

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – October 1, 2001

IN THE MATTER OF Sections 84, 85 and 87 of the *Environmental Protection and Enhancement Act*, S.A. 1992 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 by Mr. Harry Proft with respect to Amending Approval 00140706-00-01 issued under the *Water Act* to Her Majesty the Queen in Right of Alberta by the Director, Licensing and Permitting Standards Branch, Environmental Operations Division, Environmental Assurance, Alberta Environment, authorizing the construction of a coffer dam and a spillway on SE 31-59-5-W5M.

Cite as: *Proft v. Director, Licensing and Permitting Standards Branch, Environmental Assurance, Environmental Operations Division, Alberta Environment, re: Her Majesty the Queen in Right of Alberta.*

BEFORE

William A. Tilleman, Q.C. Chairman

APPEARANCES

Appellant: Mr. Harry Proft, represented by Mr. Bernie Yakimyshyn,
Office of the Farmer's Advocate of Alberta.

Director: Mr. Ernie Hui, Director, Licensing and Permitting
Standards Branch, Environmental Operations Division,
Environmental Assurance, Alberta Environment,
represented by Mr. Darin Stepaniuk, Alberta Justice.

Approval Holder: Her Majesty the Queen in Right of Alberta.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to Her Majesty the Queen in Right of Alberta for the construction of a coffer dam and replacement of the spillway at the Tiger Lily Lake Outlet Structure at SE 31-59-5-W5M near Barrhead, Alberta.

The Environmental Appeal Board received an appeal from the Office of the Farmer's Advocate of Alberta on behalf of Mr. Harry Proft, an adjacent landowner to Tiger Lily Lake, appealing the Amending Approval. The Notice of Appeal was filed outside the prescribed time limits for filing an appeal.

The Board is not satisfied that sufficient grounds exist to extend the prescribed time limit for filing a Notice of Appeal under the *Water Act*. The Board has concluded that the appeal is moot, without merit, or otherwise not properly before the Board. Therefore, pursuant to section 87(5)(a) of the *Environmental Protection and Enhancement Act*, the Board dismisses the Notice of Appeal.

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I. BACKGROUND

[1] On November 16, 2000, the Director, Licensing and Permitting Standards Branch, Environmental Operations Division, Environmental Assurance, Alberta Environment (the “Director”) issued Approval No. 00140706-00-00 (the “Approval”) under the *Water Act*, S.A. 1996 c. W-3.5, to Her Majesty the Queen in Right of Alberta (the “Approval Holder”). The Approval authorized the construction of a coffer dam and replacement of the spillway of the Tiger Lily Lake Outlet Structure, near Barrhead, Alberta. The Approval incorrectly referred to land location NE 31-59-5-W5M. However, the plan attached to the Approval showed the correct, adjoining land location, SE 31-59-5-W5M.

[2] On February 7, 2001, the Director issued Amending Approval No. 00140706-00-01 (the “Amending Approval”) which corrected the legal description of the land in the Approval.

[3] On March 28, 2001, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from the Office of the Farmer’s Advocate of Alberta, on behalf of Mr. Harry Proft (the “Appellant”). The Notice of Appeal referred to the land location, NE 31-59-5-W5M, in the Approval and stated that the Appellant was the owner of that land. The Notice of Appeal objected to: changes in the lease related to the original project; failure to give notice or obtain input from the landowner; a failure to provide proper notice that would have permitted an appeal; and that there should be compensation for the loss of time and loss of use of property associated with the project.

[4] The Board acknowledged the appeal on March 30, 2001, and requested that the Appellant provide clarification of his Notice of Appeal and advise why the appeal was filed outside the time limits prescribed in the *Water Act*; how a project on the adjoining parcel of land affects him; and whether he was appealing Amending Approval or the original Approval. The Board also requested that the Director provide the records related to the appeal (the “Record”).

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both Boards responded in the negative.

