

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – May 15, 2001

IN THE MATTER OF sections 84, 85, 86 and 87 of the *Environmental Protection and Enhancement Act*, S.A. c. E-13.3 and section 115 of the *Water Act*, S.A. 1996, c. W-3.5.

-and-

IN THE MATTER OF an appeal filed on January 29, 2001 by Ms. Maggie Collins, on behalf of Mr. Gordon Grant, and by Ms. Joan Yule with respect to Approval No. 00082525-00-00 issued under the *Water Act* by the Director, Bow Region, Natural Resources Service, Alberta Environment, to the Village of Standard to maintain existing works, upgrade the water collection system, replace a water supply line, and conduct spring supply testing and examinations in SE 21-25-22-W4M.

Cite as: *Grant and Yule v. Director, Bow Region, Natural Resources Service, Alberta Environment*, re: *Village of Standard*.

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I. BACKGROUND

[1] On December 19, 2001, Approval No. 00082525-00-00 (the “Approval”) was issued to the Village of Standard (the “Approval Holder”) under the *Water Act*, S.A. 1996, c. W-5, by the Director, Bow Region, Natural Resources Service, Alberta Environment (the “Director”). The Approval authorizes the Approval Holder to maintain existing works, upgrade the water collection system, replace a water supply line and conduct spring supply testing and examinations in SE 21-25-22-W4 M. A letter was also issued with the Approval stating: “[t]his Approval does not allow for the increased diversion or use of water”.

[2] On January 24, 2001, the Environmental Appeal Board (the “Board”) received a copy of a letter from Ms. Maggie Collins, on behalf of Mr. Gordon Grant, to the Village of Standard, regarding the Approval. The Board acknowledged this letter on January 24, 2001, requesting clarification of whether this letter constituted a Notice of Appeal. The Board also advised that it appeared the time frame to file a Notice of Appeal had expired and that she clarify her client’s intent by January 29, 2001.

[3] On January 29, 2001 the Board received a Notice of Appeal from Ms. Maggie Collins on behalf of Mr. Gordon Grant (EAB Appeal No. 01-015) and a letter from Ms. Joan Yule (EAB Appeal No. 01-016), (the “Appellants”), appealing the Approval. A Notice of Appeal was also received from Mr. Bradley Gilmour, Bennett Jones, on behalf of Mr. Perry and Ms. June Ellis (EAB Appeal No. 00-076) with respect to the same Approval. The Ellis appeal is currently in abeyance to facilitate discussions between the parties.

[4] On January 29 and 30, 2001 the Board acknowledged receipt of the Notices of Appeal from the Appellants and requested a copy of the records related to the appeals. On that same day the Board also notified the Approval Holder of the appeals.

[5] According to standard practice, on January 29, 2001, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective Board’s legislation. Both the NRCB and the AEUB replied in the negative.

[6] On January 31 and February 1, 2001, the Board received letters from the Approval Holder objecting to the Notices of Appeal. The Approval Holder maintained that the appeals were out of time and in addition the Appellants had not previously filed a Statement of Concern with the Director. On February 5, 2001, the Board received a letter from the Director also objecting to the Notices of Appeal as they were not filed in accordance with the statutory requirements of the *Water Act*. The Director also advised that the Appellants had not filed a Statement of Concern with the Director and requested the Board set submission deadlines on the issue. The Board received a further letter from the Director on February 6, 2001, enclosing forms of public notice that were undertaken with respect to the Approval, and re-iterating that the Director had not received Statements of Concern from the Appellants in response to that notice.

[7] On February 12, 2001, following a telephone call from Ms. Yule, the Board wrote to Ms. Yule requesting that she confirm whether or not her letter dated January 29, 2001, constituted a Notice of Appeal.

[8] On February 20, 2001, the Board responded to the Director's, Approval Holder's and the Appellants' letters of January 31, and February 1, 2001, setting a schedule for written submissions, to determine if the Notices of Appeal filed by the Appellants were properly before the Board. The Appellants were asked to respond to the following questions:

- “1. As it appears that Notice of the Application initiated by the Village of Standard was published pursuant to section 108 of the *Water Act* (please see attached copies of the Notices), please outline what circumstances prevented you from filing a Statement of Concern within the time frame and manner specified in the published Notices.
2. Please indicate how you are directly affected (impacted) by the Director's decision to issue an Approval, which authorizes the construction of works to upgrade and test the spring water collection system. Please do not raise the issue of the diversion of water, as a licence has not yet been granted for this activity.
3. The *Water Act* states that individuals have 7 days following the receipt of a Notice of Decision by the Director to file an appeal. It appears to the Board that this time frame has lapsed. Please outline the circumstances that prevented you from filing your appeal within the legislated time limits.”

