

ALBERTA ENVIRONMENTAL APPEALS BOARD

Discontinuance of Proceedings

Date of Discontinuance of Proceedings – July 4, 2008

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 Ross and Judy Warner in relation to *Water Act* Licence No. 00188451-00-00; File No. 80439 with priority numbers 1998-06-30-01, 1998-06-30-02 and 1998-06-30-03; Licence Amendments 00140731-00-01 and 00140731-00-02 issued to AAA Cattle Company Ltd. by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Warner v. Director, Southern Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (4 July 2008), Appeal No. 06-064, 065 and 068-DOP (A.E.A.B.).

I. BACKGROUND

[1] On June 26, 2006, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), granted an extension to AAA Cattle Company Ltd. (the “Licence Holder”), to comply with certain conditions pertaining to Licence No. 00188451-00-00; Licence dated 1999-02-03, File No. 80439; Licences 00140731-00-01, 00140731-00-02; and Licence Amendments 00140731-00-01 and 00140731-00-02. The Licence Holder was not in compliance with some of the monitoring and reporting requirements of the Licences and was given an extension of time to comply.

[2] Licence No. 0018451-00-00 was issued for the diversion of 126,150 cubic metres of groundwater annually from Production Well No. PW5-02, PW6-02, PW7-02 and PW8-02, located in SW 04-031-27-W4M for agricultural purposes; Licence dated 1999-02-03, File No. 80439; Licences 00140731-00-01, 00140731-00-02 issued for the diversion and use of quantities of water prescribed in Interim Licence No. 22169 with priority numbers 1998-06-30-01, 1998-06-30-02 and 1998-06-30-03 for agricultural purposes; and Licence Amendments 00140731-00-01 and 00140731-00-02 were issued in relation to file No. 80439, collectively (the “Licences”).

[3] On July 7, August 2 and August 10, 2006, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Ms. Katherine McCulloch, Mr. Richard Kelk, and Mr. Ross and Ms. Judy Warner. The Notices of Appeal were filed in relation to the extension of conditions in the Licences, and the alleged breach by the Licence Holder and Director of the Ministerial Order 28/2005 and the November 16, 2005 mediation resolution, contained in the Board’s Report and Recommendations dated November 25, 2005.¹ This Discontinuance of Proceedings is in relation to the appeals filed by Mr. Ross and Ms. Judy Warner (the “Appellants”).

[4] On July 13, 2006, the Board wrote to the Appellants, the Licence Holder, the Director (collectively the “Participants”), Mr. Kelk and Ms. McCulloch, acknowledging receipt of the Notices of Appeal and notifying the Licence Holder and the Director of the appeals. The

¹ *McCulloch et al. v. Director, Southern Region, Regional Services, Alberta Environment* re: AAA Cattle

Board also requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals, and that the Participants provide available dates for a mediation meeting. On August 2, 2006, the Board received a copy of the Record from the Director, and on August 3, 2006 forwarded a copy to the Appellants and the Licence Holder.

[5] The Board was in the process of scheduling a mediation meeting, when on July 31, 2006, the Board received an e-mail from the Director advising the Licence Holder had provided some of the technical information the Director had requested regarding their noncompliance with the monitoring and reporting requirements contained in the Licences. The Director advised that a review of the technical information should be completed by mid-September, and that the Director would provide a status report at that time. On August 1, 2006, the Board asked the Appellants, Mr. Kelk and Ms McCulloch for their comments on whether a follow up mediation should take place after the Director's review is complete, and in response the Appellants, Mr. Kelk and Ms. McCulloch provided their schedules, and the Director advised that it would be preferable to wait until the technical review was complete.

[6] On August 24, 2006, the Board requested the Director provide a status report with respect to the technical review, and that the Director and Licence Holder provide their dates for a mediation meeting.

[7] The Board subsequently received a status report from the Director on August 29, 2006, advising the technical information was now complete, and requesting the Board assist the Director by facilitating an information meeting with the Participants so that the Director could provide the results of the technical review and the Participants, Mr. Kelk and Ms. McCulloch could communicate their respective concerns. The Board granted the Director's request and scheduled the information meeting for September 22, 2006, to be facilitated by the Board's General Counsel.