[6] On April 17, 2001, the Appellant advised the Board that he is, in fact, the owner of land location SE 31-59-5-W5M, which adjoins Tiger Lily Lake where the works were undertaken. He also stated that he was appealing the Amending Approval which authorized construction of the coffer dam and replacement spillway on SE 31-59-5-W5M.

[7] In response to the Appellant's submission, the Director informed the Board by letter dated May 15, 2001, that notice of the decision to issue the Approval was posted in all of Alberta Environment's offices in the North East Slopes Region between November 20 and December 22, 2000.¹ However, this notice of the decision included the incorrect land location reference. Direct written notice was not provided to the Appellant, the owner of the corrected land location SE 31-59-5-W5M, at that time.

[8] Further, the Director advised on May 15, 2001, that Alberta Environment staff met with the Appellant at the site of the water management structure on January 8, 2001. The Board was informed that at the meeting, Alberta Environment staff advised the Appellant that the Approval had been issued and discussed the nature of the work. Alberta Environment staff believe that the Appellant was provided with a copy of the Approval and notice of the decision at that time. The Board notes that the Notice of Appeal states: "Mr. Proft contacted our office [the Office of the Farmer's Advocate] on January 23, 2001, after failing to resolve the situation with officials of Alberta Environment."

[9] The Director also advises that the work authorized by the Approval was completed between January 23, 2001 and February 23, 2001.

[10] The Board was considering the various issues raised by the parties when it received a request, dated May 23, 2001, from the Appellant to hold the appeal in abeyance pending further discussions with the Director. On September 13, 2001, the parties advised the Board that these discussions had not resulted in a resolution. As a result, on September 14, 2001,

¹ A memorandum dated November 16, 2000 states that Alberta Environment waived the requirement to provide notice of the application for the Approval because, in accordance with section 108(6) of the *Water Act*, the Director was of the opinion that:

"...the proposed activity specified in the application for the approval will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agricultural users."

the Board advised the parties that it had decided to dismiss the appeal, with reasons to follow. These are those reasons.

II. ANALYSIS

[11] The relevant facts in this case are: (1) the Approval was issued on November 16, 2000; (2) the Amending Approval was issued on February 7, 2001; (3) the Board received the Appellant's Notice of Appeal on March 28, 2001; (4) the Appellant is purporting to appeal the Amending Approval; and (5) the work that was the subject of the Approval was completed by February 23, 2001.

[12] From these facts, the Appellant's Notice of Appeal was submitted over a month after the completion of the work authorized by the Approval. The Board must therefore consider whether the Notice of Appeal is properly before the Board. The concerns that trouble the Board with respect to this Notice of Appeal are: (1) that the Notice of Appeal was filed out of time; (2) that the appeal may be moot because the work is already completed; and (3) whether it is possible to appeal the Amending Approval that corrects a clerical error.

[13] In this case, the Director did not require the Approval Holder to provide public notice of its application for the Approval. He did so because in his opinion there would be "... minimal or no adverse effect..." on others. As a result, there was no notice to trigger the submission of a Statement of Concern by any person who was directly affected by the application. Section 108(6)(d) of the *Water Act* provides that the Director may waive the notice requirement if the Director has received an application for an approval and the Director is of the opinion that:

“...the activity or diversion of water specified in the application for the approval or licence or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agricultural users.”

[14] Where the Director waives the notice of application, the Director is required to give notice of his decision to issue the Approval after the fact. Section 111(1)(e) of the *Water Act* provides:

“...if notice of the application or proposed changes was waived by the Director

under section 108(6), [the Director must] ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected person....”

[15] Further, no notice was given, or needed to be given, in respect of the Amending Approval. Section 112(3)(a)² of the *Water Act* provides that the Director is not required to give notice of a decision to correct a clerical error. The Board accepts that the incorrect reference to the land location on the Approval was a clerical error because the correct land location was noted on the plan attached to the Approval. So nothing "turns" on that mistake.