A schedule for response submissions from the Director and Approval Holder, and rebuttal submissions from the Appellants, was also set.

[9] On February 22, 2001, a letter was received from the Director advising of concerns with the Board's process for written submissions with respect to Ms. Yule's appeal as Ms. Yule had not yet indicated if she wished to have her letter of January 29, 2001 considered as a Notice of Appeal. Ms. Yule wrote to the Board on February 23, 2001, advising that she wished her letter to stand as a Notice of Appeal. Ms. Yule advised that a letter would follow "...detailing why I am so directly affected and why I was not informed of the activity in the area so I could respond by said date."

[10] Letters followed on February 26 and 27, 2001 from the Approval Holder with respect to the extension of time and from Ms. Yule in response to the Approval Holder's letters. A letter was also received from Ms. Collins on March 1, 2001, in response to the Board's letter of February 20, 2001.

[11] On March 2, 2001, the Board wrote to the parties again, acknowledging all correspondence, extending the deadlines for written submissions and reminding the parties of the issues they should address. Written submissions were subsequently received from all parties.

II. ISSUE

[12] Are the appeals filed by Mr. Gordon Grant and Ms. Joan Yule validly before the Board?

III. SUMMARY OF EVIDENCE

A. Mr. Gordon Grant

[13] The position of the Grants is that no actual notice was received and regardless of how applications are advertised, the Grants did not know about the Approval until January 17, 2001.¹

[14] To use the words argued by Mr. Grant:

“It appears that notices were posted in the Drumheller Mall [sic] on May 17/00 and published once only in the Strathmore Standard. It is my understanding that Mr. and Mrs. Grant do not receive The Strathmore Standard paper, nor did they have occasion that necessitated a trip to Drumheller from or after May 17, 2000, during the relevant time. They live close to Standard and frequent that town. They were first aware of this matter on or about January 17, 2001, when Mr. Ellis brought the matter to Mr. Grant’s attention (the date when the initial letter was written to the Town of Standard) and the actual notice was not reviewed until it was faxed to me on February 6, 2001.”

B. Ms. Joan Yule

[15] Like the Grants, Ms. Yule argues that she did not receive notice, because, according to Ms. Yule “[the notice] is not circulated in the rural part of the county where I live.”²

C. Town of Standard (the “Town”)

[16] The Town responded to the submissions of Mr. Grant and Ms. Yule by acknowledging that there was a “switch” in the newspaper used³ to communicate notice to area residents, but that the newspaper selected to advertise was “...significantly increased compared to the [original paper].”⁴

D. Director

[17] The position of the Director is that regardless of the media used to communicate Notice, (Drumheller or Strathmore Standard), both newspapers were circulated in the area where the Appellants lived.⁵ Additionally, the Director stresses the need for administrative certainty; for that reason, the Director points out the requirements of the *Water Act*⁶ and *Environmental Protection and Enhancement Act*⁷ that require Statements of Concern to be filed within the 30 day time period.

[18] Finally, the Director points out that, even if the Appellants could file appeals without the prerequisite of the Statement of Concern, there “...are no special circumstances present...to extend the time to file a Notice of Appeal.” For the reasons listed below, the Board agrees with the Director.

IV. ANALYSIS

[19] In order for an appeal to be valid, *Water Act* appeals must meet the following *Water Act* requirements:

115(1) A notice of appeal under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances:...

- (b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted
 - (i) by the preliminary certificate holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or
 - (ii) by the preliminary certificate holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of application was not provided; ...

109(1) If notice is provided

- (a) under section 108(1), any person who is directly affected by the application or proposed amendment, and
- (b) under section 108(2), the approval holder, preliminary certificate holder of licensee, may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.

(2) A statement of concern must be submitted

- (a) in the case of an approval, within 7 days after the last providing of the notice, and
 - (b) in every other case, within 30 days after the last providing of the notice,
- or within any longer period specified by the Director in the notice.

Section 116(1)(a)(ii) of the *Water Act* states:

116(1) A notice of appeal must be submitted to the Environmental Appeal Board

- (a) not later than 7 days after ...
 - (ii) in the case of an approval, receipt of the notice of the decision that is appeal from or the last provision of the decision that is appealed from....

[20] In the Grant and Yule appeals before the Board, all parties agreed that the Village of Standard met the statutory pre-requisites imposed upon it.⁸ At the same time, the Appellants maintain that it would still be unfair to punish citizens in cases where they did not *actually* receive notice. This means that all potential appellants must personally receive notice.

