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ALBERTA  
ENVIRONMENTAL APPEAL BOARD

Decision

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Date of Decision – October 30, 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 Dorene Rew with respect to *Water Act* Preliminary Certificate No. 00198509-00-00 issued to Capstone Energy Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003), Appeal No. 03-138-D (A.E.A.B.).

**BEFORE:**

Dr. William A. Tilleman, Chair.

**PARTIES:**

**Appellant:** Dorene Rew.

**Certificate Holder:** Capstone Energy Ltd., represented by Mr. Brad Graham.

**Director:** Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

## **EXECUTIVE SUMMARY**

Alberta Environment issued a Preliminary Certificate to Capstone Energy Ltd. on July 23, 2003, for the diversion of water from the Red Deer River for industrial (oilfield injection) purposes at SW 4-36-1-W5M near Red Deer, Alberta.

The Board received a Notice of Appeal from Ms. Dorene Rew appealing the Preliminary Certificate on September 19, 2003. The time period in which an appeal may be filed with the Board with respect to a Preliminary Certificate is 30 days, unless the Board finds there is sufficient reason for extending this filing period. The Board requested reasons from Ms. Rew as to why the Board should extend the time limit for filing the appeal.

After reviewing the submissions provided by Ms. Rew, the Board found she did not present sufficient reasons to demonstrate that special circumstances existed to warrant an extension of the time limit. Therefore, the Board dismissed the appeal for being filed outside the prescribed time limit.

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## **I. BACKGROUND**

[1] On July 23, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Preliminary Certificate No. 00198509-00-00 (the “Certificate”) under the *Water Act*, R.S.A. 2000, c. W-3, to Capstone Energy Ltd. (the “Certificate Holder”), for the diversion of water from the Red Deer River for industrial (oilfield injection) purposes at SW 4-36-1-W5M near Red Deer, Alberta.

[2] Between August 15 and September 8, 2003, the Environmental Appeal Board (the “Board”) received Notices of Appeal from the Mountain View Regional Water Services Commission (Appeal No. 03-116), Mr. Gerald Oxtoby (Appeal No. 03-118), the City of Red Deer ( Appeal No. 03-119), Mr. Terry Litte (Appeal No. 03-120), Mr. Kely Smith (Appeal No. 03-121), the Butte Action Committee (Appeal No. 03-122), and Mr. Mike Gallie (Appeal No. 03-123). On September 19, 2003, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Ms. Dorene Rew (the “Appellant”) appealing the Licence.

[3] The Board wrote to the Certificate Holder and the Director notifying them of the appeals and wrote to the appellants acknowledging receipt of the Notices of Appeal. The Board requested the Director provide the Board with a copy of the records (the “Record”) relating to this appeal.

[4] 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.

[5] In the Board’s letter of September 22, 2003, the Board advised the Appellant that it appeared that the Notice of Appeal had been filed outside the time limit prescribed in the *Water Act*. The Board’s letter stated:

“The normal time limit prescribed in the *Water Act* for filing such an appeal is 30 days. As the Preliminary Certificate was issued on July 23, 2003, your Notice of Appeal appears to be significantly outside the time limit prescribed in the *Water Act*, you are requested to advise the Board if you wish to request an extension of time to appeal? Please indicate to the Board the reasons for the extension of time to appeal and provide an explanation as to why the appeal was filed outside of the 30 day time limit. The granting of the extension of time is at the discretion of the

Board and is not routinely granted. You are requested to provide this information in writing to the Environmental Appeal Board by October 6, 2003.” (Emphasis deleted.)

[6] On September 26, 2003, the Board received a letter from the Appellant stating:

“I received official information concerning Capstone Energy Inc’s water approval when I phoned Alberta Environment on September 5, 2003. At my request a letter and a copy of Capstone’s Preliminary Certificate 00198509-00-00 were sent out to me dated the same day.

I received this letter on September 11, 2003. This gave me the information I needed to complete the Notice of Appeal forms. I mailed my completed Notice of Appeal along with a typed letter...on September 17, 2003.

