

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – June 15, 2002

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Mr. Ross Warner and Ms. Judy Warner and Mr. Richard Kelk and Ms. Katherine McCulloch with respect to *Water Act* Approval 00160167-00-00 issued by the Director, Central Region, Regional Services, Alberta Environment to AAA Cattle Company Ltd.

Cite as: *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.*

EXECUTIVE SUMMARY

Alberta Environment issued an Approval under the *Water Act* to the AAA Cattle Company Ltd., authorizing the exploration for groundwater near Didsbury, Alberta.

The Environmental Appeal Board (the Board) received Notices of Appeal from Mr. Ross Warner and Ms. Judy Warner and Mr. Richard Kelk and Ms. Katherine McCulloch opposing the Approval (the Appellants).

The Board found the Appellants had not filed a Statements of Concern with the Director within the time frames as required by the *Water Act*. Therefore, the Board dismissed the Notices of Appeal for being moot, without merit, or not properly before the Board.

The Board also found the issues raised in the Notices of Appeal dealt mainly with the Licence to divert rather than with the Approval to explore. The Board notes that Mr. Warner, Ms. Warner, Mr. Kelk, and Ms McCulloch are free to file Notices of Appeal in relation to the Licence to divert, should it be issued in the future.

BEFORE:

William A. Tilleman, Q.C., Chair.

PARTIES:

Appellants: Mr. Ross Warner, Ms. Judy Warner, Ms. Katherine McCulloch, and Mr. Richard Kelk.

Director: Mr. Larry Williams, Director, Parkland Region, Regional Services, Alberta Environment, represented by Mr. Darin Stepaniuk, Alberta Justice.

Approval Holder: AAA Cattle Company Ltd., represented by Mr. Simon Cobban.

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	SUMMARY OF SUBMISSIONS	2
A.	INITIAL SUBMISSIONS OF THE APPELLANTS	2
B.	THE DIRECTOR.....	4
C.	THE APPROVAL HOLDER	5
D.	RESPONSE SUBMISSIONS FROM THE APPELLANTS	5
III.	DISCUSSION.....	6
IV.	DECISION.....	11

I. BACKGROUND

[1] On January 14, 2002, the Director, Parkland Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00160167-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to AAA Cattle Company Ltd. (the “Approval Holder”), authorizing the exploration for groundwater on 8-31-27-W4M and S½ 4-31-27-W4M near Didsbury, Alberta. The purpose of obtaining the Approval was to provide the basis for the application for a licence to divert groundwater at the same locations (the “Licence”).

[2] The Environmental Appeal Board (the “Board”) acknowledged receipt of Notices of Appeal on January 21, 2002, from Mr. Ross Warner and Ms. Judy Warner and on January 24, 2002, from Mr. Richard Kelk and Ms. Katherine McCulloch (collectively the “Appellants”).

[3] The Board notified the Approval Holder and the Director of the appeals and requested that the Director provide the Board with a copy of all documents related to these appeals (the “Record”).

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (“NRCB”) and the Alberta Energy and Utilities Board (“AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. The AEUB responded in the negative. No response has been received from the NRCB.

[5] On February 5, 2002, the Board acknowledged letters from the Appellants and the Approval Holder providing their available dates for a mediation meeting and settlement conference.

[6] On February 5, 2002, the Board acknowledged receipt of a letter from the Director advising of his available dates for a mediation meeting and settlement conference along with the Director’s Record, which was copied and sent to the Parties¹ to these appeals. In this letter, the Director also advised that he was of the position that these appeals were not properly

¹ The “Parties” to these appeals are Mr. Ross Warner, Ms. Judy Warner, Mr. Richard Kelk, Ms. Katherine McCulloch, the Director, and the Approval Holder.

before the Board because the Appellants did not previously file Statements of Concern and are therefore not entitled to file a Notice of Appeal.²

[7] On February 11, 2002, the Board set down a schedule for written submissions to deal with the Director's motion that the appeals were not properly before the Board because the Appellants' Statements of Concern were not filed on time.

