

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 17, 2011

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 Verna Phippen with respect to Licence No. 00228908-00-00 issued under the *Water Act* to MEC Operating Company by the Director, Central Region, Environmental Management, Alberta Environment.

Cite as: *Phippen v. Director, Central Region, Environmental Management, Alberta Environment*, re: MEC Operating Company (17 March 2011), Appeal No. 10-037-D (A.E.A.B.).

BEFORE:

Delmar W. Perras, Chair.

SUBMISSION FROM:

Appellant:

Verna Phippen

EXECUTIVE SUMMARY

On November 6, 2009, Alberta Environment issued a licence to MEC Operating Company authorizing the diversion of water and the operation of a works for oilfield injection purposes near Pigeon Lake.

On December 15, 2010, Ms. Verna Phippen appealed the decision. The Board noted the appeal was filed significantly past the legislated deadline (approximately 13 months) and asked Ms. Phippen to provide an explanation as to why the appeal was filed outside of the 30 day time limit.

After reviewing Ms. Phippen's explanation, the Board did not grant an extension for filing the Notice of Appeal and dismissed the appeal. Ms. Phippen stated that at the time the licence was issued she did not have sufficient grounds to file an appeal, and she entrusted a local association to raise her concerns. These reasons do not demonstrate the extenuating or special circumstances that warrant accepting an appeal filed more than one year past the legislated timeframe.

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I. BACKGROUND

[1] On November 6, 2009, the Director, Central Region, Environmental Management, Alberta Environment (the "Director"), issued Licence No. 00228908-00-00 under the *Water Act*, R.S.A. 2000, c. W-3, to MEC Operating Company (the "Licence Holder") for the operation of a works and the diversion of up to 31,390 metres of water annually in SW 25-046-02-W5M for oilfield injection purposes near Pigeon Lake, Alberta.

[2] Between November 26 and December 4, 2009, the Environmental Appeals Board (the "Board") received Notices of Appeal from Mr. John Slater, Mr. Peter Langelle, and the Summer Villages of Grandview, Ma-Me-O Beach, Norris Beach, Argentia Beach, Golden Days, Crystal Springs, and Poplar Bay (Appeal Nos. 09-026-029 and 09-031-035). The Board held mediation meetings on March 24, 2010, and July 21, 2010, where a resolution was reached that resulted in these appeals being withdrawn.

[3] On December 15, 2010, the Board received a Notice of Appeal from Ms. Verna Phippen (the "Appellant") appealing the decision of the Director. This decision relates to Ms. Phippen's appeal only.

[4] On December 17, 2010, the Board wrote to the Appellant, Licence Holder, and Director (collectively the "Participants") acknowledging receipt of the Notice of Appeal and notifying the Licence Holder and the Director of the appeal. The Board noted the appeal was filed significantly past the legislated deadline (approximately 13 months) and asked the Appellant to provide an explanation as to why the appeal was filed late. The Board also advised that the granting of the extension of time is at the discretion of the Board and is not routinely granted, and if the Appellant provided sufficient information to consider extending the appeal period, it would give the Licence Holder and Director an opportunity to provide comments before making a decision. The Appellant provided the information on December 21, 2010.

[5] The Board advised the Participants on February 8, 2011, that the appeal was dismissed with reasons to follow. The Board did not seek comments from the Director or the Licence Holder, as the Appellant did not provide reasons that would warrant comments from the other Participants. The Board's reasons are provided below.

II. SUBMISSION

[6] The Appellant stated that, at the time the Licence was granted, no pipeline leaks had occurred and she did not feel she had sufficient grounds to file an appeal on her own. The Appellant explained the Pigeon Lake Watershed Association (the "Association") was going to negotiate with the Licence Holder and she felt it had more resources to represent her concerns and possible appeal. The Appellant acknowledged she left it to the Association to articulate her concerns along with the other concerns filed with Alberta Environment.

[7] The Appellant explained she was notified on December 8, 2010, that the Licence Holder was going to be implementing the Liner Pull Program on her property due to contamination from a leaking pipeline. The Appellant stated she contacted the Energy Resources Conservation Board ("ERCB") seeking information on the Liner Pull Program. The Appellant stated the mixing of fresh water under the Licence contributed to the leak in the pipeline and will contribute to future leaks. She argued that, since the leak did not occur until after the Licence was granted, she would not have had sufficient grounds to file the appeal within the time limit. The Appellant submitted that, now that the leak has occurred, she has grounds to file an appeal.

