works as outlined in *The Water Security Agency Act*, reasonably, fairly, and in a timely manner?
2. Is the Water Security Agency effectively enforcing the works approval requirements in *The Water Security Agency Act* when it finds unapproved drainage works during its investigations of complaints?

Analysis of Findings and Recommendations

Is the Water Security Agency administering claims of damage, loss or injury caused by drainage works as outlined in *The Water Security Agency Act*, reasonably, fairly, and in a timely manner?

Request for Assistance (Step 1)

The Water Security Agency Act provides a framework for an informal dispute resolution process that encourages early resolution of complaints before a formal complaint process is initiated. Complainants must first demonstrate that they have made a reasonable effort to resolve the problem directly with the party responsible. If these efforts do not resolve the problem, complainants can submit a written request for assistance with the WSA. The

request for assistance process must be followed and completed before a formal complaint can be filed.

In our view, the purpose of the request for assistance process is to encourage efficient, early resolution of drainage issues with a view to avoiding the formal complaint process. The Act does not provide any timelines or guidance to the WSA on how long the request for assistance process should take. By not dictating any procedural requirements or timelines, the Act gives the WSA the discretion to develop and follow reasonable policies and procedures for administering the request for assistance process.

The WSA officials responsible for the investigation told us that during the period they worked with the complainants, its policies and procedures for handling complaints were out-of-date, because they were developed under its old Act (*The Saskatchewan Watershed Authority Act, 2005*) which was replaced by *The Water Security Agency Act*. Therefore, they did not follow any specific policies and procedures; instead, they told us, they just followed the legislation.

Since no changes were made to the drainage works complaint provisions when *The Water Security Agency Act* was passed in 2013, it is not clear why the WSA officials responsible for handling the complaint did not follow the complaint-handling policies and procedures we were told it used when the WSA was called the Saskatchewan Watershed Authority. We acknowledge that senior WSA officials have recently confirmed with us that its policies and procedures had not been made obsolete when its name was changed, but that new procedures are currently under development. Nevertheless, we find, in this case, the WSA did not follow its written policies or procedures and did not ensure it administered its complaint-handling functions effectively or efficiently.

Given the extreme weather events across the province during the relevant period, which substantially increased the WSA's work, that its investigative staff lacked any understanding or knowledge of the procedures to be followed and senior officials were not aware of this lack of understanding indicates a significant weakness in the WSA's management processes, which could increase the likelihood for performance issues to go unresolved and become more serious. As of October 2015, the WSA did not have written complaint-handling procedures that its investigative staff in this case followed or were even aware were applicable to their work.

In this case, the WSA's preliminary investigation did not follow any written or standard procedures or timelines. This appears to have negatively affected the WSA's ability to carry out the request for assistance process in a timely (and therefore, fair) manner. After a single site visit, it took a year – from October 5, 2010 to October 7, 2011 – for the WSA to complete a preliminary investigation. The WSA could not provide us with a clear explanation for this significant delay, other than to note that it received an unusually high volume of requests for assistance and complaints during the same period. We note that the formal investigation – which did not start until six months after the complainants filed a written complaint – still took more than a year to complete.

Given that the initial site visit during the request for assistance process confirmed that the neighbour's drainage works were unapproved (illegal) and draining water onto the

complainants' land, absent any clear rationale for the delay, we find that the fact that it took a year to complete the preliminary investigation was too long and was unreasonable. Because of the time it took for the preliminary investigation to be completed and recommendations made, this request for assistance process did not, as it is intended to do, facilitate any early resolution between the complainants and their neighbour.

RECOMMENDATION 1: That the Water Security Agency: (a) develops and implements written procedures to effectively manage the Request for Assistance in Resolving a Complaint process, including reasonable timelines and a reasonable maximum deadline for final preliminary reports to be written and recommendations (if any) to be issued, and (b) make the procedures available to the public online.

Formal Complaint Process (Step 2)

If a complainant is not satisfied with the WSA's recommendations, or if the person responsible for the cause of the complaint does not implement the recommendations arising from the request for assistance process, a formal complaint can be filed. *The Water Security Agency Act* requires the WSA to render a written decision, with reasons, no later than 18 months after the day on which it receives the complaint, but that can be extended.