[8] On February 22, 2002, the Board acknowledged receipt of letters dated February 18 and 19, 2002, from the Appellants. Upon review of these letters, the Board noted that the Appellants did not fully answer the Board's question regarding the late filing of the Statements of Concern as set out in sections 109(2) and 115(1)(a)(i) of the *Water Act*.³ The Board re-set the schedule for written submissions to provide the Appellants the opportunity to fully answer the question.⁴

II. SUMMARY OF SUBMISSIONS

A. Initial Submissions of the Appellants

[9] In their February 19, 2002 letter,⁵ Mr. Warner and Ms. Warner outlined their concerns, apparently in preparation for a mediation, and stated that they "...called Lois Collier

² The Director bases this position on section 115(1) of the *Water Act*, which provides:
"A notice of appeal submitted under this Act may be submitted to the Environmental Appeal Board by the following persons in the following circumstances:

- (a) if the Director issues or amends an approval, a notice of appeal may be submitted
 - (i) by the approval 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..." (Emphasis added.)

² Section 109(2) of the *Water Act* provides:

"A statement of concern must be submitted

- (a) in the case of an approval, *within 7 days* after the last providing of the notice..." (Emphasis added.)

⁴ On February 28, 2002, the Board acknowledged receipt of the initial submissions from the Appellants, and a copy was provided to the other Parties to these appeals. On March 7, 2002, the Board acknowledged receipt of the response submissions from the Approval Holder and the Director, and copies were provided to the Appellants. Rebuttal submissions were received from the Appellants on March 13 and 14, 2002.

⁵ The Initial Submission of Mr. Warner and Ms. Warner is comprised of two letters dated February 19, 2002 and February 28, 2002.

[(a member of the Director's staff)] within one working day of first seeing the notice advertised in the Didsbury Review.”

[10] In their February 28, 2002 letter, Mr. Warner and Ms. Warner indicated that they “...first submitted a statement of concern in 1998...” They further stated they “...did not receive any reply whatsoever to these or other concerns in our June 5, 1998 statement of concern.” Finally, their letter discussed the differences between sections 95(5)(a) and 95(5)(b) of *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).⁶ Specifically, they note that section 95(5)(a) states that the Board “may” dismiss an appeal under certain circumstances, while section 95(5)(b) states that the Board “must” dismiss an appeal under certain circumstances. In essence, Mr. and Ms. Warner asked the Board to exercise its discretion not to dismiss their appeal.

⁶ Section 95(5) of EPEA provides:

(5) The Board

(a) *may* dismiss a notice of appeal if

- (i) it considers the notice of appeal to be frivolous or vexatious or without merit,
- (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m), the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
- (iii) for any other reason the Board considers that the notice of appeal is not properly before it,
- (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92, or
- (v) the person who submitted the notice of appeal fails to provide security in accordance with an order under section 97(3)(b),

and

(b) *shall* dismiss a notice of appeal if in the Board's opinion

- (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the Agricultural Operation Practices Act, under the Natural Resources Conservation Board Act or any Act administered by the Energy Resources Conservation Board at which all of the matters included in the notice of appeal were adequately dealt with, or
- (ii) the Government has participated in a public review under the Canadian Environmental Assessment Act (Canada) in respect of all of the matters included in the notice of appeal.” (Emphasis added.)

[11] In their February 18, 2002 letter,⁷ Mr. Kelk and Ms. McCulloch outlined their concerns, also apparently in preparation for a mediation, and stated: “Thank you for your flexibility on the question of timely submission of statement of concerns.”

[12] In their February 27, 2002 letter, addressed to counsel for the Director, Ms. Kelk and Ms. McCulloch stated:

“We understand the legal issue of filing a statement of concern with Alberta Environmental Appeal Board. In reference to the act in the Didsbury Review, October 24, 2001. Quote: ‘Failure to file statements of concern **may** effect the right to file a notice of appeal with the Environmental Appeal Board.’”

It was our intention to submit concerns for the purpose of mediation/settlement and conference per the water act.” (*Sic*, emphasis in the original.)

B. The Director

[13] The Director stated:

- “5. The appeals depend on section 115(1)(a)(i) of the [*Water*] Act for their validity. That section provides that a ‘notice of appeal may be submitted ... by any person who previously submitted a statement of concern **in accordance with section 109** who is directly affected by the Director’s decision ...’ (emphasis added). In order for an appeal to be valid under s. 115(1)(a)(i) [of the *Water Act*], the appellant must have previously submitted a statement of concern in accordance with s. 109 of the [*Water*] Act.
6. Section 109 of the *Water Act* sets out time limits for the directly affected persons to submit statements of concern in relation to applications. In the case of an approval application, the applicable time limit in section 109 is ‘within 7 days after the last providing of notice.’
7. Notice of groundwater exploration approval application (as well as a separate *Water Act* licence application) was provided in the *Didsbury Review* on October 24, 2001 (Director’s record, item 5). The notice refers specifically to a 7 day time limit for submission of statements of concern on the groundwater exploration approval application.
8. The appellants appear to have responded to the October 24, 2001 *Didsbury Review* notice at least in part. On November 20, 2001 Alberta Environment received a letter from Richard Kelk and Katherine McCulloch dated November 19, 2001 (Director’s record, item 11). On

⁷ The Initial Submission of Mr. Kelk and Ms. McCulloch is comprised of two letters dated February 18, 2002 and the February 27, 2002 (addressed to Mr. Stepaniuk, counsel for the Director).

