

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Report and Recommendations

Date of Mediation – August 21, 2001
Date of Report and Recommendations – August 31, 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 Messrs. Brian and Nick Hunka regarding the decision of the Director, Water Management Division, Natural Resources Service, Alberta Environment to issue Licences 00139015-00-00 (WTH 2-98) and 00139016-00-00 (WTH 4-98), under the *Water Act* to Highland Feeders Ltd. which authorizes the annual diversion of 73,000 cubic metres of water from the well in SW 26-054-14-W4 and 76,650 cubic metres of water from the well in SW 24-054-14-W4.

Cite as: *Hunka v. Director, Water Management Division, Natural Resources Services, Alberta Environment, re: Highland Feeders Ltd.*

MEDIATION MEETING BEFORE

Dr. M. Anne Naeth

PARTIES

Appellants: Messrs. Brian and Nick Hunka

Director: Mr. Ernie Hui, Director, Water Management Division, Natural Resources Service, Alberta Environment represented by Ms. Heather Veale, Alberta Justice

Approval Holder: Highland Feeders Ltd. represented by Mr. Bernie Kotelko

Board Staff: Ms. Lisa Awid

Other Participants: Mr. Robert George, Water Management, Northeast Boreal Region, Regional Services, Alberta Environment for the Director

Mr. Roger Clisshold, Hydrogeological Consultants Ltd. for the Approval Holder

EXECUTIVE SUMMARY

Alberta Environment issued two licences under the *Water Act* to Highland Feeders Ltd. authorizing the annual diversion of water for the purpose of agriculture (a feedlot) subject to certain terms and conditions. Messrs. Brian and Nick Hunka appealed the issuance of both licences.

In consultation with the parties, the Board held a mediation meeting/settlement conference, following which an agreement was reached by all the parties. The agreement provides that Highland Feeders Ltd. shall adjust their practices in accordance with the resolution contained within this Report and Recommendations and that the licences shall be amended accordingly.

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I. BACKGROUND

[1] On March 30, 2001, the Director, Water Management Division, Natural Resources Service, Alberta Environment, (the “Director”) issued Licences 00139015-00-00 (WTH 2-98) and 00139016-00-00 (WTH 4-98) (collectively “the Licences”), under the *Water Act*, S.A. 1996, c.W-3.5 to Highland Feeders Ltd. (“HFL”). The Licences authorize the annual diversion of 73,000 cubic metres of water from the well in SW 26-054-14-W4 and 76,650 cubic metres of water from the well in SW 24-054-14-W4, respectively, for the purpose of agriculture (a feedlot) subject to certain terms and conditions.

[2] On April 30, 2001, the Environmental Appeal Board (the “Board”) received a Notice of Appeal dated April 29, 2001, from Messrs. Brian and Nick Hunka (the “Appellants”) appealing the Licences.

[3] The Board acknowledged the appeal on April 30, 2001, and requested that the Director provide copies of the records (the “Record”) relating to the appeal. On the same day, the Board also wrote to HLF and provided a copy of the appeal.

[4] According to standard practice, on April 30, 2001, 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 Boards’ legislation. Both Boards responded in the negative.

[5] In response to HLF’s request of May 8, 2001, asking the Board to “...convene a meeting of the parties or any other interested persons the Board considers should attend...for the purpose of mediating a resolution...”, the Board requested dates be provided for a mediation meeting/settlement conference by May 11, 2001.

[6] On May 10 and 14, 2001, HFL and the Director, respectively, provided their dates for a mediation meeting/settlement conference. Due to the short time frame, Mr. Brian Hunka on behalf of himself and his father, Mr. Nick Hunka¹ requested an extension of the May 11, 2001, due date to submit dates for mediation. The letter advised the Board that the Appellants would be amenable to mediation, however, requested HLF consider funding the costs associated in

¹ The Notice of Appeal filed with the Environmental Appeal Board on April 30, 2001, was signed by Messrs. Nick and Brian Hunka. All correspondence the Board has received from the Appellants to date with respect to this appeal has been from Mr. Brian Hunka (Mr. Nick Hunka’s son) on behalf of both Appellants.

preparing the Appellants' appeal. The Appellants also expressed their confidence in reaching a resolution through mediation. On May 11, 2001, the Board acknowledged the Appellants' letter and enclosed a copy of the Participants' Agreement to Mediate. The agreement outlines that the Board does not generally award costs in relation to mediation meeting/settlement conferences, however, does not preclude the parties from reaching an agreement between themselves and encouraged the parties to discuss possible options directly with each other. The Board also granted the Appellants' request for an extension to submit mediation dates by May 18, 2001, as no objections were received by the other parties to the appeal.