[16] Notice of the decision was posted in all of Alberta Environment's offices in the North East Slopes Region between November 20 and December 22, 2000 in compliance with the regulations.³ However, the Director did not directly notify the Appellant of his decision at this time. The Board has previously indicated that an approval holder is not required to directly inform all potentially interested parties for the purposes of section 108(1) of the *Water Act*.⁴ However, the Director's obligations under section 111(1) does not become too relevant where

² Section 112(3)(a) of the *Water Act* provides:
“Notwithstanding sections 110 and 111, the Director is not required to provide or give notice of a decision ... to correct a clerical error....”

³ Section 13 of the Water (Ministerial) Regulation, A.R. 205/98, provides:

- (1) For the purpose of providing notice under sections 34(3), 108, 110(4) and 111 of the Act, the Director must do, or must require an applicant to do, one or more of the following:
 - (a) publish notice of the application, decision or order in one or more issues of a newspaper that has daily or weekly circulation in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
 - (b) provide notice of the application, decision or order through a registry established by the Government for that purpose;
 - (c) provide notice of the application, decision or order through a telecommunication system or electronic medium;
 - (d) publish notice of the application, decision or order in The Alberta Gazette;
 - (e) make available a copy of the application, decision or order in one or more branch offices of the Department in the area of the Province in which the activity, diversion of water or operation of a works that is the subject of the application, decision or order is or will be carried out;
 - (f) provide notice of the application, decision or order, in the form and manner and within the time period specified by the Director, to
 - (i) any persons determined by the Director, and
 - (ii) the local authority of the municipality in which the land on which the activity, diversion of water or operation of a works is located;
 - (g) provide notice in any other form and manner considered appropriate by the Director.

⁴ *Grant and Yule v. Director, Bow Region, Natural Resource Services, Alberta Environment, re: Village of*

the Director has previously waived requirements to give notice of an application, because the Director later notified the Appellant, directly.

[17] The Board notes that when questioned by the Board as to whether he was appealing the Approval or the Amending Approval (which as we have stated corrected a clerical error), the Appellant advised he was appealing the clerical error. Section 115(2)(c)(i) of the *Water Act* provides:

“Notwithstanding subsection (1) [the right to appeal], a notice of appeal may not be submitted ... with respect to an amendment ... to a clerical error....”

A. Timeliness

[18] The Board is satisfied that the Appellant knew of the proposed works and the Approval on January 8, 2001, at the latest. The Board is also satisfied that the Appellant knew that he could obtain further information about the Approval from Alberta Environment because the Appellant, in his Notice of Appeal, stated that had discussed the project with Alberta Environment until January 23, 2001. However, to be fair, the Board is not satisfied that the Appellant knew, during his discussions with staff from Alberta Environment, that an avenue of appeal to the Board was available to him.

[19] Section 116(1) of the *Water Act* states:

“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 notice of the decision that is appealed from to or the last provision of notice of the decision that is appealed from...”

[20] Section 116(2) of the *Water Act* also states that the Board may extend the 7 day period for submitting a notice of appeal, “...if the Board is of the opinion that there are sufficient grounds to do so.”

[21] The Board acknowledges the importance of ensuring that potential appellants are aware of their rights to appeal to the Board against a decision of the Director. However, under the present facts, even if the Appellant was unaware of his option to appeal the Director’s

decision to the Board, he should have at least become aware of this option shortly after he contacted the Office of the Farmer's Advocate on January 23, 2001. Yet, the Appellant did not submit his Notice of Appeal until March 28, 2001.

