



**Date Issued:** December 6, 2023  
**Docket:** LEV22001  
**Type:** Environmental  
Protection Act  
Appeal

INDEXED AS: Mark Keizer v. Minister of Environment, Energy and Climate Action,  
2023 PEIRAC 10 (CanLII)

Order No: LEV23-01

**BETWEEN:**

Mark Keizer

**Appellant**

**AND:**

Minister of Environment, Energy and Climate Action

**Respondent**

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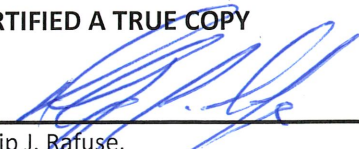
**ORDER**

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Panel Members:

J. Scott MacKenzie, K.C. Chair  
M. Douglas Clow, Vice-Chair

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Philip J. Rafuse,  
Appeals Administrator  
Prince Edward Island Regulatory & Appeals  
Commission

**Contents**

**Appearances & Witnesses ..... 3**

**1. Introduction..... 4**

**2. Background..... 4**

**3. Issues ..... 5**

**4. Disposition ..... 5**

**5. Positions of the Parties ..... 6**

**6. Analysis..... 9**

**7. Conclusion ..... 12**

**8. Order..... 12**

## **Appearances & Witnesses**

**For the Appellant, Mark Keizer:**

Mark Keizer

**For the Respondent, Minister of Environment, Energy  
and Climate Action:**

**Counsel:**

Mitchell O'Shea, Legal Services,  
Department of Justice and Public Safety

**Witnesses:**

Dale Thompson, Environmental Assessment Officer  
Department of Environment, Energy and Climate Action

Shawn Banks, Watercourse/Wetland Alteration Technician  
Department of Environment, Energy and Climate Action

## 1. INTRODUCTION

1. This is an appeal of the decision of the Minister of Environment, Energy and Climate Action, dated June 13, 2022, to deny an application by Mark Keizer for a Watercourse, Wetland and Buffer Zone Activity Permit for proposed shoreline protection on his residential property, PID #920934 (the Property).
2. Mr. Keizer's property is situated along the Hillsborough River at Fullerton's Creek. He sought a permit for shoreline protection along both the shoreline and the side of his Property. He wants to build a retaining wall out of large cement barriers to protect against erosion, storm surges, and the surface water drainage from the subdivision.
3. The Minister denied Mr. Keizer's permit because, in their assessment, the Property fronts on a saltmarsh wetland, which is protected under the *Environmental Protection Act*,<sup>1</sup> and placing the cement barriers Mr. Keizer proposes to use on the saltmarsh or in the buffer zone would destroy the saltmarsh.

## 2. BACKGROUND

4. In 2021, Island Coastal, a duly licensed corporate licensee pursuant to section 5 of the *Environmental Protection Act Watercourse and Wetland Protection Regulations*<sup>2</sup> (the "Contractor"), attempted to register a project to conduct shoreline stabilization work at the Property on behalf of the Appellant.
5. On September 10, 2021, Dale Thompson, an Environmental Assessment Officer with the Department of Environment, Energy and Climate Action (the "Department"), notified the Contractor that shoreline stabilization work could not proceed on the Property as it could not be completed under the Contractor Licensing Program where the area at the base of the bank to be armoured is a wetland or sand dune.<sup>3</sup>
6. After this initial denial, the Department prepared a Coastal Hazard Assessment for the Property.<sup>4</sup> The Coastal Hazard Assessment comments that the property is fronted entirely by a saltmarsh, and that approximately 60% falls within the High Flood Hazard Zone.
7. On May 9, 2022, the Appellant filed an Application for a Watercourse, Wetland and Buffer Zone Activity Permit pursuant to section 6 of the Regulations.<sup>5</sup> The Application indicates the type of activity is "shoreline protection". The time period for carrying out the work was noted as June 1, 2022, to September 30, 2022. In particular, the Appellant sought to construct a retaining wall to protect forty (40) meters of shoreline.<sup>6</sup> The Application notes the "sensitive features at construction site" as being "wetland".

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<sup>1</sup> *Environmental Protection Act*, RSPEI 1988, E-9.

<sup>2</sup> *Environmental Protection Act Watercourse and Wetland Protection Regulations*, EC720/08

<sup>3</sup> Additional Documents of the Minister of Environment, Energy and Climate Action, Tab 1. [Additional Documents]

<sup>4</sup> Additional Documents, Tab 2.

<sup>5</sup> Record of the Decision Prepared by the Minister of Environment, Energy and Climate Action, Tab 2. [Record]

<sup>6</sup> Record, Tab 2, Application Part 7F.