November 21, 2001 Alberta Environment received a letter from Ross Warner and Judy Warner via fax (Director's record, item 7). On their face, the letters appear to be statements of concern directed to the licence application. Alberta Environment acknowledged them as such by letter dated November 21, 2001 (Director's record, items 6 and 10). Even if the appellants' letters were intended as statements of concern directed at the groundwater exploration approval application, they were certainly not submitted within 7 days of the October 24, 2001 notice.

9. On the basis of the facts outlined in paragraphs 7 and 8, the appellants have either not submitted statements of concern in relation to the groundwater exploration approval application or failed to submit statements of concern within the time required by section 109 of the *Water Act*. These appellants have not submitted statements of concern in accordance with s. 109 of the [*Water*] Act as required by s. 115(1)(a)(i) of the Act and their appeals should therefore be dismissed." (Emphasis in the original.)

C. The Approval Holder

[14] The Approval Holder responded to the initial submissions of the Appellants by stating that the Appellants "...failed to give any reason why their letters of concern were filed late." The Approval Holder also stated that they felt that mediation was premature at this stage.

D. Response Submissions from the Appellants

[15] Mr. Kelk and Ms. McCulloch responded to the submissions of the Director and the Approval Holder by stating that Ms. McCulloch is "legally blind" and therefore "...unable to read any printed material."⁸ Further, they stated that Mr. Kelk "...commute 180 km per day to the City of Calgary..." and, therefore does not "...have the luxury of reading or responding to the local papers for sometimes a week or two...."⁹

[16] Mr. Warner and Ms. Warner responded to the submissions of the Director and the Approval Holder by stating:

1. that they did not receive proper notice as the "...*Didsbury Review* is delivered with much less rural distribution than three other papers...";

⁸ Appellants' Response Submission, dated March 13, 2002.

⁹ Appellants' Response Submission, dated March 13, 2002.

2. that in the letter dated January 14, 2002 from the Director to the Approval holder it stated "... (our) statements of concern ... are to be addressed as part of the exploration process...";
3. that they first submitted a Statement of Concern on June 5, 1998; and
4. that during a visit to Alberta Environment on November 20, 2001, one of the Director's staff stated that the "... statement of concern received after the deadline would be put on file."¹⁰

III. DISCUSSION

[17] Under the *Water Act*, a person applying for an approval to explore for groundwater or a licence to divert water must advertise the fact that an application has been made. This is called the Notice of Application.¹¹ In the notice that was published in this case,¹² the Approval Holder included both the Notice of the Application for the Approval to explore and the Notice of the Application for the Licence to divert water. The Board understands, based on its review of other similar appeals, that it has been standard procedure to notify the public of both applications at the same time, even though each application is separate and is considered individually by the Director. Although an approval to explore may be granted, it does not mean that a licence *will* be granted. The decision to grant or not grant a licence will depend largely on the information collected from the work carried out under the approval.

[18] Once the Notices of Application for an approval to explore and a licence to divert has been published, people who have concerns with the proposed work (potential appellants) have seven days to file a Statement of Concern with respect to the approval to explore and 30 days to file a Statement of Concern with respect to the licence to divert. These timelines are specified by section 109(2) of the *Water Act* and must be adhered to.

¹⁰ Appellants' Response Submission, dated March 14, 2002.

¹¹ Section 108(1) of the *Water Act* provides:

"An applicant

- (a) for an approval,
- (b) for a licence, ...

shall provide notice of the application in accordance with the regulations."

¹² The Public Notice was published in the *Didsbury Review* on October 24, 2001. See: the Director's Record, Tab 5.

[19] The purpose of filing a Statement of Concern is twofold. First, it provides the Director with the filer's input into the decision that the Director must make. Second, the filing of a Statement of Concern preserves the filer's right to appeal. Both of these rights are contingent on the Statement of Concern being filed on time.