[8] In concluding the information meeting on September 22, 2006, and in consultation with the Participants, Mr. Kelk and Ms. McCulloch, the Director issued a letter at the information meeting, stating in part:

“Further to our meeting of September 22, 2006, attended by the participants [and Mr. Kelk and Ms. McCulloch]...this is to advise of the Director’s decision after consultation with the participants [and Mr. Kelk and Ms. McCulloch] in attendance and after review of the material provided by AAA Cattle....The Director is satisfied that AAA Cattle has, to date, met the requirements of Ministerial Order 28/2005....AAA Cattle may commence production under Licence No. 00188451-00-00 on October 23, 2006....”

[9] The Board wrote to the Participants, Mr. Kelk and Ms. McCulloch on September 25, 2006 advising it would like to proceed with the appeals. The Participants, Mr. Kelk and Ms. McCulloch were requested to advise the Board if they wished to proceed to a mediation meeting, and to provide their available dates to the Board by October 4, 2006.

[10] On October 4, 2006, the Board received letters from the Director and the Licence Holder advising that given the outcome of the September 22, 2006 meeting, they did not feel there is a need for a mediation meeting. They requested the Board set up a process to determine if it has jurisdiction to deal with the appeals. Mr. Kelk and Ms. McCulloch advised via a telephone call to the Board on October 5, 2006 that they did not believe further mediation is necessary. A letter was also received from the Appellants on October 5, 2006, advising they would like time to review the information described in the Director’s September 22, 2006 letter. On October 5, 2006, the Board wrote to the Participants, Mr. Kelk and Ms. McCulloch, requesting Mr. Kelk and Ms. McCulloch advise by October 13, 2006 whether they wished to proceed with their appeal, and requesting the Appellants provide an update on the status of their position by October 13, 2006.

[11] On October 6, 2006, the Appellants requested additional information referenced in the Director’s September 22, 2006 letter. On October 10, 2006, the Board forwarded the request to the Director requesting the information be provided to the Board along with an updated Record by October 13, 2006. The Appellants were also requested to provide the Board with an update on their position regarding their appeals by October 23, 2006.

[12] The Director advised on October 12, 2006, that it would not be in a position to provide the information until October 27, 2006. On October 13, 2006, the Board requested Mr. Kelk and Ms. McCulloch advise the Board by November 13, 2006 if they wished to proceed with their appeals, and requested the Appellants provide an update on their position regarding their appeals by November 13, 2006.

[13] The Director provided the information requested on October 16, 2006, and on October 18, 2006 the Board forwarded to Participants, Mr. Kelk and Ms. McCulloch, and requested a response from the Appellants, Mr. Kelk and Ms. McCulloch on their positions regarding their appeals by November 13, 2006.

[14] On November 13, 2006, the Board received a letter from Mr. Kelk and Ms. McCulloch advising that they were prepared to withdraw their appeals "...with the understanding that an appeal may be filed with this Board if warranted in future." The Board advised Mr. Kelk and Ms. McCulloch on November 15, 2006, that the Board "...cannot give assurance that an appeal will be accepted in the future regarding the current matters before the Board. Should Alberta Environment make future decisions respecting AAA Cattle, Ms. McCulloch and Mr. Kelk may be able to file an appeal at that time, and the Board will make a decision whether to accept the appeal." The Board also asked Mr. Kelk and Ms. McCulloch what they would like to do with their appeals by November 22, 2006. On November 20, 2006, the Board received an e-mail from Mr. Kelk and Ms. McCulloch withdrawing their appeals. The Board issued a Discontinuance of Proceedings on January 3, 2007 in relation to Mr. Kelk's and Ms. McCulloch's appeals.²

[15] The Board received an e-mail from the Appellants on November 12, 2006 advising that they are not in a position to withdraw their appeals. The Board acknowledged the Appellants' letter on November 15, 2006 stating it would advise further once a response was received from Mr. Kelk and Ms. McCulloch regarding the status of their appeals.

² *McCulloch and Kelk v. Director, Southern Region, Regional Services, Alberta Environment re: AAA Cattle Company Ltd.* (3 January 2007), Appeal No. 06-055 and 06-056–DOP (A.E.A.B.).

