

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – January 11, 2005

**IN THE MATTER OF** sections 91, 92, 95, and 101 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 Barbara A. Higgins with respect to *Water Act* Approval No. 00205213-00-00 issued to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Reconsideration Decision: *Higgins v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (11 January 2005), Appeal No. 04-053-RD (A.E.A.B.).

**BEFORE:**

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

**SUBMISSIONS:**

**Appellant:** Ms. Barbara A. Higgins.

**Approval Holder:** Cardinal River Coals Ltd., represented by Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

**Director:** Mr. Larry Williams, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

## EXECUTIVE SUMMARY

On July 29, 2004, the Director, Central Region, Regional Services, Alberta Environment, issued an Approval under the *Water Act* to Cardinal River Coals Ltd. for the placement, construction, operation, maintenance, and removal of works within the fenceline of the Cheviot Creek Pit for the purpose of the diversion and management of water, construction of rock drains and sedimentation facilities, and the development of an end-pit lake and fisheries enhancement ponds on a tributary of the McLeod River, near Hinton, Alberta.

On September 13, 2004, the Board received a Notice of Appeal from Ms. Barbara Higgins.

As the appeal was filed past the 7-day legislated time frame, the Board requested Ms. Higgins provide reasons why an extension should be granted.

After reviewing the response, the Board determined no special circumstances existed to warrant an extension to file the appeal. Therefore, the Board dismissed the appeal.

Ms. Higgins filed a reconsideration request of the Board's decision. After reviewing the parties' submissions regarding the request, the Board determined Ms. Higgins did not provide any new evidence that was not available at the time of the original decision or identified any error in law.

Therefore, the Board denied the reconsideration request.

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## **I. BACKGROUND**

[1] On July 29, 2004, the Director, Central Region, Regional Services, Alberta Environment, (the “Director”), issued Approval No. 00205213 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Cardinal River Coals Ltd. (the “Approval Holder”) for the placement, construction, operation, maintenance, and removal of works within the fenceline of the Cheviot Creek Pit for the purpose of the diversion and management of water, construction of rock drains and sedimentation facilities, and the development of an end-pit lake and fisheries enhancement ponds on a tributary of the McLeod River, near Hinton, Alberta.

[2] On September 3, 2004, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Ms. Barbara A. Higgins (the “Appellant”) appealing the Approval.

[3] On September 8, 2004, the Board wrote to the Appellant, Approval Holder, and Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and Director of the appeal. The Board requested the Appellant advise the Board if she wished to request an extension of time to appeal the Director’s decision, as the normal time limit prescribed in the *Water Act* for filing such an appeal is seven days.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative.

[5] The AEUB stated it had not dealt with the specific appeal, but it “...did receive an application for the construction and operation of the Cheviot Coal Mine and Processing Plant from Cardinal River Coals Ltd. The [A]EUB along with the Canadian Environmental Assessment Agency held two joint hearings in 1997 and 2000 into the application.” The AEUB provided a copy of Decision 97-08, Decision 2000-59, and Permit No. C2003-4, which pertained to the joint hearings.

[6] On September 17, 2004, the Appellant wrote to the Board, explaining:

“It was a simple mistake on my part. In my haste to study the decision and compile an appeal, I inadvertently missed the difference in time limit for Water Act appeals.

I ask the Board to please overlook my gaffe and consider my Appeal as submitted.”

[7] On September 22, 2004, the Board notified the Parties that it had decided to dismiss the appeal, and the decision was released on October 27, 2004.<sup>1</sup>

[8] On September 23, 2004, the Board received a reconsideration request from the Appellant.

[9] The Parties provided their submissions to the Board between October 19, 2004, and November 15, 2004.

[10] On December 7, 2004, the Board notified the Parties it decided to deny the reconsideration request.

[11] The following is the Board’s reasons.

## **II. SUBMISSIONS**

### **A. Appellant**

[12] In her reconsideration request, the Appellant stated she did not understand the dates for appealing the *Water Act* approval and the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) approval were very different. She stated, “It was a gross misunderstanding on my part and I regret my oversight.”<sup>2</sup>

[13] The Appellant stated the open pit mining operation, as proposed by the Approval Holder, will have dire consequences on the McLeod River basin. She explained the mining operation is at a high altitude within a cold-continental climatic zone. According to the

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<sup>1</sup> See: *Higgins v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (27 October 2004), Appeal No. 04-053-D (A.E.A.B.).

Appellant, the climatic conditions will "...preclude successful regeneration of flora and fauna and, quite certainly, will result in the degradation of a river and its tributaries."<sup>3</sup>

[14] The Appellant argued such an important consequence should not be ignored on the basis of her mistake.

