

ALBERTA ENVIRONMENTAL APPEALS BOARD

Report and Recommendations

Date of Mediation Meeting – June 22, 2004

Date of Report and Recommendations – June 28, 2004

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 Gary Moses with respect to *Water Act* Preliminary Certificate No. 00082881-00-00 and *Water Act* Approval No. 00082878-00-00 issued to Ducks Unlimited Canada by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Moses v. Director, Central Region, Regional Services, Alberta Environment re: Ducks Unlimited Canada* (28 June 2004), Appeal Nos. 04-001 and 04-002-R (A.E.A.B.).

MEDIATION MEETING BEFORE:

Mr. Ron Peiluck, Board Member.

APPEARANCES:

Appellant:

Mr. Gary Moses and Mr. Rod MacMillian.

Director:

Mr. Tom Slater, Director, Central Region, Regional Services, Alberta Environment, Mr. Doug Jeremy, Water Team Leader, Alberta Environment, represented by Mr. Jeffrey Moore, Alberta Justice.

Approval Holder:

Mr. Don Stachniak Ducks Unlimited Canada and Mr. Rick Shewchuk, Ducks Unlimited Canada.

Board Staff:

Ms. Denise Black, Board Secretary.

EXECUTIVE SUMMARY

Alberta Environment issued, to Ducks Unlimited Canada, a Preliminary Certificate under the *Water Act* authorizing the diversion of up to 30,300 cubic metres of water annually from Deer Creek into a dam in NE 02-053-06-W4 with a priority no. 200-04-17-001 for the purpose of habitat enhancement, upon compliance with the conditions in the Preliminary Certificate, and a *Water Act* Approval authorizing the construction of a dam and related works on Deer Creek at NE 02-053-06-W4 and SE 02-053-06-W4 near Vermilion, Alberta.

The Board received a Notice of Appeal from Mr. Gary Moses appealing both the Preliminary Certificate and the Approval.

The Board held a mediation meeting in Vermilion, Alberta on June 22, 2004, following which an agreement was reached by the parties. The Board recommends that the Minister of Environment accept the agreement.

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I. BACKGROUND

[1] On March 15, 2004, the Director, Central Region, Regional Services, Alberta Environment (the “Director”) issued, to Ducks Unlimited Canada, (the “Approval Holder”) *Water Act* Preliminary Certificate No. 00082881-00-00 (the “Preliminary Certificate”) stating that Ducks Unlimited Canada will receive a licence to divert up to 30,300 cubic meters of water annually from Deer Creek into a dam in NE 02-053-06-W4 with priority no. 200-04-17-001 for the purpose of habitat enhancement upon compliance with the conditions within the Preliminary Certificate; and *Water Act* Approval No. 00082878-00-00 (the “Approval”) authorizing the construction of a dam and related works on Deer Creek at NE 02-053-06-W4 and SE 02-053-06-W4, near Vermilion, Alberta.

[2] On April 13, 2004 the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Gary Moses (the “Appellant”) dated April 12, 2004, appealing the Preliminary Certificate and the Approval.

[3] On April 26, 2004, the Board wrote to the Appellant, the Approval Holder and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board requested that the Appellant provide further information in relation to his appeal, and that the Director provide the Board with a copy of the records (the “Record”) relating to this appeal. The Board also requested that the Parties provide available dates for a mediation meeting or hearing.

[4] As the Preliminary Certificate and Approval were issued on March 15, 2004, and the Appellant’s Notice of Appeal in relation to the Approval was filed on April 12, 2004, significantly outside of the seven day time limit prescribed in the *Water Act*, the Appellant was requested to advise the Board if he wished to request an extension of time to appeal the Approval, to indicate the reasons for the extension of time to appeal, and to provide an explanation as to why the appeal was filed outside the seven day time limit.

[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 May 10, 2004, the Board received a copy of the Record from the Director, and on May 11, 2004, forwarded a copy to the Appellant and the Approval Holder.

[7] On May 18, 2004, the Board received the additional information from the Appellant, dated May 17, 2004. The Board also received a letter from the Appellant dated May 17, 2004 regarding his late-filed appeal of the Approval. The Appellant's May 17, 2004 letter in relation to the late filed appeal of the Approval stated:

“The appeal was filed outside the seven days because of the letter from Alberta Environment...stating I had 30 days to respond...”

[8] The Board wrote to the Parties on May 18, 2004 requesting written submissions from the Approval Holder and the Director in response to the Appellant's comments regarding the late filed appeal of the Approval.

[9] On May 19 and 21, 2004, the Board received letters from the Director dated May 18, 2004 and from the Approval Holder dated May 20, 2004 in relation to the late filed appeal of the Approval. The Director's May 18, 2004 letter stated:

“...Alberta Environment advised Mr. Moses, by way of correspondence dated March 15, 2004, that it was issuing the approval and preliminary certificate and that he had 30 days in which to appeal. Mr. Moses no doubt relied upon that statement. Consequently, it is Alberta Environment's position that under these circumstances there are sufficient grounds for the Environmental Appeals Board to extend the appeal period...”