8. On June 13, 2022, the Minister issued a decision letter to the Appellant denying the permit application. The letter states that the Application was denied because the Property “fronts entirely on a saltmarsh wetland”, which are protected under the *Environmental Protection Act*. The letter also notes that a large portion of the Property is at a high risk for flooding, and the purpose of shoreline protection material is to provide some measure of protection for areas of the coastline prone to erosion, rather than to create a barrier for flood protection. The letter states that in the case of the Appellant’s Property, the saltmarsh provides a measure of protection from erosion in addition to being a protected wetland.
9. The Appellant filed a Notice of Appeal with the Commission on June 20, 2022.
10. On August 1, 2022, the Minister filed its Record in this matter along with a second set of documents titled Additional Documents of the Minister of Environment, Energy and Climate Action. The Minister provided a written reply to the Notice of Appeal on August 3, 2022.
11. On September 6, 2022, the Appellant responded with written submissions and supporting documentation.
12. After the filing of the Notice of Appeal and the exchange of documents between the parties, the Commission set the matter down for hearing on December 1, 2022, which was the earliest available date for both parties. Unfortunately, due to illness it was not possible to proceed on that date and the hearing in this matter was delayed. However, on November 30, 2022, the parties met, with the assistance of Commission Staff, to discuss possible resolutions. Ultimately, those discussions were not successful and the hearing was rescheduled for May 18, 2023.

### **3. ISSUES**

13. The issue the Commission must decide on this appeal is:

Under section 6 of the *Environmental Protection Act Watercourse and Wetland Protection Regulations*, did the Minister err in denying Mr. Keizer’s application for a Watercourse, Wetland and Buffer Zone Activity Permit to carry out shoreline protection work and build a retaining wall along his property?

### **4. DISPOSITION**

14. For the reasons that follow, the appeal is dismissed.
15. The Commission finds that the decision of the Minister to deny Mr. Keizer’s permit application was reasonable in the circumstances.

## 5. POSITIONS OF THE PARTIES

### Appellant's Position and Evidence

16. The Notice of Appeal raises several grounds:<sup>7</sup>
- i. The Minister's reasons state that all shoreline fronts entirely on a saltmarsh; however, it can be shown that approximately only half the shoreline sits on wetland;
  - ii. It can be shown that erosion is excessive and there is no protection from storm tides or wave action;
  - iii. The side of the Property with the wetland has a drainage ditch and the drainage for the subdivision feeds into this ditch which causes problems with water running into the yard and placing shoreline protection can solve that problem; and
  - iv. The excessive amount of erosion can be shown by the property marker.
17. The Notice of Appeal states that shoreline protection is needed both along the shoreline and the side of the Property to protect against the surface water drainage from the subdivision, as well as erosion control and storm surges.
18. Prior to the hearing, Mr. Keizer submitted a volume of material. The material included a significant number of photographs of his Property depicting the change in landscape and shorefront over the years. For example, Mr. Keizer described, using the photographs, how the beach and shoreline have "eroded" into his yard over the years. The material also included photos of the drainage ditch that runs into his backyard and what it looks like after a rain storm.
19. Mr. Keizer also submitted documents in support of his appeal. For example, the PEI Wetland Conservation Policy and examples of other Watercourse, Wetland and Buffer Zone Activity Permits issued for other properties.
20. At the hearing, Mr. Keizer made submissions and provided oral evidence to support his position.
21. Much of Mr. Keizer's oral evidence focussed on the change in his property from the time he purchased his home back in the early 2000s. He said, at that time, the property went right to the beach, but that several feet of his property are now gone due to erosion. He relied on the photographs he submitted as evidence of this erosion.
22. He explained to the Commission, through the use of photographs, where he wants to put shoreline protection material. He plans to install a wall of large cement barriers all along the side and front of the Property. Mr. Keizer submitted that this kind of protection is necessary to stop the erosion of his property. He explained

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<sup>7</sup> The Grounds of Appeal reproduced here are slightly paraphrased from the Notice of Appeal.

that he does not want to put the cement blocks in the wetland, but rather in the buffer zone.

