

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – April 7, 2003

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 an appeal filed by Ian Skinner, under the *Water Resources Act* with respect to Temporary Permit No. 16707-2 issued by the Director, Alberta Environment to Consolidated Concrete Ltd., now Inland Aggregates Limited.

Cite as: *Skinner v. Director, Alberta Environment re: Consolidated Concrete Ltd.* (7 April 2003) Appeal No. 02-139-D (A.E.A.B).

BEFORE:

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

PARTIES:

Appellant:

Mr. Ian Skinner.

Director:

Mr. Ernie Hui, Controller, Alberta Environment,
represented by Mr. William McDonald, Alberta
Justice.

Permit Holder:

Consolidated Concrete Ltd., now Inland Aggregates
Limited.

EXECUTIVE SUMMARY

Alberta Environment issued Temporary Permit 16707-3 under section 27 of the *Water Resources Act* to Consolidated Concrete Ltd., now Inland Aggregates Limited, authorizing the diversion and use of water for the purpose of drainage.

The Board received a Notice of Appeal from Mr. Ian Skinner appealing the Temporary Permit.

In the Board's view the appeal is not properly before it, as there is no right to appeal a Temporary Permit. Further, it appeared to the Board that the Temporary Permit had expired. The Board therefore advised the parties that it would dismiss the appeal unless the Appellant, Temporary Permit Holder, or Alberta Environment could provide any information to the contrary.

None of the parties responded to the Board's request and therefore, the appeal was dismissed.

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I. BACKGROUND

[1] On October 11, 1990, the Controller (now the “Director”), Alberta Environment, issued Temporary Permit No. 16707-2 (the “Permit”) to Consolidated Concrete Ltd., now Inland Aggregates Limited (the “Permit Holder”) under the *Water Resources Act*,¹ authorizing the diversion of water up to 891 acre-feet (242 million Canadian gallons) from an aquifer in E1/2 20-54-26-W4M.

[2] On December 24, 2002, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Mr. Ian Skinner (the “Appellant”) appealing the Permit. The Notice of Appeal was imbedded in a document that pertained to a separate appeal that had been filed by the Appellant. On February 13, 2003, the Board acknowledged receipt of the Notice of Appeal and notified the Director and the Permit Holder of the appeal. The Board’s February 13, 2003 letter stated:

“The *Water Resources Act* was repealed and replaced by the *Water Act* on January 1, 1999. Section 18(4) of the *Water Act* provides:

‘A temporary permit, permission for temporary diversion and interim licence, including an updated and reissued interim licence and supplementary interim licence, granted under a predecessor Act that on January 1, 1999 authorizes the diversion of water may, by order of the Minister, be

- (a) a deemed approval, deemed preliminary certificate or deemed licence under this Act, or
- (b) a deemed approval as well as a deemed preliminary certificate or deemed licence under this Act.’

It is the Board’s understanding that Ministerial Order 10/99 (copy attached) dealt with the transition of existing permits and licences under the *Water Resources Act* to the *Water Act*. Paragraph 1 of that order states:

‘Subject to paragraphs 2, 3 and 4 of this Order, *all temporary permits* and permissions existing on December 31, 1998, issued under the *Water Resources Act* R.S.A. 1980, c. W-5, that authorize

¹ The *Water Resources Act*, R.S.A. 1980, c. W-5, was repealed and replaced by the *Water Act*, S.A. 1996, c. W-3.5 on January 1, 1999. The *Water Act*, S.A. 1996, c. W-3.5 was replaced by the *Water Act*, R.S.A. 2000, c. W-3 on January 1, 2002.

the diversion of surface water or groundwater are ordered to be a *deemed temporary diversion licence* under the Water Act with an expiry date of the original temporary permit or permission or December 31, 1999, whichever is the sooner.’ (emphasis added.)

Based on the provisions of the *Water Act* and the Ministerial Order, the Temporary Permit issued to Consolidated Concrete appears to have expired.

Further, as this Temporary Permit appears to be deemed a temporary licence, pursuant to section 115(2)(b) of the *Water Act* (attached), a temporary licence for the diversion of water cannot be appealed. Section 115(2)(b) of the *Water Act* states:

‘115(2) Notwithstanding subsection (1), a notice of appeal may not be submitted
(b) with respect to any matter relating to a licence for the temporary diversion of water.’

Subsection (1) of section 115 outlines those matters that may be appealed to the Environmental Appeal Board under the *Water Act*.

Thus, the Board views this appeal as not properly before us as there is no right to appeal a temporary permit or the Temporary Permit has expired.

Therefore, the Board proposes to dismiss this appeal and close this file unless Mr. Skinner, Mr. Chamberlain [the Director], or Consolidated Concrete Ltd. can provide the Board with any information, including written reasons, to the contrary.”

The Appellant, the Director, and the Permit Holder (collectively the “Parties”) were requested to provide their responses to the Board by February 20, 2003.

[3] On February 18, 2003, the Board received a response from the Director, reserving his right to provide a substantive response to any material that may be received from the Appellant. A response was not received from the Appellant or the Permit Holder.

[4] On March 21, 2003, the February 13, 2003 letter from the Board was sent to Inland Aggregates Limited as the Board was advised that Inland Aggregates Limited now owns Consolidated Concrete.

[5] On March 26, 2003, the Board wrote to the Parties, stating "...no response was received from the Appellant providing an explanation as to why this matter is properly before the Board..." and advising that the Board was dismissing the appeal.