The May 20, 2004 letter from the Approval Holder stated:

“...Ducks Unlimited Canada has no issues against extending the appeal period...”

[10] Upon review of the written submissions dated May 17, 18 and 20 from the Parties in relation to the late filed Notice of Appeal, the Board granted the extension of time to appeal the Approval.

[11] On June 8, 2004, in consultation with the Parties, the Board scheduled a mediation meeting for June 22, 2004 to be held in Vermilion, Alberta.

II. THE MEDIATION MEETING

[12] Pursuant to section 11 of the Environmental Appeal Board Regulations, A.R. 114/93, the Board conducted a mediation meeting in Vermilion, Alberta on June 22, 2004 with Mr. Ron Peiluck as the presiding Board Member (the “Mediator”).

[13] In conducting the mediation meeting, the Mediator reviewed the appeal and the mediation process and explained the purpose of the mediation meeting. He then circulated copies of the Participants’ Agreement to Mediate. All parties signed the Agreement and discussions ensued.

[14] Following productive and detailed discussions, a Resolution evolved at the June 22, 2004 mediation meeting and is attached as pages 4 and 5.

III. RECOMMENDATIONS

[15] In accordance with section 99 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the “Act”), the Board recommends that the Minister of Environment order that Approval No. 00082878-00-00 be confirmed, and that Preliminary Certificate No. 00082881-00-00 be varied. Attached for the Minister’s consideration are draft Ministerial Orders implementing the recommendations.

[16] Further, with respect to sections 100(2) and 103 of the Act, the Board recommends that copies of this Report and Recommendations, and of any decision by the Minister, be sent to the following Parties:

- Mr. Gary Moses;
- Mr. Don Stachniak, Ducks Unlimited Canada; and
- Mr. Jeffrey W.A. Moore, Alberta Justice, representing Mr. Tom Slater, Director, Central Region, Regional Services, Alberta Environment.

Dated on June 28, 2004, at Edmonton, Alberta.

“original signed by”
Mr. Ron Peiluck
Board Member

IV. RESOLUTION

RESOLUTION OF APPEAL NOS. 04-001 AND 04-002 REGARDING APPROVAL NO. 00082878-00-00 AND PRELIMINARY CERTIFICATE NO. 00082881-00-00 ISSUED UNDER THE *WATER ACT* BY THE DIRECTOR, CENTRAL REGION, REGIONAL SERVICES, ALBERTA ENVIRONMENT, TO DUCKS UNLIMITED CANADA, AUTHORIZING THE CONSTRUCTION OF A DAM AND RELATED WORKS ON DEER CREEK AT NE 02-053-06-W4 AND SE 02-053-06-W4 AND AUTHORIZING THE DIVERSION OF UP TO 30,300 CUBIC METRES OF WATER ANNUALLY FROM DEER CREEK INTO A DAM IN NE 02-053-06-W4 WITH PRIORITY NO. 200-04-17-001 FOR HABITAT ENHANCEMENT, NEAR VERMILION, ALBERTA.

All parties to the appeal have agreed to the following terms and conditions:

THAT the Preliminary Certificate shall be amended by striking out Condition 10 and inserting the following:

- a) The licensee shall operate the structure as per Plan 00082881-P006 at a Full Supply Level no higher than 97.75 metres until May 15 of each calendar year, or upon the completion of spring runoff, whichever is earliest, unless authorized in writing by the Director.
- b) Following May 15 or the completion of spring runoff, whichever is earliest, the licensee shall operate the structure as per Plan 00082881-P006 at a Summer Operating Level no higher than 97.6 metres for the balance of each calendar year unless authorized in writing by the Director
- c) In the event of a dispute with respect to the completion of spring runoff, the Director or his designate shall determine whether spring runoff is complete and his decision is final and binding on all parties and is not subject to appeal.
- d) The licensee may operate the lease road culvert as per Plan 00082881-P004 at a Full Supply Level no higher than 98.0 metres at all times.

2. THAT in consideration of the foregoing, the Appellant, Mr. Gary Moses, agrees to withdraw his Notice of Appeal.

RESOLUTION AGREED TO BY:

“original signed by”

Gary Moses

Date: June 22, 2004

“original signed by”

Don Stachniak
Ducks Unlimited Canada

Date: June 22, 2004

“original signed by”

Tom Slater
Director, Central Region, Regional
Services, Alberta Environment
Represented by Jeffrey W.A. Moore, Alberta Justice

Date: June 22, 2004

V. DRAFT ORDER: APPROVAL

**Ministerial Order
/2004**

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12

Water Act, R.S.A. 2000, c. W-3

**Order Respecting Environmental Appeals Board
Appeal No. 04-001**

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 04-001.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2004.