23. Mr. Keizer disputed that the entire frontage of his property is a wetland, and submitted that, in his opinion, the plants and grasses growing in his yard are not wetland plants. Mr. Keizer did not have expert evidence to support this contention, though he did submit that both the Greenhouse Operations Manager & Head Grower of Jewell's Country Market, and Watershed Coordinator for Hillsborough River, told him there appears to be goldenrod along the shoreline, which he submits is not a wetland plant.
24. Mr. Keizer also spoke to the drainage ditch that runs along one side of his property. He submitted that the Department of Transportation has an easement along his property that runs all the way to the river. The drainage ditch drains the surface water from the entire subdivision, and he said when it rains, the drainage ditch flows like a river. Mr. Keizer submitted that the wetland on his property is only flooded because of the drainage ditch.
25. With respect to the Coastal Hazard Assessment, Mr. Keizer noted that it specifically states it was not informed by a site visit. Further, he believes his erosion is occurring at a moderate rate.
26. In summary, Mr. Keizer submitted that the solution he has proposed for erosion protection is the only solution he can see to protect his property. He submitted that, over time, the eroding wetland will go right up to his house and without the armour material, his property will be destroyed.

#### **Minister's Position and Evidence**

27. Prior to the hearing, the Minister filed its record with the Commission. The record totaled forty-five (45) pages and included the Appellant's Application, the decision letter of the Minister, internal correspondence of the Department related to the Application, a map of the Property, and the Department's Watercourse and Wetland Alteration Buffer Zone Policy. The Record also included the Appellant's Notice of Appeal.
28. The Minister also filed with the Commission Additional Documents, consisting of an email exchange between the Department and the Contractor who initially applied for the shoreline protection work on the Appellant's behalf, a Coastal Hazard Assessment of the Property (dated October 8, 2021) and a document titled "Notes on Saltmarsh Migration" (dated July 11, 2022).
29. At the hearing, the Minister called two witnesses. Dale Thompson has been an Environmental Assessment Officer since 2014, and has worked with the Department<sup>8</sup> since 1988. Shawn Banks is a Watercourse/Wetland Alteration Technician.
30. The Minister submits that there are two separate issues here. One is the surface water from the drainage ditch, and the other is the water from the shorefront.

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<sup>8</sup> Department of Environment, Energy and Climate Action.

Therefore, while Mr. Keizer has characterized his issue as “erosion”, the Minister submits the issues are caused by flooding and saltmarsh migration.

31. With respect to the flooding caused by the drainage ditch, the Minister’s witnesses at the hearing indicated that there are ways to mitigate this flooding through better surface water management, and that Government will look at the issue and how best to address the harm caused. For example, if the storm water can be diverted through more than one pipe, or be better directed, Mr. Keizer would have less flooding on that portion of his property.
32. However, with respect to the saltmarsh migration and resulting flooding from sea level rise, the Minister submitted that putting cement barriers within the saltmarsh or the buffer zone is not a solution.
33. The Minister submits that the Watercourse, Wetland Alteration and Buffer Zone Policy specifically states that shoreline protection and bank stabilization cannot be completed in saltmarshes. The presence of a saltmarsh on Mr. Keizer’s property was confirmed through site visits. Both Mr. Banks and Mr. Thompson testified that they observed the presence of a wetland, in particular a saltmarsh, at Mr. Keizer’s property. Further, they both said that provincial mapping indicated the area is a saltmarsh. Following the hearing, the Minister provided evidence of this mapping which labels the shorefront all along Mr. Keizer’s property, and the surrounding properties, as “saltmarsh or brackish”.
34. The Minister submits that that shoreline protection is not permissible on or adjacent to a saltmarsh because:
  - As sea levels rise due to climate change, saltmarshes will gradually move inland, and the placement of material on or adjacent to the saltmarsh will interrupt this process and may result in the loss of or reduction in the area of the saltmarsh; and
  - Saltmarshes provide a natural buffer from storm tides and wind/wave action.
35. Dale Thompson testified that saltmarshes move inland as sea level rises and that, to some extent, they are thought to be beneficial to flood protection. He said that the placement of hard armour material behind a saltmarsh would have at least two negative effects. One, it would provide a barrier to its natural inland migration. Two, the armour material – which is typically used to protect from the eroding effects of wind and wave action – would create a barrier, and the energy from the backwash of the wind and waves would go directly back out into the saltmarsh, eroding it away and eventually destroying it.
36. Mr. Thompson’s testimony included evidence about the importance of protecting wetlands for wildlife habitat and ecological functions. He said that permits are required for work that will alter a wetland or watercourse because the Department wants to minimize any negative impact. In particular, he spoke to why saltmarshes are important. He said much saltmarsh habitat has been lost and that they cannot be created just anywhere. Rather, they only establish themselves in certain areas where they are more protected. For example, the wind and wave action on the



North Shore does not allow saltmarsh vegetation to become established. Shawn Banks testified that saltmarshes are very unique, very productive, and only grow in certain areas and cannot be duplicated, the way some other wetlands can be manmade. This is why they are afforded extra protection under the Policy.