[7] On May 14 and 15, 2001, the Board received a copy of the Record and replacement documents respectively, and on May 17, 2001, the Board forwarded a copy of the Record to the parties for review.

[8] In response to the Appellants' letter of May 18, 2001, requesting documents that were "omitted" from the Record, the Board wrote to the Director and asked for comments respecting the "omitted" documents. The parties were asked to provide mediation meeting/settlement conference dates for the last week in June, as there were no common dates in the first set of mediation dates provided.

[9] The Director replied to the Board's May 18, 2001 letter on May 23, 2001, and advised that "...it remains the Department's position that documents previously provided to the Board are all of the relevant documents upon which Mr. Hui based his decision to issue the licence amalgamation and licences which are presently under appeal." The Director provided a number of additional documents that should have been included in the Record and indicated that notwithstanding his position, the Director would provide a complete copy of the historical documents in this matter for the Board's review.

[10] On May 31, 2001, the Director forwarded the remaining Record to the Board and advised that there was no record of three letters requested by the Appellants. The Board forwarded the additional Record to the parties on the same day.

[11] On June 22, 2001, the Board responded to a June 15, 2001 letter from the Director providing the mediation dates. The Board's letter also acknowledged the Appellants' letter of June 18, 2001, whereby mediation dates were provided and the Appellants advised that they would prefer to carry out a mediation between the parties with the exception of HLF. In

response to the Appellants' request, the Board advised that since mediation was a consensus-building process, all parties should be involved.

[12] On June 29, 2001, the Board wrote to the parties in response to two letters of July 25, 2001, received from the Appellants. The Board's letter advised that as a result of the Appellants' letters, the Board believed mediation would not be a viable option. The Board referenced one of the Appellants' letters which stated:

“The undersigned is concerned that if a mediation meeting is held, and if a solution is found that would be amenable to all parties.... The undersigned has no faith in the ability of Alberta Environment to enforce the laws governed within the Water Act, let alone any commitment that may be made at a mediation meeting.”

The Board then requested available dates for a hearing of this appeal.

[13] On July 12, 2001, the Board acknowledged receipt of a fax from HLF dated July 5, 2001, letters from the Appellants and the Director dated July 6, 2001, and a copy of a letter from HLF to Alberta Environment dated July 10, 2001. The Board's letter advised the parties that a hearing would take place on August 28, 2001, and further information would be forwarded in the near future.

[14] On July 19, 2001, the Board wrote to the parties advising that the hearing scheduled for August 28, 2001, would be held in Vegreville, Alberta and attached a Notice of Public Hearing with respect to 00143149-00-00 that would appear in the *Vegreville Observer* on July 24, 2001. Lastly, the Board advised of a July 31, 2001, deadline for application from others to make representations before the Board.

[15] On July 25, 2001, further to a telephone conversation between Board staff and Mr. Shawn Munro (calling on behalf of the Appellants), a question was raised with respect to the Notice of Hearing. The Board wrote to the parties and noted that the Notice of Hearing provided to the parties referred to Licence 00143149-00-00 issued on March 30, 2001, with an allocation of 209,000 cubic metres with priority no. 1997-02-01-002. The Board advised that upon reviewing its file, it determined that a total of three licences were issued to HLF by the Director on March 30, 2001, including Licence 00143149-00-00 (an amalgamation of several pre-existing licences) in addition to Licences 00139015-00-00 and 00139016-00-00 which were both new licences. The Board explained that it was under the impression that Licences 00139015-00-00 and 00-139016-00-00 were part of the amalgamation that occurred with Licence 00143149-00-

00, however determined this was not the case. The Board advised the parties that a new Notice of Public Hearing would be published to correct the misunderstanding and reflect the Licences under appeal, namely Licences 00139015-00-00 and 00139016-00-00 only.