Honourable Dr. Lorne Taylor
Minister of Environment

Draft Appendix

Order Respecting Environmental Appeals Board Appeal No. 04-001

With respect to the decision of the Director, Central Region, Regional Services, Alberta Environment (the “Director”) to issue Approval No. 00082878-00-00 (the “Approval”), under the *Water Act*, R.S.A. 2000, c. W-3, to Ducks Unlimited Canada, I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director to issue the Approval is confirmed.

VI. DRAFT ORDER: PRELIMINARY CERTIFICATE

**Ministerial Order
/2004**

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12

Water Act, R.S.A. 2000, c. W-3

**Order Respecting Environmental Appeals Board
Appeal No. 04-002**

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 04-002.

Dated at the City of Edmonton, in the Province of Alberta this ____ day of _____, 2004.

Honourable Dr. Lorne Taylor
Minister of Environment

Draft Appendix

Order Respecting Environmental Appeals Board Appeal No. 04-002

With respect to the decision of the Director, Central Region, Regional Services, Alberta Environment (the “Director”) to issue Preliminary Certificate No. 00082881-00-00 (the “Preliminary Certificate”), under the *Water Act*, R.S.A. 2000, c. W-3, to Ducks Unlimited Canada, I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director to issue the Preliminary Certificate is confirmed subject to the following amendment.
2. The Preliminary Certificate shall be amended by striking out Condition 10 and replacing it with the following:
 - “10.1 The licensee shall operate the structure as per plan 00082881-P006 at a Full Supply Level no higher than 97.75 metres until May 15 of each calendar year, or upon the completion of spring runoff, whichever is earliest, unless authorized in writing by the Director.
 - 10.2 Following May 15 or the completion of spring runoff, whichever is earliest, the licensee shall operate the structure as per plan 00082881-P006 at a Summer Operating Level no higher than 97.6 metres for the balance of each calendar year, unless authorized in writing by the Director.
 - 10.3 In the event of a dispute with respect to the completion of spring runoff, the Director or his designate shall determine whether spring runoff is complete and his decision is final and binding and is not subject to appeal.
 - 10.4 The licensee may operate the lease road culvert as per plan 00082881-P004 at a Full Supply Level no higher than 98.0 metres at all times.”

ALBERTA ENVIRONMENT
Office of the Minister

Ministerial Order
12/2004

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12

Water Act, R.S.A. 2000, c. W-3

Order Respecting Environmental Appeals Board
Appeal No. 04-001

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 04-001.

Dated at the City of Edmonton, in the Province of Alberta this 30th day of June, 2004.

“original signed by”

Honourable Dr. Lorne Taylor
Minister of Environment

Appendix

Order Respecting Environmental Appeals Board Appeal No. 04-001

With respect to the decision of the Director, Central Region, Regional Services, Alberta Environment (the “Director”) to issue Approval No. 00082878-00-00 (the “Approval”), under the *Water Act*, R.S.A. 2000, c. W-3, to Ducks Unlimited Canada, I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director to issue the Approval is confirmed.

ALBERTA ENVIRONMENT
Office of the Minister

Ministerial Order
13/2004

Environmental Protection and Enhancement Act
R.S.A. 2000, c. E-12

Water Act, R.S.A. 2000, c. W-3

Order Respecting Environmental Appeals Board
Appeal No. 04-002

I, Dr. Lorne Taylor, Minister of Environment, pursuant to section 100 of the *Environmental Protection and Enhancement Act*, make the order in the attached Appendix, being an Order Respecting Environmental Appeals Board Appeal No. 04-002.

Dated at the City of Edmonton, in the Province of Alberta this 30th day of June, 2004.

“original signed by”

Honourable Dr. Lorne Taylor
Minister of Environment

Appendix

Order Respecting Environmental Appeals Board Appeal No. 04-002

With respect to the decision of the Director, Central Region, Regional Services, Alberta Environment (the “Director”) to issue Preliminary Certificate No. 00082881-00-00 (the “Preliminary Certificate”), under the *Water Act*, R.S.A. 2000, c. W-3, to Ducks Unlimited Canada, I, Dr. Lorne Taylor, Minister of Environment:

1. Order that the decision of the Director to issue the Preliminary Certificate is confirmed subject to the following amendment.
2. The Preliminary Certificate shall be amended by striking out Condition 10 and replacing it with the following:

“10.1 The licensee shall operate the structure as per plan 00082881-P006 at a Full Supply Level no higher than 97.75 metres until May 15 of each calendar year, or upon the completion of spring runoff, whichever is earliest, unless authorized in writing by the Director.

10.2 Following May 15 or the completion of spring runoff, whichever is earliest, the licensee shall operate the structure as per plan 00082881-P006 at a Summer Operating Level no higher than 97.6 metres for the balance of each calendar year, unless authorized in writing by the Director.

10.3 In the event of a dispute with respect to the completion of spring runoff, the Director or his designate shall determine whether spring runoff is complete and his decision is final and binding and is not subject to appeal.

10.4 The licensee may operate the lease road culvert as per plan 00082881-P004 at a Full Supply Level no higher than 98.0 metres at all times.”