[22] To explain this, by letter dated May 17, 2001, the Appellant explains why he did not appeal until March 28, 2001, because:

“The original approval specifically stated that the appeals must be received within 7 days (assumed working days) after receipt. Even if you considered the last date of public posting at the regional offices of Alberta Environment, December 22, 2000, as the official date of receipt, Mr. Proft would have been obligated to appeal by January 8, 2001, which by coincidence was the day that Mr. Proft was apparently informed of the construction. Also note that copies of the Approvals submitted to the EAB were in a package of information copied for me when I met Mr. Stephen Yeung of Alberta Environment to discuss this issue on March 2, 2001. Additional note: Mr. Proft did not receive notification of this project until all materials were on-site.”

[23] The Board does not consider that this response satisfactorily explains why the Appellant waited so long; he did not submit his Notice of Appeal within 7 days of meeting with Alberta Environment staff on January 8, 2001 or even within 7 days of receiving the package of information from Alberta Environment on March 2, 2001. And even if discussions between the Appellant and Alberta Environment staff were on-going, the Appellant could have moved to protect his appeal right by filing within one of these time frames.

[24] The appeal process should be supported by administrative certainty and is intended to balance the rights of those obtaining approvals under the *Water Act* and those challenging a decision to grant an approval. The time limits are an integral part of this balanced process and the Board will only extend a time limit if it is satisfied that there is a good reason and usually special circumstances for such an extension. The Board is not satisfied on these facts that special circumstances exist to extend the prescribed time limit under the *Water Act* for submitting the Notice of Appeal. As a result, the appeal is filed out of time and is not properly before the Board.

B. Mootness

[25] In a letter dated May 15, 2001, the Director submitted that the appeal should be dismissed because, "...[t]he appeal is moot as the rehabilitation work is complete."⁵ In his letter of response dated May 17, 2001, the Appellant conceded that, "...the appeal for new construction is now moot." However, he said, "...it is necessary to pursue the matter of the application and approval processes, the lack of appropriate notifications, and the fact that Mr. Proft had no opportunity for input during the process." The Board notes that both parties agree that the appeal against the Approval for the construction of the works is moot and the remaining issue is one of process that presumably could be clarified by the appeal. The Board does not agree. In the present circumstances, the Board does not believe that it should review the "process" that the Director followed with respect this appeal.

[26] The Board's power is to make a recommendation to the Minister to "...confirm, reverse, or vary the decision appealed..."⁶ Since the work authorized under the Approval has been completed, any comments that the Board would have regarding the substantive aspects of the appeal or the process that the Director followed could not assist the Minister in confirming, reversing, or varying the decision appealed. Therefore, the matter is moot.

⁵ In *Butte Action Committee and the Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment* (January 9, 2001), EAB Appeal No. 00-029 and 00-060-D at paragraph 28, the Board stated: "By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants' concerns because the issue found within the Approval appealed from is now abstract or hypothetical."

⁶ Section 91(1) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the "Act") provides:

"In the case of a notice of appeal referred to in section 84(1)(a) to (j) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the Water Act, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it."

Section 92(1)(a) of the Act provides:

"On receiving the report of the Board the Minister may, by order ... confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make"

C. Appeal of Amending Approval

[27] In response to one of the questions posed by the Board in relation to the timeliness of his appeal, the Appellant advised that he was appealing the Amending Approval. As stated previously, the Board accepts the Director's explanation that the Amending Approval corrected a typographical error regarding the land location.

[28] Section 115(2)(c)(i) of the *Water Act* provides: "Notwithstanding subsection (1) [the right to appeal], a notice of appeal may not be submitted ...with respect to an amendment ... to correct a clerical error...." The Board concludes that, in addition to the reason stated above, or in the alternative, the Notice of Appeal filed by the Appellant is without merit and should be dismissed.

III. DECISION

[29] For the reasons stated above, the Board dismisses the Notice of Appeal pursuant to section 87(5)(a) of the *Environmental Protection and Enhancement Act*, either because: (i) it is not properly before the Board, (ii) it is moot, or (iii) it is without merit.

Dated on October 1, 2001, at Edmonton, Alberta.

William A. Tilleman, Q.C.