[16] On July 26, 2001, the Board acknowledged receipt of two e-mails from legal counsel for the Director, in response and from the Director to the Appellants that copied Board staff. The e-mails pertained to pursuing discussions between the Director and the Appellants. The Board advised in its letter that it had no objections to these discussions taking place.

[17] On July 26, 2001, the Board acknowledged receipt of a letter from Mr. Shawn Munro which advised the Board that he had been retained to act on behalf of the Appellants with respect to this appeal. Mr. Munro's letter further advised that the Appellants appreciated the invitation of the Director to meet and pursue discussions and that "...Mr. Hunka and his father Nick Hunka are fully prepared to attend a Board mediation with the parties involved..." Lastly, the Board's letter acknowledged receipt of a letter from the Director of July 27, 2001, which advised that the Director remained open to participate in a mediation meeting/settlement conference.

[18] On August 2, 2001, further to the Messrs. Shawn Munro and Brian Hunka's letters of July 26, 2001, the Board informed the parties that a Board member could be available for a mediation meeting/settlement conference on August 13, 2001, in Edmonton, Alberta, to examine the possibility of a mediated settlement and the parties were requested to contact the Board by August 8, 2001, if available to participate. The letter also advised that in the event a resolution could not be reached, the parties would review procedural matters to ensure an expeditious hearing on August 28, 2001.

[19] On August 2 and 3, 2001, the Board received letters from Mr. Theodore Bosse, legal counsel for HLF, and the Director, respectively. The letters advised that the parties would be willing to participate in mediation with the Appellants.

[20] Some of the parties were not available for the the Board's proposed mediation date of August 13, 2001. Therefore, in consultation with the parties, on August 9, 2001, the Board advised that a mediation meeting/settlement conference would be held on August 21, 2001, at the Board's office in Edmonton, Alberta. The letter attached a copy of the "Participants' Agreement to Mediate" which would be signed by the parties on August 21, 2001, and a copy of

the Notice of Mediation Meeting/Settlement Conference advertisement that would appear in the *Vegreville Observer*.

[21] Further to its letter of August 9, 2001, the Board wrote to the parties on August 10, 2001, advising that given the date of the mediation meeting/settlement conference, the Board would extend the deadline for filing written submissions, for the possible hearing, to August 23, 2001.

[22] On August 13, 2001, the Board advised the parties that Dr. M. Anne Naeth would be the presiding Board member at the mediation. As Dr. Naeth previously lived in Vegreville, Alberta, she may have been acquainted with the parties, however, after contacting the parties via telephone, no concerns were raised with respect to Dr. Naeth's role as mediator.

II. THE MEDIATION MEETING/SETTLEMENT CONFERENCE

[23] Pursuant to section 11 of the Environmental Appeal Board Regulations, A.R. 114/93, the Board conducted a mediation meeting/settlement conference in Edmonton, Alberta on August 21, 2001.

[24] According to the Board's standard practice, it called the mediation meeting to facilitate through settlement conference the resolution of this appeal; or failing that, to structure procedural arrangements for the oral hearing. The Board invited representatives from each party to participate in the mediation meeting/settlement conference.

[25] In conducting the mediation meeting/settlement conference, Dr. Naeth circulated copies of the "Participants' Agreement to Mediate", discussed the appeal and mediation process and explained the purpose of the mediation meeting. At the conclusion of her discussion, all participants signed the agreement.

[26] Following productive and detailed discussions, an agreement evolved and the parties signed the attached Resolution (page 7 of this Report and Recommendations). Given that a Resolution was reached between the parties, the Board cancelled the hearing scheduled to take place in Vegreville, Alberta on August 28, 2001.

III. RECOMMENDATIONS

[27] The Board recommends that the Minister of Environment vary the Licences in accordance with the Resolution contained herein. Attached for the Minister's consideration is a draft Ministerial Order implementing this Resolution.

[28] Further, with respect to section 92(2) and 93 of *the Environmental Protection and Enhancement Act*, the Board recommends that copies of this Report and Recommendations and of any decision by the Minister be sent to the following parties:

- Messrs. Nick and Brian Hunka, represented by Mr. Shawn Munro, Bennett Jones;
- Mr. Bernie Kotelko, Highland Feeders Ltd., represented by Mr. Theodore Bosse, Ogilvie;
- Mr. Ernie Hui, Director, Water Management Division, Natural Resources Service, Alberta Environment, represented by Ms. Heather Veale, Alberta Justice; and
- Ms. Vivian Soldan.