[8] The Appellant argued that fresh water is not necessary to deplete the resource for the Licence Holder and there are better available alternate resources. The Appellant argued that, since fresh water is not required and it is a contributing cause of environmental damage in the area, the Licence Holder should voluntarily give back the Licence or the Director should rescind the Licence.

III. DISCUSSION

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

"A Notice of Appeal must be submitted to the Environmental Appeals 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 this case, the appeal period was 30 days after receipt of the Director’s decision to issue the Licence.

[10] The Board has the authority to extend the filing time if there are sufficient grounds to do so. Section 93 of *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) states:

“The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so.”

[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. 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. The onus is on the Appellant to demonstrate there are exceptional circumstances that warrant an extension of time to file an appeal. The Board may consider extending time limits by a few days in certain circumstances, but the appellant must be able to give the Board sufficient reasons to justify the action. In the circumstances of this case as presented by the Appellant, an extension of one year cannot be justified.

[12] One of the conditions that must be met before the Board has jurisdiction to hear an appeal is that the Notice of Appeal is filed within the legislated timeframe. In this case, the appeal period ended on December 6, 2009, but the Appellant did not file her Notice of Appeal until December 15, 2010, over one year later.

[13] One of the purposes of having deadlines incorporated into legislation, particularly regulatory legislation, is to bring some element of certainty to the regulatory process. In this case, the *Water Act* requires an applicant for a licence to go through an application process. This process provides for public notice, which allows anyone who may be directly affected by the proposed licence to submit their concerns to the Director in the form of a Statement of Concern. Once a decision is made to issue, or for that matter not to issue, the licence, then there is an appeal period in which the applicant or anyone who is directly affected (and who filed a

Statement of Concern) can file an appeal. The time limit in which an appeal must be filed is legislated so that all participants – the applicant, the people who are directly affected, and the regulator – know when the process is complete. The time limits included in the legislation, and the certainty these time limits create, balances the interests of all the participants.

[14] If there were no time limits placed on the appeal period, the applicant for a licence 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 licence. Licence holders need to know that decisions that are made that affect the way they are required to operate will not be susceptible to continuous change by those wanting to file appeals months or years after the licence was issued.

[15] The Appellant was aware of the project when the Licence Holder filed its application in 2009. The Appellant filed a Statement of Concern on June 25, 2008, and she received notification of the issuance of the Licence on November 6, 2009. If she still had concerns, she could have filed a Notice of Appeal. The Appellant stated she was relying on the Association to negotiate with the Licence Holder to address her concerns along with the other concerns filed. The Board advises individuals wanting to file an appeal, to file individual Notices of Appeal even when they are part of a group or association filing an appeal. This preserves the individual's right to appeal even when the Board may not accept the group-filed appeal. In this case, the issues were settled through a mediated agreement. If the Appellant had filed her own Notice of Appeal, she would have been a part of the mediation process.

[16] Many of the concerns noted in her submission relate to contamination from a leaking pipeline presumably operated by the Licence Holder. With respect, these arguments do not provide any basis for the Board to consider overriding the certainty provided by the time limits prescribed in the *Water Act*. It is difficult to understand how the Licence granted for the use of fresh water contributed to the Appellant's contamination concern. The Licence is for the diversion of water and the works required to use the water. It appears more of a coincidence that the leak occurred after the Licence was granted. The Board believes the Appellant is taking the appropriate steps by contacting the ERCB and Alberta Environment regarding her concerns about potential contamination.

[17] The Appellant is relying on an incident that occurred after the appeal period had expired as a basis for arguing her appeal should be allowed. If this reasoning was used, there never would be a deadline for filing a Notice of Appeal since incidences can occur years after an approval or licence is issued. The legislators restricted the time allowed to file an appeal to allow for certainty in the process, but they also included other mechanisms in the legislation to address concerns that arise during the term of an approval or licence.

[18] The Appellant was aware of the application filed by the Licence Holder and the issuance of the Licence, but she chose to rely on others to present her interests. The Appellant did not provide any relevant evidence to the Board that indicates there were any exceptional circumstances in this case and she did not provide any compelling reason to warrant an extension of time to file an appeal.

[19] Therefore, the Board dismisses the appeal.

IV. DECISION

[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. Therefore, pursuant to section 95(5) of EPEA, the Board dismisses the appeal.

Dated on March 17, 2011, at Edmonton, Alberta.



Delmar W. Perras
Chair