All of this occurred within a thirty day period, albeit later than the August 23<sup>rd</sup> date, since I did not have the relevant facts in hand before September the 11<sup>th</sup>.”

[7] After reviewing the reasons provided by the Appellant, the Board notified the Parties on October 17, 2003, that the Board was not prepared to grant an extension of time to appeal and dismissed the appeal for filing the Notice of Appeal late.

## **II. ANALYSIS**

### **A. Statutory Background**

[8] Section 116(1) of the *Water Act* provides:

“A Notice of Appeal must be submitted to the Environmental Appeal Board

- (a) not later than 7 days after
  - (i) receipt of a copy of a water management order or enforcement order, or
  - (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from, or
- (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.”

Therefore, in the case of a preliminary certificate issued under the *Water Act*, the normal time limit for filing a Notice of Appeal is 30 days.

[9] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 116(2) of the *Water Act* states:

“The Environmental Appeal Board may, on application made before or after the expiry of the period referred to in subsection (1), extend that period, if the Board is of the opinion that there are sufficient grounds to do so.”

## **B. Application**

[10] After reviewing the submission of the Appellant, the Board has determined the appeal must be dismissed based on two grounds – the need for certainty in the appeal process and the Appellant’s failure to meet the onus in applying for an extension.

[11] The legislation has provided the Board with some flexibility to allow for late filed appeals in certain circumstances, but the Board uses this authority in only limited situations.<sup>1</sup> The onus is on the Appellant to demonstrate to the Board that the time limit should be extended to allow the appeal.

### **1. Certainty**

[12] One of the purposes of having deadlines incorporated into legislation is to bring some element of certainty to the regulatory process. In this case, the *Water Act* requires an applicant for a preliminary certificate to go through an application process. This process provides for a technical and scientific review of the application and a public notice process, which seeks out concerns (statements of concern) of anyone who may be directly affected by the proposed preliminary certificate. Once a decision is made to issue, or for that matter not to issue, the preliminary certificate, there is an appeal period in which the applicant for the preliminary certificate or anyone who is directly affected (and who filed a statement of concern) can file an

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<sup>1</sup> See: Preliminary Motions: *Hanson et al. v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (29 November 2002), Appeal Nos. 01-123-131, 02-001, 02-050-058-D (A.E.A.B.); *Dyck v. Director, Southern Region, Regional Services, Alberta Environment re: Coyote Cove Golf Course Inc.* (14 February 2003), Appeal No. 02-137-D (A.E.A.B.); *Shennan et al. v. Director, Central Region, Regional Services, Alberta Environment re: Parkbridge Communities Inc.* (13 February 2003), Appeal Nos. 02-066 and 068-D (A.E.A.B.); *Seabolt Watershed Association v. Director, Central Region, Regional Services, Alberta Environment re: Mountain Creeks Ranch Inc.* (14 February 2003), Appeal No. 02-085-D (A.E.A.B.); *Seniuk v. Director, Enforcement and Monitoring, Parkland Region, Regional Services, Alberta Environment* (4 June 2002), Appeal No. 01-112-D (A.E.A.B.); *Warner et al. v. Director, Central Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (15 June 2002), Appeal Nos. 01-113 and 01-115-D (A.E.A.B.); *Municipal District of Rocky View No. 44 v. Director, Southern Region, Regional Services, Alberta Environment re: Apple Creek Golf and Country Club* (25 June 2002), Appeal No. 02-006-D (A.E.A.B.); and *Proft v. Director, Licensing and Permitting Standards Branch, Environmental Assurance, Environmental Operations Division, Alberta Environment re: Her Majesty the Queen in Right of Alberta* (1 October 2001), Appeal No. 01-037-D (A.E.A.B.).

appeal. The time limit in which an appeal must be filed is prescribed so that all parties – the applicant, the people who are directly affected, and the regulator – know when the process is complete.