Dated on August 31, 2001, at Edmonton, Alberta.

“Original signed by”

Dr. M. Anne Naeth

IV. RESOLUTION

V. **DRAFT MINISTERIAL ORDER**

**Ministerial Order
/2001**

Environmental Protection and Enhancement Act

S.A. 1992, c. E-13.3

Water Act

S.A.1996, c.W-3.5

Order Respecting EAB Appeal No. 01-044

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 92 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order respecting Environmental Appeal Board Appeal No. 01-044.

Dated at the City of Edmonton in the Province of Alberta, this ____ day of _____, 2001.

Honourable Dr. Lorne Taylor
Minister of Environment

Draft Appendix

Order Respecting Environmental Appeal Board Appeal No. 01-044

With respect to the decision of Mr. Ernie Hui, Director, Water Management Division, Natural Resources Service, Alberta Environment to issue Licences 00139015-00-00 (WTH 2-98) and 00139016-00-00 (WTH 4-98) under the *Water Act* to Highland Feeders Ltd. which authorizes the annual diversion of 73,000 cubic metres of water from the well in SW 26-054-14-W4 and 76,650 cubic metres of water from the well in SW 24-054-14-W4, respectively, I Dr. Lorne Taylor, Minister of Environment, order that the decision of the Director is varied as follows:

1. *Water Act* Licence No. 00139015-00-00 is amended by adding the following condition immediately after condition 6:

“6.1 The licensee shall provide a copy of the information provided to the Director under condition 6 to Messrs. Nick and Brian Hunka on or before January 30 of each year.”

2. *Water Act* Licence No. 00139015-00-00 is amended by adding the following condition immediately after condition 7:

“7.1 (1) The licensee shall cease or reduce their diversions from the production well when the water level in the observation well located in SE 24-54-14-W4 drops below 18 metres from the surface.

(2) This condition will apply for 7.5 years from the date of the Ministerial Order which amended the licence to include this condition.

7.2 (1) Should the 18 metre level be reached in the observation well located in SE 24-54-14-W4, the licensee is required to conduct an investigation into the sustainability of the water supply in the area and provide the results of the investigation, including the data and/or reports, to the Director, Messrs. Nick and Brian Hunka, and other interested landowners.

(2) Upon receipt of the results of the investigation, the Director will initiate a review of the results of the investigation and the terms and conditions of this licence to determine if the conditions in the licence adequately safeguard groundwater resources in the area.

(3) The review conducted by the Director under condition 7.2(2) shall include the licensee, Messrs. Nick and Brian Hunka, and other interested landowners.

(4) This condition will apply for 7.5 years from the date of the Ministerial Order which amended the licence to include this condition, if the water level has not reached 18 metres.”

3. *Water Act* Licence No. 00139016-00-00 is amended by adding the following condition immediately after condition 6:

“6.1 The licensee shall provide a copy of the information provided to the Director under condition 6 to Messrs. Nick and Brian Hunka on or before January 30 of each year.”

4. *Water Act* Licence No. 00139016-00-00 is amended by adding the following condition immediately after condition 7:

“7.1 (1) The licensee shall cease or reduce their diversions from the production well when the water level in the observation well located in SE 24-54-14-W4 drops below 18 metres from the surface.

(2) This condition will apply for 7.5 years from the date of the Ministerial Order which amended the licence to include this condition.

7.2 (1) Should the 18 metre level be reached in the observation well located in SE 24-54-14-W4, the licensee is required to conduct an investigation into the sustainability of the water supply in the area and provide the results of the investigation, including the data and/or reports, to the Director, Messrs. Nick and Brian Hunka, and other interested landowners.

(2) Upon receipt of the results of the investigation, the Director will initiate a review of the results of the investigation and the terms and conditions of this licence to determine if the conditions in the licence adequately safeguard groundwater resources in the area.

(3) The review conducted by the Director under condition 7.2(2) shall include the licensee, Messrs. Nick and Brian Hunka, and other interested landowners.

(4) This condition will apply for 7.5 years from the date of the Ministerial Order which amended the licence to include this condition, if the water level has not reached 18 metres.”