

ALBERTA
ENVIRONMENTAL APPEALS BOARD
DECISION

Date of Decision – November 29, 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 an appeal filed by Gary Moses with respect to *Water Act* Approval No. 00082878-00-00 issued to Ducks Unlimited Canada by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motion: *Moses v. Director, Central Region, Regional Services, Alberta Environment re: Ducks Unlimited Canada* (29 November 2004), Appeal No. 04-001-ID1 (A.E.A.B.).

BEFORE:

Dr. Frederick C. Fisher, Q.C., Chair.

WRITTEN SUBMISSIONS:

Appellant:

Mr. Gary A. Moses.

Approval Holder:

Ducks Unlimited Canada, represented by Mr. Don Stachniak.

Director:

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

EXECUTIVE SUMMARY

Alberta Environment issued a *Water Act* Approval to Ducks Unlimited Canada authorizing the construction of a dam and related works on Deer Creek at NE 02-53-06-W4M and SE 02-53-06-W4M near Vermilion, Alberta.

The Board received a Notice of Appeal from Mr. Gary Moses appealing the Approval.

As the appeal was filed outside the 7-day timeline provided in the *Water Act*, the Board established a written submission process to determine whether the Appellant's request for an extension of time to appeal should be granted.

Upon review of the written submissions, the Board decided to grant Mr. Moses' request for an extension of time to appeal, as Mr. Moses relied on the information provided in the Director's letter, stating he had 30 days to file an appeal.

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I. BACKGROUND

[1] On March 15, 2004, the Director, Central Region, Regional Services, Alberta Environment (the “Director”) issued *Water Act* Approval No. 00082878-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Ducks Unlimited Canada, (the “Approval Holder”), authorizing the construction of a dam and related works on Deer Creek at NE 02-53-06-W4M and SE 02-53-06-W4M, near Vermilion, Alberta. The Director also issued Preliminary Certificate No. 00082881-00-00 (the “Preliminary Certificate”), stating the Approval Holder will receive a licence to divert up to 30,300 cubic meters of water annually from Deer Creek into a dam in NE 02-53-06-W4M with priority no. 200-04-17-001 for the purpose of habitat enhancement upon compliance with the conditions within the Preliminary Certificate.

[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 Approval.¹

[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 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 the Parties provide available dates for a mediation meeting or hearing.

[4] As the Approval was issued on March 15, 2004, and the Appellant’s Notice of Appeal in relation to the Approval was filed on April 12, 2004, 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

¹ The Appellant also appealed the Preliminary Certificate. The Notice of Appeal was received within the legislated timeframe and will not be considered in this Decision.

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, a copy was forwarded to the Appellant and the Approval Holder.

[7] The Board received a letter from the Appellant dated May 17, 2004, regarding his late-filed appeal. The Appellant's letter 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.

[9] On May 19 and 21, 2004, the Board received letters from the Director and the Approval Holder. The Director's 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...”

[10] The May 20, 2004 letter from the Approval Holder stated, “...Ducks Unlimited Canada has no issues against extending the appeal period...”

II. ANALYSIS

[11] In considering the Appellant's request for an extension of time to appeal, the Board refers to sections 116(1)(ii) and 116(2) of the *Water Act*, in which the timelines for filing a Notice of Appeal with the Board, with respect to approvals issued under the Act, are dealt with. Sections 116(1) and 116(2) of the *Water Act* state:

“116(1) A notice of appeal must be submitted to the Environmental Appeals Board

(a) not later than 7 days after ...

- (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.
- (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.
- (2) The Environmental Appeals 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.”

[12] As it is a *Water Act* Approval that has been appealed, the applicable deadline is seven days. The Appellant filed his Notice of Appeal 28 days after the Director issued the Approval.

[13] While section 116 of the Act provides strict timelines for filing a Notice of Appeal with the Board in relation to a *Water Act* Approval, it also gives the Board the authority to extend the deadline for filing a Notice of Appeal where there are extenuating circumstances.

[14] In making its previous decisions in relation to late-filed appeals, the Board determined that certainty is an important element to take into consideration. In this case, certainty involves the specific deadlines included in the legislation for appealing Approvals under the *Water Act*.

[15] In its *Biggart*² decision, the Board stated the time limit specified in the legislation in which an appeal must be filed is stipulated so that all parties – the applicant for the approval, the people who are directly affected, and the regulator – know when the process is complete. If no time limits were placed on the appeal period, the applicant for an approval 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 approval. The time lines included in the legislation, and the certainty they create, balance the interests of all parties involved. Once the appeal period has ended, the right of the approval holder to proceed with his project based upon the known terms and conditions under the approval crystallizes.

² *Biggart v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (24 November 2003), Appeal No. 03-039-D (A.E.A.B.).

[16] As in the *Biggart* case, where the appellant did not provide sufficient reasons to justify allowing an extension of time to appeal, the Board commonly dismisses late-filed appeals as allowing an extension of time to appeal without extenuating circumstances would undoubtedly promote uncertainty. In this case, although the *Water Act* stipulates the timeline for filing an appeal of a *Water Act* Approval is seven days, the Director stated in his letter to the Appellant the time limit in which to file an appeal of such an approval is 30 days. Given this fact, and the fact the Appellant filed his Notice of Appeal within the 30 day timeline prescribed by the Director, the Board finds that certainty is not affected or jeopardized.

[17] Finally, neither the Director nor the Approval Holder objected to the Appellant's request for an extension of time to file the Notice of Appeal. Further, the Director conceded the Appellant had likely relied upon the information provided to him in the Director's March 15, 2004 letter, which advised the Appellant that he had 30 days in which to file a Notice of Appeal in relation to the Approval. Based on this, the Board is of the view the equities favour granting the extension of the period in which to file the appeal.

III. CONCLUSION

[18] Upon review of the legislation and the written submissions from the Parties, the Board concludes the Appellant's Notice of Appeal was filed late due to the information he relied upon from the Director. The Board is satisfied the Appellant acted upon the information he received from the Director, and filed his Notice of Appeal in good faith within the period of time specified in the letter. The Board therefore grants the Appellant's request for an extension of time to appeal the Approval, and accepts the Appellant's Notice of Appeal.

Dated on November 29, 2004, at Edmonton, Alberta

“original signed by”

Dr. Frederick C. Fisher, Q.C.
Chair