[21] However, the Board has previously ruled that requiring approval holders to give actual notice to all potentially affected people is a burden that is too heavy for the Director to impose. In *Cardinal River Coals*, the Board wrote as follows:

“Ms. Ladouceur implies that she should not be subject to the section 84(1)(a)(iv) requirement, because she was out of town on the dates the AEP’s public notice was published and, thus, she was never apprized of her chance to submit a statement of concern on the *EPEA* approval ‘in accordance with section 70.’ Her ‘implied’ argument misses the point. As a legal matter, section 84(1)(a)(iv), and sections 70 and 69 which are referenced directly and indirectly through section 84(1)(a)(iv), require that a statement of concern be provided as a prerequisite to filing an appeal if the Director provides notice. Presumably, notice means notice to the public generally rather than notice to particular interested persons, *especially* those persons of whose identity the Director is unaware; that burden is too much for the Director to carry. In other words, it is irrelevant that the particular appellant may have never actually received the notice, as long as the notice itself was adequate for informing the public generally. And Ms. Ladouceur does not question the sufficiency of the Director’s notice to the public generally.”⁹

[22] Also, this Board said in another case, *O’Neill*:

“Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed late. Or perhaps an appeal could be processed even when a statement of concern has not been filed--due to an extremely unusual case (e.g. a directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case. Indeed we cannot imagine a case proceeding to the next step where the appellant, like Mr. O’Neill, refuses to answer Board questions and provide at least some evidence of the requisite statement of concern and its proper filing. His appeal cannot proceed.”¹⁰ (Footnotes removed.)

[23] The same principle applies to this case for several reasons. First, there is no evidence that the Village of Standard’s advertisement was uniquely small or hidden, or otherwise improper in that it prevented Statements of Concern from being filed.¹¹ Second the Board

accepts that notice was placed in a manner such that the area coverage was reasonable in fact reasonable. In reaching this conclusion, the Board relies on statements of the Drumheller Mail newspaper that indicates the paper's circulation for Standard is actually higher than for the other listed communities.¹²

[24] Additionally, Village of Standard Council minutes indicate that "...everyone has a free subscription (rural and urban) to the Drumheller Mail and it goes in the mailbox...provid[ing] the most coverage for our notices to local residents [sic]."¹³ Thus, the Village Council believed the Drumheller Mail was proper and the Director was reasonable in responding as he did to these facts.

[25] Third, and as a result, the Board agrees with counsel for the Director that statutory prerequisites have been met and that no special circumstances exist to extend statutory deadlines.

[26] In dismissing the Grant and Yule appeals, the Board notes that another Appellant, Mr. Perry Ellis, did file on time and that his appeal against the Village of Standard's *Water Act* Approval No. 00082525-00-00 will proceed in the ordinary course. Both Mr. Grant and Ms. Yule have the opportunity to file requests for intervention in the Ellis appeal, as do other citizens, and Board staff are being notified through this decision that both Mr. Grant and Ms. Yule receive notice regarding these opportunities vis-a-vis the hearing of the Ellis appeal.

V. DECISION

[27] The Notices of Appeal filed by Ms. Joan Yule and Mr. Gordon Grant are dismissed.

Dated on May 15, 2001 at Edmonton, Alberta.

William A. Tilleman, Q.C., Chairman

¹ Letter from M. Collins, February 28, 2001, page 1.

² Letter from J. Yule, February 23, 2001, page 1.

³ Originally, the Director required the Town to advertise in the “Strathmore Standard”. However, on May 9, 2000, Alberta Environment approved the amendment to advertise in the “Drumheller Mail”.

⁴ Submission of the Approval Holder, March 14, 2001, page 1.

⁵ Submission of the Approval Holder, March 14, 2001, page 1.

⁶ See section 115 of the *Water Act*.

⁷ See e.g. section 84(1) of the *Environmental Protection and Enhancement Act*.

⁸ See section 108 of the *Water Act* and section 13 of the Water (Ministerial) Regulation, A.R. 205/98.

⁹ Re: *Cardinal River Coals Ltd.* (1999), 28 C.E.L.R. (NS) 145 at paragraph 25.

¹⁰ *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection, Re: Town of Olds*, EAB Appeal No. 98-250-D, at paragraph 14.

¹¹ For example, no one has alleged that the wording of the notice asking for Statements of Concern somehow chilled or confused their participation.

¹² Letter from O. Sheddy (Drumheller Mail) to Evelyn Larsen (Village of Standard), March 8, 2001, page 1.

¹³ Village of Standard Council Policy 1104-5A for Statutory Advertising: Reference 11-04/12/00, page 1.