[13] Once this process is complete, the preliminary certificate “crystallizes” and the preliminary certificate holder can make decisions based on the known terms and conditions of the preliminary certificate. If there were no time limits placed on the appeal period, the applicant would never know when it could proceed with its project, as there would always be the possibility of an appeal that could result in changes to the preliminary certificate. The uncertainty this would create would make it impossible for the preliminary certificate holder to properly plan its investments, to carry out construction with respect to any works that are needed to exercise the water right granted by the preliminary certificate, and to ensure that they have a stable water supply.

[14] The *Water Act* recognizes the importance of integrating the conservation and management of water with the need for economic growth.<sup>2</sup> Uncertainty would create unfavourable conditions for economic growth. Companies need to know that decisions that are made that affect the way they are required to operate will not be susceptible to continuous change.

[15] Therefore, taking into consideration the importance of certainty in any decision made by the Director and the potential impact uncertainty would bring for continued economic growth in this province, the Appellant has not presented sufficient reasons to justify allowing the appeal to proceed at this late date, and therefore the appeal must be dismissed. We find that

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<sup>2</sup> Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta’s economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.”

there was sufficient time and notice to file an appeal because several other parties *did* file in time.

2. Extension of Time

[16] The second consideration the Board examined was whether the Appellant had provided sufficient reasons to grant an extension of time to file an appeal. To allow an extension of time, the Appellant must be able to show that extenuating or special circumstances existed that prevented her from filing within the legislated timeframe. In her response to the Board's letter asking for reasons why an extension should be granted, the Appellant stated she submitted the Notice of Appeal within 30 days of receiving the information from the Director. This does not demonstrate the special circumstances that are required for the Board to extend the time period. It is unclear as to when the Appellant became aware of the issuance of the Certificate, but it is generally accepted the time of receiving notice is either when it is published in a local newspaper or posted in a specified location, or within seven days of the Director mailing the notification to valid Statement of Concern filers. The Board notes the Appellant submitted a Statement of Concern and the Director deemed her to be not directly affected and therefore, she did not receive written notification of the issuance of the Certificate. We also note that the Director's directly affected decision does not affect the Board's decision regarding standing under Part 4 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

[17] Section 2 of the *Water Act* anticipates Alberta citizens to have a shared responsibility in providing advice regarding water management and conservation. The Appellant was aware of the application as she did submit a Statement of Concern. An individual who has concerns regarding an impending application should be even more diligent in seeking additional information regarding the application, including making inquiries as to when the preliminary certificate is issued. Even though the Director did not send notice of his decision to issue the Preliminary Certificate directly to the Appellant, which he probably should have,<sup>3</sup> she certainly could have telephoned the Director's office to inquire about the status of the application. If she

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<sup>3</sup> The Board is of the view that even where the Director does not accept a Statement of Concern, the Director should still advise the person who attempted to file the Statement of Concern that he has made a decision regarding the application. Providing such advice would create greater certainty in the appeal process.

had called weekly, she would have received the information and had been able to respond well within the 30-day appeal period.

[18] Thus, the Appellant has not provided the Board with the evidence of the special circumstances required to grant an extension of time to file an appeal, and the appeal must therefore be dismissed.

3. Concerns of the Appellant

[19] The Board notes the concerns expressed by the Appellant are similar to those stated by the other Notice of Appeal filers. Therefore, should the matter proceed to a hearing, the other Notice of Appeal filer would be in a position to advance the types of concerns raised by the Appellant. Further, if a hearing is scheduled, the Board will notify the Appellant and notice of the hearing will also be published in the local newspaper. Based on this notice, the Appellant will have the opportunity to apply to the Board for intervenor standing.

### III. CONCLUSION

[20] The Board finds that the statutory prerequisites for filing a Notice of Appeal have not been met as the appeal was filed out of time and no special circumstances exist to extend the appeal deadline. The Board is of the opinion that certainty requires that the appeal timelines be adhered to, unless special circumstances exist to warrant an extension. Therefore, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeal of Ms. Dorene Rew.

Dated on October 30, 2003, at Edmonton, Alberta.

“original signed by”

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William A. Tilleman, Q.C.  
Chair