[20] The requirement to filing as Statement of Concern as a prerequisite to filing a Notice of Appeal has been previously dealt with by the Board under EPEA and the *Water Act*. The Statement of Concern and Notice of Appeal process under EPEA are virtually identical to those under the *Water Act*, and therefore, the Board is of the view that the same principles should apply. In the case of *O'Neill*,¹³ we held:

“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 where a statement of concern has not been filed – due to an extremely unusual case (e.g. 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.” (Emphasis in the original, footnotes omitted.)

[21] The Board also dealt with this issue in *Bildson*.¹⁴ In his appeal, Mr. Bildson filed his Statement of Concern three weeks late, but the Director accepted it anyway and treated it as a valid Statement of Concern.

[22] In the case before us, as in *St. Michael Trade and Water Supply Ltd.*, we are of the view that:¹⁵

“...despite the Appellant's apparent confusion regarding the joint public notice respecting the application for the Approval to explore for groundwater and the application for the Licence, the Board believes it was likely the Appellant's intent to file a Statement of Concern with respect to both applications. However, it is

¹³ *O'Neill v. Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (March 12, 1999), E.A.B. Appeal No. 98-0250-D, paragraph 14.

¹⁴ *Bildson v. Acting Director, North East Slopes Region, Alberta Environmental Protection*, re: *Smokey River Coal Ltd.* (October 18, 1998), E.A.B. Appeal No. 98-230-D.

¹⁵ *St. Michael Trade and Water Supply Ltd. v. Director, Environmental Service, Parkland Region, Alberta Environment*, re: *Cam-A-Lot* (July 17, 2001), E.A.B. Appeal No. 01-055-D.

clear that the Appellant did not actually file a Statement of Concern with respect to the application for the Approval to explore for groundwater.”

[23] In the case before us, the Board agrees with the Director that the issues presented in the Statements of Concern appear to be directed to the Licence to divert and *not* the Approval to explore.¹⁶ In the Statements of Concern, the Appellants referred to the water diversion and the production interval, which are aspects of the Licence to divert. The Statements of Concern *do not* refer to the type of work that is undertaken under the Approval to explore.

[24] Similarly, the issues identified in the Notices of Appeal apply more directly to the Licence to divert rather than the Approval to explore.¹⁷

[25] The issues presented by the Appellants do not apply to the exploration for groundwater.¹⁸ For example, the request that all wells be upslope from existing pens and future pens cannot be considered without the proper testing and exploration authorized by the Approval. After the location of the potential well is identified and the data presented to the Director, then the Director can determine if the Licence should be granted. Issues regarding monitoring water quantity and quality also apply to the actual *diversion* of water under the Licence and not the exploration under the Approval.

¹⁶ Director's Submission, dated March 7, 2002.

¹⁷ The Appellants' Notices of Appeal included the following issues:

1. production interval should be deeper than 150 feet;
2. uncertainty about available water;
3. exploration should be on upslope areas on all 6 quarters, not all over; and
4. quantity applied for should be much less than 157,680 m³ per year.

¹⁸ In the Appellants' Initial Submission, dated February 18, 2002, the Appellants stated their concerns were:

- “1. Clarification on drilling depth...
2. All wells upslope from existing pens and future pens
3. Review of water monitoring reports 1998-2001(4)
4. All traditional water user applications should be completed and included on file for four townships which are directly affected
5. List all numbers of residents, dwellings, livestock facilities, land users, potential development of existing land and community facilities
6. Calculate water use for 17,000 cattle feeders as per NRCB application
7. No notification to Lois Collier of significant increase in numbers of animals with verification including AAA Cattle Company Ltd. records
8. No water reports submitted to Alberta Environmental Protection for the past four years
9. A plan for future water supply for affected community based on decreases
10. Discussing bridging good neighbor relations for the purposes of monitoring water

[26] The Director, before making any final decision with respect to the Licence, is required to assess all relevant information. He must ensure all data necessary to make a valid decision is before him prior to determining whether or not the Licence should be granted. Information relating to the aquifer is essential before the decision is made to grant or refuse the Licence to divert water. To be able to determine the capability of the aquifer to withstand the water diversion, tests must be completed. The Approval to explore is a necessary step to allow the Approval Holder to collect the data that will give a true representation of the aquifer, to collect information for the Director to make his decision with respect to the Licence application.

[27] As the Appellants have filed a Statement of Concern with respect to the Licence to divert, the Director has an obligation under section 111¹⁹ of the *Water Act* to notify the Appellants if and when a Licence to divert water is issued to the Approval Holder. Within 30 days of receiving the notice, the Appellants, if they want to pursue an appeal, must file a new Notice of Appeal with the Board. Such Notice of Appeal would be processed in the ordinary manner.