In this case, the formal investigation process took 13 months, culminating in an order dated December 10, 2012. Even though the investigation was completed within the 18-month time limit as set out in the legislation, it appears that no investigative work took place on the complaint until May 2012, six months after the complainants filed their formal complaint, and then it took almost five months after the interviews to review the data and write the investigation report. Even if the delay in starting the investigation can be explained by the WSA needing to wait until the spring, the WSA did not reach any different conclusion after the formal investigation than what it reached by the end of the request for assistance process. In our view, regardless of it meeting the maximum deadline set in *The Water Security Agency Act*, we find that the WSA did not process the complainants' formal complaint in a reasonable length of time.

RECOMMENDATION 2: That the Water Security Agency: (a) develop and implement written procedures to effectively manage its formal complaint process, including reasonable timelines for final reports to be written and orders (if any) issued, and (b) make the procedures available to the public online.

Orders

The WSA told us that the deadlines for compliance with its orders take into consideration when field conditions will be dryer – most often in the fall, and allow landowners time to harvest before doing the ordered work. In this case, the order dated December 10, 2012, gave the neighbour just over 6 months – until June 15, 2013 – to complete the work. The order specifically stated that work was to begin 'immediately'.

The Water Security Agency Act gives the WSA the discretion to extend the deadline by which a landowner must comply with an order. When the WSA inspected the neighbour's work in

mid-June 2013, the neighbour had constructed two new soil berms between two sloughs. On June 26, 2013, the WSA gave the neighbour an extension until September 3, 2013, to complete the work on the ditches, as well as ordering him to remove the new berms. Thereafter, it does not appear that the WSA monitored the neighbour's progress. The WSA's aerial inspection did not take place until the following spring and the final site inspection was not completed until August 7, 2014. Further, there does not appear to be any reasonable explanation as to why the neighbour was not able to comply with the order by the original deadline date.

Given the effect the decision to extend the order deadline had on the complainants – they continued to suffer flooding – we would have expected the WSA to treat the extension with the same level of procedural fairness as the order. However, there is no evidence that the WSA talked with the complainants about the neighbour's progress to-date or that it was considering granting an extension. There is no evidence that the WSA considered whether granting the extension would result in additional flooding to the complainants' land over the rest of the summer. Generally, there is no evidence that the WSA made the decision to extend based on an objective analysis of the competing interests of the parties. While the WSA gave the complainants a copy of the extension letter it sent to the neighbour, the letter did not explain whether (nor is *The Water Security Agency Act* clear about) the complainants could have appealed the decision to extend the deadline.

RECOMMENDATION 3: That the Water Security Agency develops and follows a fair decision-making process regarding the granting of extensions that includes: (a) giving each affected party notice that it is considering granting an extension; (b) providing each party an opportunity to comment in support of or against the granting of an extension; and (c) providing a written decision regarding the extension that summarizes the information it considered, provides a reasonable explanation for the decision, and explains the parties' rights if they disagree with the extension.

Given the length of time it took for this complaint to be reviewed by the WSA, we find the complainants were not served well by the WSA's complaint handling process.

RECOMMENDATION 4: That the Water Security Agency waive the fee for the formal complaint and return the money to the complainants in this case.

Appeals to the Water Appeal Board

The WSA decisions and orders resulting from the formal complaint process may be appealed to the Water Appeal Board. *The Water Appeal Board Act* provides that a notice of appeal must be served on the Board within 30 days after the day the decision or order is made. It is not clear that the WSA's June 26, 2013 decision to extend compliance with the original December 2012 order was an "order" that may be appealed to the Water Appeal Board.

RECOMMENDATION 5: That the Water Security Agency clarifies whether the 30-day period to appeal one of its orders to the Water Appeal Board also applies to an extension of the time to comply with an order, and, if necessary, request that legislative changes be made to ensure the parties may appeal an extension of an order.

Is the Water Security Agency effectively enforcing the works approval requirements in *The Water Security Agency Act* when it finds unapproved drainage works during its investigations of complaints?

When we asked why the WSA does not immediately enforce the drainage works approval requirements in *The Water Security Agency Act* when it does a site inspection and determines that a drainage work is illegal, it told us that it could not, because it has to issue an order first. Then, if the order is not complied with, it is able to arrange to have the landowner charged and to ask the Ministry of Justice to prosecute. While we do not disagree with this reasoning, the WSA appears to only ever issue orders at the end of its formal complaint process, which the complainants went through (and continue to go through). But the WSA has the authority to issue orders under other provisions of the Act.