37. Mr. Thompson explained that, generally, “erosion” is characterized by crumbling bank and a lack of vegetation. Mr. Banks, in his testimony, explained that erosion is the loss of land – the land is washed out in the water and is gone. He said he would expect to see a red bank with no vegetation due to wave action as evidence of erosion.
38. In contrast, Mr. Thompson said that erosion does not occur within a saltmarsh because they are unable to establish themselves in areas prone to erosion. Rather, he testified that saltmarshes move inland as sea level rises. Mr. Banks testified that saltmarshes tend to be lower lying land with lots of vegetation. He says this is what he observed on Mr. Keizer’s property – gentle sloping and a change in vegetation.
39. Mr. Banks testified that that he did not see signs of erosion at Mr. Keizer’s property, but he did see signs of flooding. For example, the seaweed left behind after high tide. In Mr. Banks’ opinion, the majority of Mr. Keizer’s issues are, therefore, not from erosion, but rather are a result of flooding, both from the shorefront and the drainage ditch. Mr. Banks testified that Mr. Keizer’s property is below sea level, and this makes it difficult to protect from flooding as sea level rises.
40. Mr. Thompson testified that, generally, the Department does not issue permits for flood protection. He said the armour material (e.g. cement barriers) proposed by Mr. Keizer is used to protect from the effect of wind and waves that leads to erosion.
41. Both Mr. Thompson and Mr. Banks testified that Mr. Keizer has at least two options for protecting his property from flooding. One, he could place the cement barriers outside the buffer zone. He could do this without a Watercourse, Wetland and Buffer Zone Activity Permit. Two, he could add up to 2ft of fill material to his lawn to create a berm and reduce the risk of flooding. Mr. Banks further suggested a Coastal Engineer may be able to provide better advice on how best to protect Mr. Keizer’s property from flooding as sea level continues to rise.

## 6. ANALYSIS

### The Property Contains a Wetland

42. As a starting point, the *Watercourse and Wetland Protection Regulations* prohibit any alteration of a wetland, or any part thereof, without a permit.<sup>9</sup> This includes constructing or placing structures of any kind.

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<sup>9</sup> *Regulations*, s. 2(1)

43. Both the *Regulations* and the *Environmental Protection Act* define “wetland” as meaning:<sup>10</sup>
- (i) an area which contains hydric soil, aquatic or water-tolerant vegetation, and may or may not contain water, and includes any water therein and everything up to and including the wetland boundary, and
  - (ii) without limiting the generality of the foregoing, includes any area identified in the Prince Edward Island Wetland Inventory as open water, deep marsh, shallow marsh, salt marsh, seasonally flooded flats, brackish marsh, a shrub swamp, a wooded swamp, a bog or a meadow
44. In this case, the Commission finds that the portion of Mr. Keizer’s property that fronts the shoreline is a “wetland”, and in particular, a saltmarsh.
45. First, the Minister’s witnesses both testified that this property is identified as a saltmarsh wetland in the Prince Edward Island Wetland Inventory, and the Minister provided documentary evidence of this after the hearing. While this is conclusive based on the definition of “wetland”, we also note that both Mr. Thompson and Mr. Banks testified that they observed the property as exhibiting the characteristics of a saltmarsh after visiting the site. Further, Mr. Thompson provided evidence that when he did a site visit in December 2022, albeit after the time of the permit denial, he confirmed there is “hydric soil” in the area, which is soil that shows characteristics of flooding over extended periods.
46. While the Minister’s witnesses were not qualified, nor proffered, as experts at the hearing, the Commission accepts their evidence as credible based on their experience working for the Department.
47. Mr. Keizer made submissions that, in his opinion, his property is not a saltmarsh. However, he did not provide cogent evidence to support this position and contradict the evidence of the Minister. For example, the evidence from the Greenhouse Operations Manager & Head Grower of Jewell’s Country Market and Watershed Coordinator for Hillsborough River with respect to the vegetation at the edge of his property was in the form of an email and a notation from Mr. Keizer about a discussion he had.
48. Therefore, in the face of the Minister’s evidence, and with no cogent or compelling evidence to the contrary, the Commission accepts that Mr. Keizer’s property contains a saltmarsh.
49. We pause here for a moment to comment on the drainage ditch that runs along Mr. Keizer’s property.
50. In his cross-examination of Mr. Thompson, Mr. Keizer asked if his yard was a manmade wetland because of the surface water drainage. Mr. Thompson replied that it is his understanding that the wetland has been there for quite some time,

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<sup>10</sup> *Environmental Protection Act*, s. 1(v); *Regulations*, s. 1(1)(gg)

and that it was not created solely because of the drainage. Rather, the surface water drainage was routed into the wetland. However, Mr. Thompson indicated that the legislation does not distinguish between a natural and manmade wetland.