II. DISCUSSION

A. The Temporary Permit

[6] This was a unique set of circumstances in that the appeal was filed in relation to a temporary permit issued under the *Water Resources Act*. The *Water Resources Act* was repealed and replaced by the *Water Act*, which came into effect on January 1, 1999, and as is the case now, when new legislation comes into force, there will often be a period of transition. Section 18(4) of the *Water Act* provides the Minister with the authority to proclaim existing temporary permits to be deemed approvals, preliminary certificates, or licences.² Ministerial Order 10/99 (the "Ministerial Order") was issued to minimize issues arising from this transition, but there remained an issue as to whether the temporary permit in this appeal is still valid.

[7] The Ministerial Order states:

"1. Subject to paragraphs 2, 3 and 4 of this Order, all temporary permits and permissions existing on December 31, 1998, issued under the *Water Resources Act* R.S.A. 1980, c. W-5, that authorize the diversion of surface water or groundwater are ordered to be a deemed temporary diversion licence under the *Water Act* with an expiry date of the original temporary permit or permission or December 31, 1999, whichever is the sooner."

[8] Paragraphs 2 and 4 of the Ministerial Order provide:³

² Section 18(4) of the *Water Act* provides:

"A temporary permit, permission for temporary diversion and interim licence, including an updated and reissued interim licence and supplementary interim licence, granted under a predecessor Act that on January 1, 1999 authorizes the diversion of water may, by order of the Minister, be

(a) a deemed approval, deemed preliminary certificate or deemed licence under this Act, or

(b) a deemed approval as well as a deemed preliminary certificate or deemed licence under this Act."

³ Paragraph 3 of the Ministerial Order applies to temporary permits or permissions authorizing the remediation of groundwater, and is not applicable to the Permit at issue in this appeal.

“2. All temporary permits or permissions existing on December 31, 1998, issued under the *Water Resources Act*, that authorize the diversion of groundwater and include an expiry date, a priority number and an allocation of water are ordered to be a deemed licence under the *Water Act* with an expiry date of December 31, 2003.

4. All temporary permits or permissions existing on December 31, 1998, issued under the *Water Resources Act*, that are for drainage and include an expiry date, a priority number and an allocation of water are ordered to be a deemed approval under the *Water Act* with an expiry date of the original temporary permit or permission.”

[9] The Permit was originally issued on October 11, 1990, and the term of the Permit has been extended seven times. The last extension had an expiry date of August 5, 2007. Therefore, it was a valid temporary permit on December 31, 1998, allowing for the diversion of 891 acre-feet of water annually. However, the Permit does not have a priority number. As the Ministerial Order states that it applies to temporary permits with “...an expiry date, a priority number *and* an allocation of water...” (emphasis added), the Permit does not fall into the description as it only has two of the three requirements. Paragraph 3 of the Ministerial Order refers to a temporary permit with “...an expiry date and an allocation of water, but no priority number...”, but this paragraph deals exclusively with the remediation of groundwater. Thus, the validity of this Permit, and others issued in a similar manner, may be an issue the Director and the current Permit Holder may want to investigate.

[10] Regardless, none of the Parties provided any evidence or information to determine this issue, and therefore, the Board will not make a decision on the validity of the Permit, and the Board is confident the Director will make the necessary inquiries to determine the current status of the Permit.

[11] If it is determined the Permit is in actual fact a temporary licence, section 115(2) of the *Water Act* would apply. This section states:

“115(2) Notwithstanding subsection (1), a notice of appeal may not be submitted
(c) with respect to any matter relating to a licence for the temporary diversion of water.”

[12] Therefore, even if the Appellant had successfully demonstrated the Permit is valid, the Board does not have jurisdiction to hear the matter. An appeal cannot be filed in

respect to a temporary diversion of water. The Board does note, however, that the Permit has been extended continually, and there is no indication that it would not be extended again if applied for by the Permit Holder. Therefore, it is unclear when a project is no longer considered a temporary diversion.

B. Request for Information

[13] In its February 13, 2003 letter, the Board notified the Parties that it would dismiss the appeal and close the file unless the Parties provided any information regarding the Permit. The information was to be provided to the Board by February 20, 2003.

[14] Pursuant to section 92 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”),⁴ the Board may, by written notice, request the submission of additional information (a submission) from the person who filed a Notice of Appeal, and pursuant to section 95(5)(a)(iv) of EPEA,⁵ the Board may dismiss the Notice of Appeal if a person fails to respond to a request under section 92.

[15] Even though the Board requested further information from the Parties, no submissions were received by March 25, 2003. Therefore, pursuant to section 95(5)(a)(iv) of EPEA, the Board dismisses the appeal.

III. CONCLUSION

[16] The Board hereby dismisses this appeal as it is not properly before the Board; alternatively, the Board also exercises its discretion under section 95(5)(a)(iv) of the *Environmental Protection and Enhancement Act* and dismisses the Notice of Appeal filed by Mr. Ian Skinner for failure to respond to the Board’s written request.

⁴ Section 92 of EPEA provides:

“Where the Board receives a notice of appeal, it may by written notice given to the person who submitted the notice of appeal require the submission of additional information specified in the written notice by the time specified in the written notice.”

⁵ Section 95(5)(a)(i) of EPEA provides:

“The Board (a) may dismiss a notice of appeal if ... (iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92....”

Dated on April 7, 2003, at Edmonton, Alberta.

“original signed by”
William A. Tilleman, Q.C.
Chair