**B. Approval Holder**

[15] The Approval Holder argued the Appellant did not point out an error in law, and she admitted the Board was correct to determine her appeal was filed late. It stated the Appellant did not raise any new evidence that was not before the Board when it dismissed her appeal.

[16] The Approval Holder submitted the reconsideration ought to be denied.<sup>4</sup>

**C. Director**

[17] The Director stated the Appellant is concerned with the Cheviot Coal Project going forward and with the environmental assessment process, which cannot be the subject of an appeal under the *Water Act*. The Director argued any issues related to water quality that can be raised have already been discussed and determined by the joint AEUB/Canadian Environmental Assessment Agency review panel.

[18] The Director argued the original decision was correct so there is no error of law. He stated the Appellant did not introduce any new information, and she was simply rearguing the previous facts.

[19] The Director submitted the decision to dismiss the appeal was proper and should not be reconsidered.<sup>5</sup>

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<sup>2</sup> Appellant's letter, dated September 23, 2004.

<sup>3</sup> Appellant's letter, dated September 23, 2004.

<sup>4</sup> Approval Holder's submission, dated October 22, 2004.

<sup>5</sup> Director's submission, dated October 19, 2004.

### III. ANALYSIS

[20] Under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), the Board can reconsider a decision made by it. Section 101 states: “Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.”

[21] The Board has stated in previous decisions that its power to reconsider “...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.”<sup>6</sup> The Board uses its discretion to reconsider a decision with caution. The power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for parties to reargue the same issues a second time.

[22] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.<sup>7</sup> The factors the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.<sup>8</sup>

[23] The evidence does not have to, on the grounds of probability, result in a change of the original decision, but there must be a reasonable possibility the decision could be altered.<sup>9</sup>

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<sup>6</sup> *Whitefish Lake First Nation Request for Reconsideration, re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment, re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD (A.E.A.B.).

<sup>7</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

<sup>8</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment, re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

<sup>9</sup> *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration, re: Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (7 April 1998), Appeal No. 96-059 (A.E.A.B.).

[24] The applicant must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made but was available at the time of the hearing is not relevant for purposes of reconsideration. However, information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.<sup>10</sup>

[25] In its previous decision, the Board dismissed the appeal on the basis the Appellant had filed her Notice of Appeal late, and she did not provide the Board with sufficient reasons or special circumstances to warrant an extension of time. Therefore, any information that would support that special circumstances existed that justify an extension would be the most valuable in this reconsideration request.

[26] In her reconsideration request, the Appellant stated she did not understand the appeal periods for appealing an EPEA approval and an approval under the *Water Act* were very different.<sup>11</sup> She admitted, “It was a gross misunderstanding on my part and I regret my oversight.”<sup>12</sup>

[27] The Appellant did not provide any information to explain why the Notice of Appeal was filed late. She admitted it was her error the appeal was filed late and reiterated some of the concerns she had with the project that she identified in her Notice of Appeal.

[28] The Board appreciates the different time periods for filing appeals can be confusing, particularly when two approvals under two different pieces of legislation are granted at the same time. However, the timelines are legislated, and it is only under exceptional circumstances will the Board consider extending the timelines.

[29] The Appellant’s concerns with the project existed at the time of the original decision, and therefore do not constitute new evidence or evidence that was not available when the first decision was made.

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<sup>10</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

<sup>11</sup> The Appellant filed appeals with respect to the EPEA approval (Appeal No. 04-054) and the *Water Act* approval. The deadline for filing an appeal of an EPEA approval is 30 days, whereas an appeal of a *Water Act* approval must be filed within 7 days. At issue in this appeal is the Board’s decision to reject the Appellant’s appeal of the *Water Act* approval.

[30] The Appellant did not identify any error in law in the Board's previous decision. The Appellant only restated her previous concerns and did not provide any new evidence or reason to justify the Board reconsidering its initial decision.

[31] The Appellant has not presented any exceptional or compelling reasons to allow a reconsideration. She has not presented any new evidence that was not available at the time of the original decision, nor provided any further reasons to explain why the appeal was filed late. In this case, certainty in the Board's process requires the reconsideration request be denied.

#### **IV. CONCLUSION**

[32] The Board finds the Appellant did not provide any compelling evidence or arguments for a reconsideration to extend the time period to file her Notice of Appeal. She did not present any new evidence or identify any error in law in the Board's original decision. Therefore, the Board denies her request for reconsideration.

Dated on January 11, 2005, at Edmonton, Alberta.

*“original signed by”*

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

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<sup>12</sup> Appellant's letter, dated September 23, 2004.