[28] The Board notes that the Appellants referred to a "...statement of concern filed in 1998." However, that Statement of Concern was filed in response to a licence to divert and use water that was issued on February 3, 1999. Although that licence and the current Approval to explore relate to the same property and same Approval Holder, they are two distinct applications.

quantity and quality.”

¹⁹ Section 111 of the *Water Act* provides:

“111(1) If the Director

(a) issues an approval,

(b) issues a preliminary certificate,

(c) issues a licence when a preliminary certificate has not been issued with respect to that licence, except for a licence issued to the Government under section 51(2) that relates to the implementation of a water conservation objective....

(2) If subsection (1) applies, the Director must

(a) if notice of the application or proposed changes was waived by the Director under section 108(6), ensure that notice of the decision is provided, in accordance with the regulations, to any directly affected person, or

(b) if notice of the application or proposed changes was provided under section 108, give notice or require the approval holder, preliminary certificate holder or licensee to give notice of the decision, in accordance with the regulations, to every person who submitted a statement of concern under section 109.”

As a result, the 1998 Statement of Concern is not a Statement of Concern with respect to these appeals.

[29] The Appellants are also correct in their statement that under section 95(5)(a) of EPEA, a "...failure to file statements of concern may effect [sic] the right to file a notice of appeal with the Environmental Appeal Board."²⁰ (Emphasis in original). Under section 91(5),²¹ the Board has limited discretion to extend the period in which to receive a notice of appeal, therefore the word "may" is used in the published notices.

[30] The Board can arguably accept a Notice of Appeal without a Statement of Concern being filed as discussed in *O'Neill*. However, to respect the intent of the Legislature, the Board will allow this only in exceptional cases. In this case, it is the Board's view that no such exceptional circumstances exist to prompt the Board to permit the Appellants to proceed in the absence of a valid Statement of Concern. (The Board also notes that the exception in *Bildson* also does not apply.)

[31] The Board notes the fact that Ms. McCulloch is "legally blind"²² and that it could be argued that this is the basis on which the Board should allow the appeals to proceed without a valid Statement of Concern. However, the Board notes that Mr. Kelk is capable of reading the local newspapers for notices concerning the Approval Holder. Mr. Kelk states that he is too busy to do this on a regular basis because of work commitments. However, the Board is not prepared to accept this explanation because it appears that the Approval Holder has had the intention to expand its operations from as early as 1998 and the Board expects that if this was a concern for the Appellants, Mr. Kelk would have been watching for the appropriate notices in the newspapers.²³

²⁰ Appellants' Submission, dated February 27, 2002.

²¹ Section 91(5) of EPEA provides:

"The Board may, on application made before or after the expiry of the period referred to in subsection (4), extend that period, where the Board is of the opinion that there are sufficient grounds for doing so."

²² In the Appellants' Rebuttal Submission, dated March 13, 2002, Ms. Katherine McCulloch stated that she is legally blind and is unable to read printed materials.

²³ Director's Record, Tab 23. On June 5, 1998, Mr. Ross Warner filed his concerns with the Water Administration Branch of Alberta Environment. Although this was under the *Water Resources Act*, which was subsequently replaced with the current *Water Act*, the filing of concerns was a similar process. Note also that a previous licence was issued on February 3, 1999 on the lands included in the Approval.

[32] In the Appellants' submission dated March 14, 2002, they stated that they had been told that their Statement of Concern that was filed late would remain on file. In this particular case, the Statement of Concern may have been filed too late for the Approval to explore, but it is on file for the application for the Licence to divert water. This is consistent with the letters that the Appellants received from the Director advising that their Statement of Concern had been accepted with respect to the Licence to divert.²⁴

IV. DECISION

[33] Section 95(5)(a) of EPEA states:

“The Board (a) may dismiss a notice of appeal if

- (i) it considers the notice of appeal to be frivolous or vexatious or without merit, ...
- (iii) for any other reason the Board considers that the notice of appeal is not properly before it....”

[34] For the reasons outlined above, the Board dismisses the Notices of Appeal filed by Mr. Richard Kelk and Ms. Katherine McCulloch and Mr. Ross Warner and Ms. Judy Warner, as their appeals are either moot, not properly before the Board, or without merit.

Dated on June 15, 2002, at Edmonton, Alberta.

“original signed by”

William A. Tilleman, Q.C.
Chair

²⁴ Director's Record, Tabs 6 and 10.