[16] On November 22, 2008, the Board wrote to the Participants advising it would proceed to an oral preliminary motions hearing relating to the Appellants' appeals. The Board raised the motion asking if Mr. Warner's appeals are validly before it. The Participants were requested to provide the Board with any further preliminary motions, and to advise if they were available on February 19, 22, 23, 26, 27 or 28, 2007, for the preliminary motions hearing.

[17] On December 1, 2006, a telephone call was received from the Licence Holder advising he had concerns regarding the preliminary motions hearing. In a letter dated December 7, 2006 to the Participants, the Board requested the Licence Holder provide his concerns in writing.

[18] On December 11, 2006, the Board received a letter dated November 30, 2006 from the Appellants asking the Board to hold the preliminary motions hearing in abeyance until he received a response from the Board on the following questions relating to the *Water Act*, and that upon receiving the information he would withdraw his appeals:

“...please confirm that [section] 115(1)(i) [*Water Act*] would apply to myself and other persons who submitted a statement of concern in accordance with section 109, if the Director renews the Licences and Amendments...and that this appeal opportunity would also apply to corresponding successors, assigns, and the like”

“...please confirm that [section] 115(2)(iii) [*Water Act*] would not apply to myself and other persons who submitted a statement of concern in accordance with section 109, specifically with respect to the Licences and Amendments...Rather (115)(1)(i) would apply...”

“...please confirm that the Director will send out either a letter or a courtesy letter to all of the above appellants (or their successors and the like, if applicable), received in sufficient time for the appellants to have reasonable and sufficient time to send in a corresponding notice of appeal, if there is a change to the Licences or Amendments shown above, or if there is a new Application for a licence, both with respect to either the current lands...or future lands of AAA Cattle Company Ltd. or its successors and the like.”

“...please confirm that ‘subsequent occupant’ is interpreted as the subsequent occupant’s respective successors and assigns, or the equivalent...”

[19] On December 12, 2006, the Board received a letter from the Licence Holder outlining his concerns as requested by the Board. It stated:

“...Our clients are concerned...about the continued costs they are being forced to incur in the myriad of regulatory processes that Mr. Warner and others have triggered over the past 5 years. In this regard, our clients propose to have our office provide written submissions with respect to the issues that the Board identifies prior to the hearing. Our clients will then attend the hearing to speak to the Board and make themselves available for questions by the Board and Mr. Warner...”

[20] The Board wrote to the Participants on December 21, 2006, acknowledging receipt of the letters from the Appellants and Licence Holder and advising further correspondence would be forthcoming.

[21] On January 26, 2007, the Board wrote to the Participants advising that a response would be forthcoming in relation to the letters dated November 30, 2006 from the Appellant and dated December 12, 2006 from the Licence Holder. It further stated that it was unable to hold the preliminary motions hearing in February 2007.

[22] Further to the Board’s letters where the Board asked the Appellants to advise on the status of their positions regarding their appeals, the Board wrote again to the Appellants on May 26, 2008 stating:

“...It is the Board’s preliminary view that Mr. Warner’s appeals are not properly before the Board. However, before making a decision in this matter, the Board is prepared to provide Mr. Warner with the opportunity to make a written submission to the Board as to why the Board should accept his appeals, if he wishes.

The Board is requesting that Mr. Warner advise the Board in writing by 4:30 pm on June 13, 2008 as to whether he is prepared to withdraw his appeal or whether he would like the opportunity to provide a written submission to the Board. Please note that if the Board does not receive a response from Mr. Warner by this date, the Board reserves the right to make its decision in this matter without further notice.”

[23] On June 13, 2008, the Board received a letter from the Appellants providing comments and withdrawing their appeals.

[24] Pursuant to section 95(7) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12, and based on the withdrawal of the appeals by the Appellants, the Board hereby discontinues its proceedings in Appeal Nos. 06-064, 065 and 068 and closes its files.

Dated on July 4, 2008, at Edmonton, Alberta.

“original signed by”

Steve E. Hrudey, FRSC, PEng
Chair