The Water Security Agency Act requires anyone constructing certain drainage works to get the WSA's prior written approval, whether or not their neighbours make a complaint. And if they don't get the WSA's approval, clause 62(1)(c) of the Act authorizes the WSA to order that the works be altered or removed. These orders do not require anyone to complain or go through the formal complaint review process, because they are based on the works not constructed without first going through the WSA approval process. It does not appear that the WSA contemplated making an order under these provisions in this case, even though it could have.

In this case, on October 5, 2010, the senior technologist who did the initial inspection during the request for assistance process made a finding that the ditches were constructed without WSA approval. In our view, the WSA could have considered issuing an order under clause 62(1)(c) right then, because the ditches were not approved. Instead, it made the complainants go through the request for assistance and formal complaint processes first, and did not issue an order under section 83 until some 26 months later. Issuing an order under clause 62(1)(c) would have saved the WSA a lot of time (and possibly money) and would have likely led to the same result, albeit much sooner. It would have addressed the complainant's issues – at least to the same extent that the section 83 order that the WSA issued addressed their issues.

RECOMMENDATION 6: That the Water Security Agency develops and follows a clear process for assessing and deciding whether to issue an order under clause 62(1)(c) of *The Water Security Agency Act* to address unapproved works that come to its attention through its request for assistance and formal complaint processes.

Summary

Finding

The WSA taking over a year to complete its preliminary investigation was unreasonable and resulted in its request for assistance process failing its intended purpose of facilitating early resolution of drainage complaints.

RECOMMENDATION 1

That the Water Security Agency: (a) develops and implements written procedures to effectively manage the Request for Assistance in Resolving a Complaint process, including reasonable timelines and a reasonable maximum deadline for final preliminary reports to be written and recommendations (if any) to be issued, and (b) make the procedures available to the public online.

Finding

The WSA taking an additional 13 months to complete its formal investigation process and to issue an order was unreasonable even though it was done within the maximum 18-month time limit set out in *The Water Security Agency Act*.

RECOMMENDATION 2

That the Water Security Agency: (a) develop and implement written procedures to effectively manage its formal complaint process, including reasonable timelines for final reports to be written and orders (if any) issued, and (b) make the procedures available to the public online.

Finding

The process the WSA followed to make the decision to extend the deadline for the complainants' neighbour to comply with its order was not procedurally fair to the complainants. Also, the notice it gave the complainants of its decision to extend the deadline did not provide adequate reasons or explain the complainants' right to appeal the decision to extend.

RECOMMENDATION 3

That the Water Security Agency develops and follows a fair decision-making process regarding the granting of extensions that includes: (a) giving each affected party notice that it is considering granting an extension; (b) providing each party an opportunity to comment in support of or against the granting of an extension; and (c) providing a written decision regarding the extension that summarizes the information it considered, provides a reasonable explanation for the decision, and explains the parties' rights if they disagree with the extension.

Finding

The complainants were not served well by the WSA's complaint handling processes.

RECOMMENDATION 4

That the Water Security Agency waive the fee for the formal complaint and return the money to the complainants in this case.

Finding

The WSA decisions and orders resulting from the formal complaint process may be appealed to the Water Appeal Board. *The Water Appeal Board Act* provides that a notice of appeal must be served on the Board within 30 days after the day the decision or order is made. It is not clear that the WSA's October 1, 2014 decision to extend compliance with the original December 2012 order was an "order" that may be appealed to the Water Appeal Board.

RECOMMENDATION 5

That the Water Security Agency clarifies whether the 30-day period to appeal one of its orders to the Water Appeal Board also applies to an extension of the time to comply with an order, and, if necessary, request that legislative changes be made to ensure the parties may appeal an extension of an order.

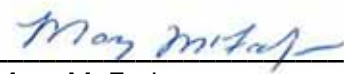
Finding

When, on October 5, 2010, the WSA's preliminary investigation in response to the complainants' request for assistance revealed that the complainant's neighbours ditches were constructed without the WSA's approval as required under *The Water Security Agency Act*, the WSA did not consider whether it would be appropriate to order the works to be altered or removed under the authority of clause 62(1)(c) of *The Water Security Agency Act*. Instead, the WSA followed through with both the informal and formal complaint handling process before, some 26 months later, ordering the works to be altered or removed under section 83.

RECOMMENDATION 6

That the Water Security Agency develops and follows a clear process for assessing and deciding whether to issue an order under clause 62(1)(c) of *The Water Security Agency Act* to address unapproved works that come to its attention through its request for assistance and formal complaint processes.

Dated: March 31, 2016



Mary McFadyen
Ombudsman