51. The Commission accepts that the definition of wetland in the *Regulations* and *Environmental Protection Act* does not distinguish between a natural and manmade wetland. However, in reviewing the evidence and hearing the testimony of Mr. Keizer and the Minister's own witnesses, we nevertheless take Mr. Keizer's point that the drainage ditch has, in all likelihood, exacerbated the negative effects on his property from the wetland.
52. We encourage the Minister to consider this reality and how it impacts property owners who have the unfortunate plight of an ever-growing natural wetland that is caused, in part, by manmade forces. Particularly where those manmade forces are within Government's control to mitigate. For example, a revised definition of wetland or discretion within the Policy to take those factors into account when determining what is and is not a wetland worthy of protection.

#### **The Minister Did Not Err in Denying the Permit**

53. The *Regulations*, at subsection 6(2), give the Minister broad discretion to grant a Permit to a person to carry out alteration activities in a wetland.
54. The *Environmental Protection Act* provides that the Minister can make policies in order to manage, protect or enhance the environment. In this case, the Watercourse and Wetland Alteration and Buffer Zone Policy was followed. Following the hearing, the Minister clarified that this policy was originally prepared in 2009. However, it was reviewed in November 2021, as part of a larger policy initiative and there was a combined Environmental Land Management Section Policy document which incorporated this specific policy into it. It was signed off at the Deputy Minister level in November 2021.
55. The Policy provides that "bank stabilization" is intended to prevent the erosion of shorefront property and that this work cannot be completed in saltmarshes or along the front of sand dunes.
56. The testimony from Mr. Banks and Mr. Thompson is that when this application was received, both from Mr. Keizer and the Contractor who initially applied to do the work, the Departmental Staff carried out a site visit, spoke with the manager, and consulted the Policy. In this case, because it was determined Mr. Keizer's property contains a saltmarsh, the permit for shoreline protection was denied.
57. The Minister's witnesses testified in some detail about why the Policy protects saltmarshes and the negative impacts that cement barriers in the saltmarsh or buffer zone would have on the saltmarsh. For example, both testified about the uniqueness of saltmarshes and how they only grow in certain areas and cannot be duplicated. According to Shawn Banks, this is why they are afforded extra protection under the Policy. However, the placement of cement barriers would threaten the saltmarsh and eventually destroy it.

58. The Minister's evidence on saltmarsh migration versus "erosion" is relevant here. Mr. Keizer is concerned that he is losing property to "erosion" and that shoreline protection and cement barriers are the only way to prevent his property from eroding away. However, the Commission accepts the evidence of the Minister's witnesses that, in fact, the property isn't "eroding", rather the salt marsh is migrating inland as sea level rises, and this brings with it increased flooding. Mr. Banks testified that Mr. Keizer's property is below sea level, and this makes it difficult to protect from flooding as sea level rises.
59. In summary, the Commission is satisfied that the Minister's decision to deny Mr. Keizer's permit in order to protect the natural saltmarsh was reasonable in the circumstances and based on the Policy.
60. As a final comment, we say two things. First, despite finding the Minister's decision was reasonable in this case, the Commission is concerned about the appearance of arbitrariness or subjectivity that accompanies these discretionary permitting decisions. The Regulations provide no objective parameters to consider, and the Policy relied on in this case provides little detail about shoreline protection in wetlands and the factors that are to be considered. A more detailed policy could provide more guidance to both Department staff, and permit applicants, about permitting decisions.
61. Finally, the Commission urges Government to continue to work with Mr. Keizer on a better storm water management plan for the property in order to mitigate the negative effects of the storm water drainage which cause significant flooding to his property and exacerbate the natural flooding caused by the saltmarsh.

## **7. CONCLUSION**

62. For the reasons above, the appeal is dismissed.
63. The Commission thanks the Appellant and the Minister for their submissions in this matter.

## **8. ORDER**

64. The appeal is hereby dismissed. The decision of the Minister is upheld.

**DATED** at Charlottetown, Prince Edward Island, **December 6, 2023**

**BY THE COMMISSION:**

*(sgd.) J. Scott MacKenzie, K.C.*

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J. Scott MacKenzie, K.C., Chair

*(sgd.) M. Douglas Clow*

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M. Douglas Clow, Vice-Chair

## NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

*12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the *Act* provide as follows:

*13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*

*(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

**NOTE:** In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.